FEDERAL RULES OF CIVIL PROCEDURE: SOME PROBLEMS RAISED BY THE PRELIMINARY DRAFT

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ON MAY 1, 1936, the Supreme Court's Advisory Committee presented to the Court its Preliminary Draft of the Federal Rules of Civil Procedure, and asked the Court's permission to print and distribute the draft to the bench and bar of the country as a basis for suggestion and criticism. Both the Committee and the Court made it clear in the foreword to the rules that the draft was not a report of the Committee to the Court, that the Court did not approve nor disapprove of the rules, but rather that the draft was preliminary in character. "All we hope for," said the Committee, "is that we have made a sufficiently respectable beginning to justify its exposure to the bench and bar for criticism." ¹ This was a modest statement, for the Preliminary Draft represented nearly a year's effort of the Committee and its staff, and was the product of many drafts.² It was representative of many schools of thought; both theory and practice had contributed to its production.³ Yet there can be little doubt that it was


¹ Letter of Chairman Mitchell to the Chief Justice, Preliminary Draft (May, 1936) viii, ix.

² Chairman Mitchell's letter, supra note 1, refers to the Preliminary Draft as the third draft prepared by the Advisory Committee. If the Reporter's and the Style Committee's drafts were included, the Preliminary Draft could be said to be the fifth or sixth draft.

³ Actual experience and practice in the following procedures found expression in the Committee's personnel: Federal, California, Connecticut, Florida, Iowa, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, New York, Pennsylvania, Virginia and Washington. This was further supple-
wise to regard the first public draft as preliminary in character, invite criticism, and then build a new draft upon these bases. For these rules when effective will govern procedure at law and in equity, and to a great extent bankruptcy,\(^4\) in one of the world's greatest court systems. Furthermore the rule-making act, approved June 19, 1934, was the culmination of a most persistent and sustained campaign for procedural improvement—a quarter of a century struggle; and is rivaled only by the long, arduous struggle for like reform in England during the nineteenth century.\(^5\) The rules should be worthy of the background that produces them.

For nearly a year after the passage of the rule-making act, the development was largely in the direction of drafting only federal rules for actions at law. District committees were organized over the country\(^6\) and many drafted elaborate sets of rules. Too often, however, these rules reflected only the state practice with which the district committee members were familiar. Oftentimes the draftsmen of a report from State 1 would be fearful that another practice, which could be found embodied in a report from State 2, might prove disastrous, although that

\(^{4}\) See Gilbert's Collier on Bankruptcy (4th ed. 1937) 29, 30, 33, 434, 565-567, and generally throughout the book, where the writer, who was the senior author of the foregoing edition, attempted to point out how the Federal Rules would impinge upon and affect bankruptcy practice. See also the Preliminary draft at 166 where the Committee recommends an amendment to General Order XXXVII in Bankruptcy (cf. Gilbert's Collier, op. cit. supra, at 565, n. 8, pointing out that General Order XXXVI, dealing with appeals in bankruptcy, should also be amended); and Rule 1 in Copyright.

\(^{5}\) For a résumé of the background for the enactment of the federal rule-making statute and citation of authorities see Clark and Moore, A New Federal Civil Procedure—I. The Background (1935) 44 Yale L. J. 387, 388-389. For a good account of the English struggle see Sunderland, The English Struggle for Procedural Reform (1926) 39 Harv. L. Rev. 725.


\(^{6}\) At the 1934 Judicial Conference of the senior circuit judges the Chief Justice suggested that they consider methods for assisting the Court in its discharge of its duty. Report of the Judicial Conference (1934) 20 A. B. A. J. 713, 716. As a result, the senior circuit judges had the district judges in their respective circuits organize committees to suggest and draft rules for actions at law.
particular practice might be working quite satisfactorily in the latter state. This is not meant as hostile criticism, for often the members were busy practising lawyers, thoroughly familiar with their own state practice, which they had, on the whole, been able to manipulate successfully. Their reaction was not an unusual one. Thus, a few years ago a committee of the Commonwealth Fund made a study of certain questions of evidence and obtained the views of lawyers in three neighboring states with respect to a particular problem, which was handled very differently in the respective states. In general, those interviewed replied that the workable rule was the rule of their own state and that another rule would be unsatisfactory, although such other rule was in operation in other states.7

But on May 9, 1935, the Supreme Court gave a complete new turn to federal rule-making. The Chief Justice in his annual address to the American Law Institute announced that the Court had decided to act under the second section of the Act of June 19, 1934, and, in accordance with its authorization, to draft rules for a united system of law and equity. "After careful consideration," he said, "the Court has decided not to prepare rules limited to common law cases but to proceed with the preparation of a unified system of rules for cases in equity and actions at law, 'so as to secure one form of civil action and procedure for both,' so far as this may be done without the violation of any substantive right." 8 Shortly thereafter the Court appointed its Advisory Committee.9 To provide one procedure for cases now denominated legal or equitable was eminently the sound course. A survey of the cases construing Equity Rules 22 and 23 promulgated in 1912, the Law and Equity Act of 1915, and the Act of 1928 abolishing the writ of error and substituting the appeal therefor, which together provide for (1) transfer of an action at law erroneously begun as a suit in equity, (2) transfer of a suit in equity erroneously begun as an action at law, (3) the disposition of legal issues in an equitable action, (4) the interposition of equitable defenses in an action at law, and (5) one procedure on appeal, shows that the law and equity procedures in the federal courts are not far apart.10 On the contrary law and equity have been rather successfully blended, even more so than they have been united in some of the code states, of which New York is often a

8 (1935) 2 U. S. L. Week 866, 880.
9 295 U. S. 774 (1935).
10 Clark and Moore, supra note 5, at 415-435.
fair example. Anomalies, of course, remained. A legal counter-claim could not be interposed in a suit in equity; there was conflict as to whether an equitable defense could be interposed by the plaintiff in his reply; and it was not certain whether an equitable defense must be interposed, or whether an independent suit in equity could be brought, and whether an appeal could be immediately taken from court action disposing of an equitable defense. The step which the Preliminary Draft has taken in uniting law and equity is an easy and conservative step. The distinction between law and equity is an indigenous product of the common law. The fiat uttered by Judge Selden of the New York Court of Appeals, soon after the reform of 1848, that the distinction between law and equity is inherent and fundamental, that "it is possible to abolish one or the other, or both, but it certainly is not possible to abolish the distinction between them," is disproved by the civil law and nearly one hundred years of code procedure. Rule 2 of the Preliminary Draft, which provides for one form of action and one mode of procedure, and Rules 45 and 46 for claim for jury trial, waiver, and trial by jury and by the court, design one procedure. Only two things can prevent a complete union of law and equity in the federal courts: (1) a psychological attitude which goes back to the historic conflict between Coke and Ellesmere and which law schools have had no little part in keeping alive through a stuffy erudition; and (2)

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11 See Poth v. Washington Square M. E. Church, 207 App. Div. 219, 201 N. Y. Supp. 776 (1st Dep't 1923) (An action was brought for specific performance of a real property contract; damages were not asked. At the trial it appeared that specific performance was not proper, but that the plaintiff was entitled to the return of his deposit money, and it was so ordered. On appeal the Appellate Division reversed and dismissed the complaint); Jackson v. Strong, 222 N. Y. 149, 118 N. E. 512 (1917); Clark, The Union of Law and Equity (1925) 25 Col. L. Rev. 1; Walsh, Merger of Law and Equity under Codes and Other Statutes (1929) 6 N. Y. U. L. Rev. 157 (1929). Compare the liberal practice of Massachusetts, often known as a common-law state, where an amendment from equity to law is formal and freely granted, and the parties held to waive jury trial by trying the case on the merits. Adams v. Silverman, 280 Mass. 23, 182 N. E. 1 (1932); Callahan v. Broadway Nat. Bank, 286 Mass. 223, 190 N. E. 792 (1934).

12 Clark and Moore, supra note 5, at 415-435.

13 Reubens v. Joel, 13 N. Y. 488, 493 (1856); see Jackson v. Strong, 222 N. Y. 149, 154, 118 N. E. 512, 513 (1917) where it is said: "The inherent and fundamental difference between actions at law and suits in equity cannot be ignored." Cf. MAITLAND, EQUITY (1910) 20: "The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law: suffice it that it is a well-established rule administered by the High Court of Justice."
the Seventh Amendment. The Amendment is not an obstacle. It is only a fact to be considered. When a party wants a jury trial and demands it pursuant to Rule 45 he must be accorded that privilege if he was entitled to it at common law. In many cases it will be clear that he is or is not so entitled; in a borderline case, an historical excursion may be necessary. The distinction then is between jury and non-jury cases.

There are, however, many real problems to be considered. Some of these are: (1) how to handle, without marring the general symmetry of the rules, special types of litigation, such as that wherein the Government is a party, patent and eminent domain proceedings, and the procedure governing the prerogative writs; (2) how to deal with the federal statutes; (3) how to provide a simple, and inexpensive method of appeal, and conceivably one type of review; (4) how to state in simple and practical form the needed rules of evidence; and (5) how to deal with class actions.


See also the text accompanying notes 24 and 25, infra, which deals with the scope of review. This, too, is a matter affected by the Seventh Amendment, but which may, nevertheless, be dealt with satisfactorily.

15 In litigation wherein the Government is a party, the rules on time must generally provide a longer period because of the Government’s vast interests, and the departmentalization necessary to handle its litigation. Then how far the concept of “Government” should be extended is a nice problem: should rules generally applicable to the United States be extended to all of its agencies, including those that are state incorporated? There has been suggestion that the Government should be exempted from compulsory counterclaim, from certain discovery provisions, and from provisions on summary judgment and costs.

In patent litigation overbroad discovery provisions may cause undue injury. In a contest between rival patentees perhaps an interchange of sealed answers relative to the date of discovery may be necessary. This can, of course, be easily met by giving the court discretion in all cases to require sealed answers.

Eminent domain proceedings in state courts, and also in the federal courts, which have usually followed the state practice, are of various patterns; some are quite dissimilar to the usual civil action. If such proceedings are to be regulated in the district courts some special rules therefor may be necessary, and this may be true in regard to the prerogative writs.
It is with this latter problem that this paper deals specifically, and in a general way with the related problem of pleadings and parties. But it may be well to discuss generally some of the above problems. The federal statutes present a difficult problem. When the rules have become effective all legislation in conflict therewith is repealed. As a consequence there has been some suggestion that the rules embody in themselves all applicable federal statutes, and that the United States Code be revised to show the sections that are unaffected, modified, or repealed. The brief for this method is clarity, and an avoidance of chasing the lawyer around: from the rules to statutes and back again. There can be little doubt that a revision of Title 28 of the United States Code, and of many sections dealing with procedure to be found in other titles of the United States Code, will in time be necessary. But such an extensive program should be avoided, probably, until the rules have been in operation for a time. Legislation may then be necessary to cure evils or remove obstacles not clearly within the rule-making power, and probably the rules, themselves, will need modification. At that juncture a thorough-going revision of the statutes and the rules would be in order. Furthermore the

16 As for instance the following statutes which are referred to in the rules: service by publication, Rule 3; interpleader, Rule 28; survival of actions, suits, or proceedings, Rule 30; declaratory judgment, Rule 67; deposit and withdrawal of money, Rule 81; United States Arbitration Act, Rule 90 (f). Here it seemed to the Committee that little was to be gained by incorporating the statute into the rule, other than by reference. Compare, on the other hand, Rule 79 dealing with Temporary Restraining Orders and Preliminary Injunctions, which is almost a verbatim copy of 28 U. S. C. §§ 381, 382, 383. See also Equity Rule 73 (Preliminary Injunctions and Temporary Restraining Orders) which adopted the same treatment.


One of the functions of a standing committee on the rules, which will be needed to make the rules most effective and satisfactory, would be to undertake such a revision as is suggested in the text. For the proposal for a standing committee and the need therefor, see Rule A and note thereto, Preliminary Draft at 170-171.
proponents of the rule-making act hoped that the Federal Rules would serve as a model for the less advanced state procedures. If this hope is to be realized the rules must remain few and simple; a large set of rules and statutes is forbidding. And largely they should be divorced from the federal statutes if they are to serve as a model for state procedures.

The Federal Rules on appeals have abolished the outmoded summons and severance, and in cases appealed to a circuit court of appeals have provided for the perfection of an appeal by a simple notice. What kind of record should be prescribed for an appeal is bothersome. The appellate court naturally desires a concise, easily readable record and briefs. The litigants are interested in an inexpensive record, and accordingly in many state procedures a typewritten record is permitted, and in some the method is even more simple and inexpensive, i.e., the original papers and report of the proceedings had at the trial are transmitted to the appellate court. But inasmuch as cases in the federal courts usually are cases of considerable importance it may be well to serve the convenience of the appellate courts and adhere to a printed record. But in any event it seems that the narrative record is largely unsatisfactory. A matter of larger policy is what type of review should be prescribed. Clearly in jury cases, where the jury is of right and has not been called in in an advisory capacity, its verdict cannot be reexamined except as at common law. Hence the equity type of review cannot be extended to jury cases. One possibility is to keep the law type of review for jury cases, and the equity type of review for non-jury cases.

18 Consult the bulky New York Civil Practice Act, with approximately 1600 sections, and the New York Rules of Civil Practice, with approximately 300 rules, and the acts and rules governing the courts other than the Supreme Court.

19 Rule 73.

20 Rule 72. If the Supreme Court thinks it advisable to amend its rules in accordance with the practice prescribed in Rule 72, then there will be one uniform method of appeal from the district court to the circuit court of appeals, and from the district court to the United States Supreme Court. It would seem that this is advisable.

21 For citation of states permitting the typewritten record see the Preliminary Draft at 136.

22 Id. at 137.

23 Materials are collected and authorities cited in Note to the Supreme Court, Preliminary Draft at 135-137; see also id. at xv.

24 Of course another possibility than those mentioned in the text would be to retain the present scope of federal review, i.e., the law type of review for "law" actions, whether tried to the court or to the court and jury,
Another possibility is to extend the law type of review to non-jury cases, and give the same finality to the finding of a court as is now accorded to a finding by a jury. In practice in a great many cases that result is now attained, because of the reluctance of an appellate court to disturb findings based on conflicting evidence, where the lower court had the opportunity to see and hear the witnesses.\textsuperscript{25} A third possibility would be to extend the law type of review to non-jury cases, with the exception of those raising constitutional issues. In such cases it may well be argued that an appellate court ought to examine the facts carefully, because of their importance, and because it is extremely important that constitutional law be not divorced from the situations that raise the issues.

The federal law of evidence is chaotic.\textsuperscript{26} It would be very desirable if some order could be brought to the subject by way of a few, simple rules. We have clung to the jury as one of the great Anglo-American legal institutions, but we have built around that institution a most subtle, and complex body of law on evidence, ostensibly designed to control the jury, but utilized in great part to mislead the jury and to lay the basis for an appeal. Before a court sitting without a jury, a conference board, commission, bureau or other investigatory agency the process of investigation proceeds in a different fashion. All information that is relevant to the investigation, material and competent is heard: the rules of evidence are not adhered to. The law of evidence in jury cases is like the famed bird that always flew backwards since it didn't care where it was going, but only wished to see where it had been. It is clearly time to modernize and simplify that law, and it is believed that the task should be undertaken along the flexible lines that have characterized the federal rules on other procedural matters.\textsuperscript{27}

\textsuperscript{25} See Clark and Stone, \textit{Review of Findings of Fact} (1937) 4 U. of Chi. L. Rev. 190, where this is pointed out and a very good argument advanced for the law type of review.

\textsuperscript{26} See Clark and Moore, \textit{supra} note 5, at 415, and authorities therein cited; Callahan and Ferguson, \textit{Evidence and the New Federal Rules of Civil Procedure} (1936) 45 Yale L. J. 622.

\textsuperscript{27} See the authorities cited in note 26, \textit{supra}; cf. Sweeney, \textit{Federal or State Rules of Evidence in Federal Courts} (1932) 27 Ill. L. Rev. 394; Wickes, \textit{The New Rule-Making Power of the United States Supreme Court
Closely related to evidence is the subject of pleading. Erudite treatises on the nature of judicial proof have been predicated on the theory that pleadings develop issues. But the philosophy underlying the federal rules on pleadings is that they do little more than sketch the type of battle that is to follow. The theory of the common law was that the function of pleadings was to develop issues. Actually such pleading did develop obscure issues. The path travelled was tortuous. There was the declaration for a simple debt, the common counts in general assumpsit, the declaration in trespass, trover and ejectment which told the defendant little more than that the plaintiff felt himself aggrieved. Case and special assumpsit called for a little more detail. But if ritualistic language was used to allege a duty, breach, and consequent damage the declaration in case was good, although unintelligible to a layman. And since an instrument could be pleaded according to its legal effect little real information was accorded the defendant in special assumpsit. The main thing was to follow a good form to be found in Chitty, and be sure to include enough counts to circumvent the always present objection of fatal variance. And the defendant was not obliged to controvert only those things that were actually in issue. The general issue, extremely broad, in many of the forms of action, told the plaintiff nothing more than that the defendant intended to have his day in court. And there was of course the replication, the rejoinder, the surrejoinder, the rebutter, the sur-rebutter, and conceivably other pleadings that moved on toward the ideal of an issue.

The philosophy of the federal rules denies the utility of such an objective. Pleadings are to stop with the answer, unless it contains a counterclaim or cross-claim, denominated as such, or unless the court shall order a reply. It is the aim of Rule 22, which deals with amended and supplemental pleadings, to eliminate or reduce to the minimum the possibility of fatal variance. During a hearing or trial the pleadings shall be deemed amended to include issues tried by consent of the parties, express or implied; and objections to evidence on the ground that it is inadmissible under the pleadings should be overruled unless the opposing party can show actual, as distinguished from legal, surprise, and

(1934) 13 Tex. L. Rev. 1. See also Tracy, What Progress in Reform of Evidence Rules? (1936) 20 J. Am. Jud. Soc. 80. Rule 50 is a step in the direction of flexibility. But it is not informative, and is not apt to bring order out of chaos.

28 See Michael and Adler, Nature of Judicial Proof (1931).

29 Shipman, Common Law Pleading (3d ed. 1923) 298-299. For a more practical view compare Clark, Code Pleading (1928) 28-30.
then, in that case, to allow an amendment and continuance in the
discretion of the court. It is designed also to avoid the plea of
the statute of limitations to an amended pleading when essen-
tially the same claim is being set forth. It is a repudiation of the
type of state practice which was forced on the federal courts by
virtue of the Conformity Act in such a case as N. & G. Taylor Co.,
Inc., v. Anderson.30 There the plaintiff, a corporation, sued for
breach of contract. The declaration failed to allege that the claim
had been assigned to the plaintiff corporation by a co-partner-
ship of the same name, whose business the plaintiff had been
organized to take over. At the trial, five years after the com-
mencement of the action, the plaintiff was allowed to amend by
setting forth how and when it acquired title, an allegation which
was necessary under an Illinois statute. The court held that
since the Illinois Supreme Court had held such an amendment to
set forth a new cause of action, the federal court was bound by
such decision; that the statute of limitations had run against such
action, and that the plaintiff must fail.

Procedure should be only a technique for handling court busi-
ness. Yet there it was handled in a most regrettable fashion. Little
wonder that legal business is diverted to official boards, com-
mmissions and arbitrators, where similar action is unlikely to
occur and if it did would be instantly branded as archaic, bureau-
ocratic and arbitrary. The need for a flexible, workable court pro-
cEDURE cannot be overemphasized. Flexibility can well start with
pleading. Litigation is not an art in writing nice pleadings. It
can and should seldom be settled on its merits at the pleading
stage unless the parties are agreed upon the facts and want a
quick legal answer. A recent study of judicial statistics, with the
Superior Courts of Connecticut as the field of investigation,
showed that 363 demurrers were filed in a given period. Of this
number 109 were sustained, 142 were overruled, but in only 25

30 275 U. S. 431 (1928), criticized in note (1927) 36 YALE L. J. 853 (as
decided by the 7th Circuit); cf. Friederichsen v. Renard, 247 U. S. 207 (1918)
where the action was not governed by the Conformity Act. In the latter
case the action was begun in equity to cancel a land contract because of
fraud. This charge was sustained by the trial court, but it ordered a trans-
fer to the law side because plaintiff had cut considerable timber after dis-
covery of the fraud, and was therefore not entitled to equitable relief. It
then sustained a plea of the Statute of Limitations which was at that time
pleaded in the law action. Held, judgment reversed; the law action was a
continuation of the suit begun in equity. See also Clark and Moore, A New
Federal Civil Procedure—II. Pleadings and Parties (1935) 44 YALE L. J.
1291, 1299-1310 for a discussion of the federal cases on pleadings.
cases was a judgment entered on the demurrer, and in these cases appeals were taken in only four.31

The pleading rules are designed to eliminate delay, and reduce the pleading requirements to a minimum. They are implemented by and depend upon the formulation of issues and pre-trial examination and summary judgment to disclose the true nature of the case, narrow the trial to real controverted issues, and permit either a plaintiff or a defendant to have judgment, in a relatively short time, where there is no bona fide claim or defense. "Loose pleading" is the cry of an alarmist who unconsciously would punish the client because of the latter's unfortunate choice of a lawyer who chanced to be a poor pleader. The real importance of Chapter III of the Rules, which deals with pleadings, is that it makes pleadings relatively unimportant. Cases are to be decided on the merits.

PARTIES

The rules on parties do not attempt to aid or restrict such procedural techniques for the presentation of constitutional cases as were utilized in recent cases, as, for example, the T. V. A. case, or the public utility case where a creditor was procured to intervene in a 77B proceeding to attack the unconstitutionality of the legislation.32 Courts, not rules, can solve these problems.

If the need for flexibility in pleading is great, the need for flexibility is even greater in this field. It must be remembered that the federal courts are courts of limited jurisdiction and that the Rules do not affect the subject of jurisdiction and venue.33 As early as 1806 Chief Justice Marshall, in Strawbridge v. Curtis,34 established the rule that where jurisdiction is founded upon diversity of citizenship there must be complete diversity between the parties plaintiff on one side and the parties defendant on the other. Add to that requirement, and the problem of venue, the problem of acquiring jurisdiction over the person of the defendants, a problem present in all cases, of course, no matter what the basis of federal jurisdiction may be, and you can readily see that if broad rules of joinder are established along lines of com-

31 Clark, Fact Research in Law Administration (1929) 1 Miss. L. J. 324, 342.
32 For an excellent discussion of these and kindred cases, see Note, The Case-Concept and Some Recent Indirect Procedures for Attacking the Constitutionality of Federal Regulatory Statutes (1936) 45 Yale L. J. 649.
34 3 Cranch 267 (U. S. 1806).
pulsion rather than permission, a plaintiff may often be foreclosed to present his case in the federal courts. The theory of the rules is an adaptation of the present theories governing parties in federal equity practice, expanded and adapted to cover both law and equity.

Unlimited joinder of actions is authorized. A plaintiff may in one complaint, or a defendant by way of counterclaim may state, in the alternative or otherwise, as many different claims, legal or equitable or both, as he may have against an opposing party.\textsuperscript{35} This is a repudiation of the common law rules of joinder of actions, which the common law judges could state but could not explain,\textsuperscript{36} and which the common people had to bear as they would bear perils of war and contagious diseases. It is a repudiation of the old code rules of joinder inaugurated by the Field Code, which established from 6 to 12 categories, and allowed joinder only of claims falling within a particular category. One of the residuary code categories allowed the joinder of claims arising out of the same transaction, or transactions connected with the same subject of action. But in New York it has been held that if \textit{A} assaults \textit{B} and at the same time calls \textit{B} a vile name that the transactions' category is not flexible enough to permit joinder of the actions of assault and slander.\textsuperscript{37} Categorical results in procedure inevitably are arbitrary.\textsuperscript{38} And in 1935 the New York legislature repealed its joinder of actions section and substituted in lieu thereof a section permitting unlimited joinder.\textsuperscript{39}

\textsuperscript{35} Rule 25.

\textsuperscript{36} See 1 Tidd's Practice (2d Am. from the 8th London Ed.) 10. For a good criticism of the common law rules see Sunderland, Joinder of Actions (1920) 18 Mich. L. Rev. 571.


\textsuperscript{39} N. Y. Civ. Prac. Act § 258.
The problem is clearly not one of pleading but of trial convenience. A score of actions may as well be pleaded in one complaint as in twenty. And the present Equity Rule 26 on the joinder of causes of action authorized unlimited joinder of equitable causes of action where there is one plaintiff, and one defendant, or if more than one plaintiff when they jointly possess the causes of action, and where, if there is more than one defendant, the liability is asserted against all of the material defendants. The remedy is to give the trial court discretion to sever issues and claims for trial. This is done in Federal Rules 23 and 49.

The problem of joinder of parties is solved by the Federal Rules in much the same fashion as joinder of claims. Permissive joinder of plaintiffs or defendants is permitted when there is a question of law or fact common to the plaintiffs or to the defendants, as the case may be. "A plaintiff or defendant need not be interested in obtaining or defending against all the relief prayed for." 40 Again the problem is attacked as a trial, and not a pleading problem as it was thought to be at common law, and the court is given power to "order separate trials or make such other orders as may be expedient to prevent delay or prejudice." 41 If under this broad, elastic rule there is a misjoinder of parties the action is not dismissed, but the claim against the misjoined party is severed and proceeded with separately. And "Parties may be dropped or added by order of the court at any stage of the action and on such terms as may be just." 42 The federal rule is only a moderate expansion of the present federal equity practice on permissive joinder prescribed in Equity Rule 37. 43

The Federal Rules might easily have gone further and provided for unlimited joinder of parties, as they do for joinder of actions. Provisions for the severance of claims and parties would be adequate were the restriction of a common question of law or fact withdrawn: (1) because of the limitations of federal jurisdiction; (2) because as a practical matter persons will not join as plaintiffs, or join others as defendants unless there is some relation between the action and the parties joined; and (3) severance accomplishes the desired result. The rules themselves implicitly recognize this when their net effect is to prevent the

40 Rule 27.
41 Rules 27, 49.
42 Rule 47.
43 See Clark and Moore, A New Federal Civil Procedure II. 'Pleadings and Parties' (1935) 44 Yale L. J. 1291, 1319-1321, discussing the present joinder of actions and parties in the federal courts.
dismissal of an action because of multifariousness. So although unlimited permissive joinder is not expressly provided for, the restriction is rendered harmless.

Compulsory joinder has been reduced to a minimum. Persons with a joint interest must be joined, subject to case law on necessary and indispensable parties. There is some authority for the proposition, and that goes back to common law, that where the right is held jointly the holders thereof are indispensable parties, and if one will not join with the others that he must be made a party defendant, and if jurisdiction cannot be acquired over him that the action cannot proceed.\(^4^4\) On the other hand there is authority that if liability is asserted against joint parties, they are not indispensable, but are necessary parties, more accurately described as conditionally necessary.\(^4^5\) That is, all must be made parties defendant if they are subject to the court's jurisdiction as to service of process and venue, and if their joinder will not oust the court of jurisdiction. The rules have not attempted to define necessary and indispensable parties. That is a matter which can only be treated adequately by commentators or by an independent examination of cases.\(^4^6\)

**REAL PARTY IN INTEREST: CAPACITY TO SUE OR TO BE SUED**

The first paragraph of Rule 24 adopts verbatim the real party in interest provision taken from Equity Rule 37, which in turn adopted the stock code provision. Its meaning perhaps would be

\(^4^4\) McAulay v. Moody, 185 Fed. 144 (C. C. D. Ore. 1911) (joint obligee an indispensable party).

\(^4^5\) Non-joinder of joint obligors could be attacked only by plea in abatement. Shipman, Common Law Pleading (8d ed. 1928) 395. They are not indispensable parties. Simkins, Federal Practice (1934) § 17; 28 U. S. C. § 111. (When part of several defendants cannot be served).

\(^4^6\) The Supreme Court's attitude toward parties has been liberal and in the direction of delimiting the concept of indispensable parties. Bourdieu v. Pacific Western Oil Co., 299 U. S. 65 (1936) (a party is not an indispensable party if the complaint does not state a cause of action, since that party had no interest requiring protection). The court said: "The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result." Id. at 70. Cf. National Conference on Legalizing Lotteries v. Goldman, 85 F. (2d) 66 (C. C. A. 2d, 1936), which held that the Postmaster General was an indispensable party in a suit to enjoin the local postmaster from enforcing a fraud order. The case is noted in (1937) 4 U. of Chi. L. Rev. 342.

For a discussion of necessary and indispensable parties see Simkins, op. cit. supra note 45, at § 507.
more accurately expressed if it read: An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced. The reason for its retention, no doubt, was due to the feeling that judicial construction by the federal equity courts and the courts of the states that have such provisions had reduced its ambiguities to a minimum, and that an experiment with other language might only cause new difficulties.47

The real party in interest provision cannot be utilized to found jurisdiction, although the citizenship of the real party in interest, such as an assignee, guardian or administrator, is looked to in diversity cases.48 But the assignment of a chose in action to found jurisdiction is now precluded by legislation,49 and an administrator or guardian could not be chosen for the sole purpose of founding jurisdiction, because of other legislation, which directs the dismissal or remand of a suit where jurisdiction is collusively founded.50 On the other hand, if a prospective litigant is in a state which has a real party in interest provision and is desirous of suing in the state court and preventing a removal on the grounds of diversity, apparently he can do so by an assignment to a person whose citizenship is the same as the defendant’s;51 and in the administration and guardianship cases by hand-picking the ad-

47 See Clark and Moore, supra note 43, at 1311 where it was suggested: "Possibly the phrase has now assumed too familiar and consecrated an aspect to justify attempts at improvement..." For a good discussion of the real party in interest provision and how it has been construed see Clark and Hutchins, The Real Party in Interest (1925) 34 Yale L. J. 259.


51 Oakley v. Goodnow, 118 U. S. 43 (1886) (resort must be had to state courts for protection, if any, against such a device); Bernblum v. Travelers Ins. Co., 9 F. Supp. 34 (W. D. Mo. 1934), discussed in (1935) 35 Col. L. Rev. 450. This device may be used to real advantage by the beneficiary of an insurance policy who desires to prove an estoppel in a "law" case (to a jury), and in effect secure a reformation of his contract, rather than attempt an express reformation of his policy in an "equity" action (before the court). Massachusetts, New Jersey, and the federal courts "refuse to receive proof of estoppels arising before or at the inception of the contract on the assumption that the rule of policy known as the parol evidence rule would be thereby violated." On the contrary most state courts do receive proof of such estoppels. Vance, Insurance (2d ed. 1930) § 136; Vance, Cases on Insurance (2d ed. 1931) 530-569.
ministrator or guardian, provided, of course, the state court will appoint his chosen person as administrator or guardian. 52

Rule 24 provides that the capacity of a natural person to sue or be sued shall be determined by the law of his domicile. This provides a uniform rule for the federal courts, and is contra to the federal rule now prevailing. 53 It is also provided that: "Every corporation shall have the capacity to sue or be sued in the district courts of the United States." This restates the rule of David Lupton's Sons Co. v. Automobile Corporation of America. 54 It is immaterial that a corporation is disqualified to sue in a state court, because, for example, it should have but did not obtain a license to do business in the state; it can still maintain an action in the federal courts of that state if the requisite grounds of jurisdiction exist.

Provisions in Rule 24 which give a partnership or other unincorporated association the capacity to sue or be sued as an entity in the federal courts in those states which recognize the entity theory are useless in cases where jurisdiction is founded upon diversity of citizenship, for although the action may be brought by or against the unincorporated association in its common name, the citizenship of the individual members must be made to appear, and their citizenship is looked to. 55 The escape in such cases is the class action where only the citizenship of the representatives is looked to. 56 The provisions can be utilized, however, where some ground other than diversity is made the basis of jurisdiction, as in the federal question cases. And even though the state does not accord to an unincorporated association the capacity to sue or be sued, nevertheless, Rule 24 adopts the rule in the Coronado


53 See Clark and Moore, supra note 43, 1312-1317.

54 225 U. S. 489 (1912).

55 Thomas v. Board of Trustees of the Ohio State University, 195 U. S. 207 (1904) (the board was recognized as a distinct legal entity capable of suing and being sued, but it was held that the federal courts had no jurisdiction based upon diversity of citizenship unless it appeared that the citizenship of the individual members was diverse from that of the opposing party); Clark and Moore, supra note 43, 1316. Cf. the discussion therein of Puerto Rico v. Russell & Co., 288 U. S. 476 (1933) where the Supreme Court treated a sociedad en comandita, organized under Porto Rican law, as a citizen and resident of Porto Rico for purposes of federal jurisdiction.

56 Supreme Tribe of Ben Hur v. Cauble, 255 U. S. 356 (1921); (1933) 33 COL. L. REV. 363.
case,\textsuperscript{57} and accords capacity to the unincorporated association for the purpose of enforcing for or against it a federal substantive right.

**Death of Parties—Substitution (Rule 30)**

The thing of prime importance in Rule 30 which deals with Death of Parties and Substitution is the attempt to plug the hole left by *Ex Parte La Prade*.\textsuperscript{58} That case held that a suit against a state officer to enjoin him from enforcing a state statute alleged to be unconstitutional abated upon the defendant’s retirement from office, unless it could be revived against his successor under authority of a statute. The rule provides that a successor of a city, state or federal officer may be substituted, if it is shown by supplemental pleading that the successor adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing an unconstitutional law.

**Counterbalances to Unlimited Joinder**

Now there are definite counterbalances to the freedom accorded plaintiffs\textsuperscript{59} in the joinder of actions and parties. The devices to protect a defendant or a third person not made a party to the action are: impleader, interpleader and intervention. Rule 19 authorizes impleader. It authorizes a defendant to bring in a third person and claim against him, when such third person is or may be liable to the defendant for all or part of the claim made against him by the plaintiff.\textsuperscript{60}

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\textsuperscript{57} United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344 (1922) (an unincorporated labor union was treated as an entity, in an action at law, though the state court of the forum had earlier refused to recognize it as such, for the purpose of enforcing against it a federal substantive right).

\textsuperscript{58} 289 U. S. 444 (1933), criticized in Note, Substitution of State Officials in an Injunctive Proceeding (1934) 43 Yale L. J. 500.

\textsuperscript{59} "Plaintiffs" as used here means the proponents of claims, whether the claims are set forth in the complaint, answer, or other pleading; and interpleader is referred to as a device to protect a defendant. This is not literally true, for a person taking advantage of interpleader will oftentimes do so as a plaintiff, yet it remains essentially a protective device for those who are or would likely be made defendants.

\textsuperscript{60} The rule could have been broadened to allow impleader where the only connection between the claim on which impleader would be based and the main action would be a common question of law or fact. Whether or not independent grounds of jurisdiction are necessary to support impleader has not been finally determined. In Wilson v. United American Lines, 21 F. (2d) 872 (S. D. N. Y. 1927), and in Sperry v. Keeler Transportation Line,
Rule 28 deals with interpleader. The first paragraph recognizes interpleader as the converse of joinder in the alternative accorded to the plaintiff in Rules 25 and 27. It continues, extends and liberalizes the old equity practice of bills of interpleader and bills in the nature of interpleader. It authorizes a plaintiff to interplead two or more persons having conflicting claims so that the plaintiff is or may be exposed to liability to one or more of them, and permits him to deny liability in whole or in part. Here the sum in controversy would have to exceed $3,000, exclusive of interest and costs, other requisites of jurisdiction and venue would have to be attended to, and the process of the court would be no more extensive than in other actions. But there is authority that jurisdiction is well founded if there is diversity between the plaintiff on one side and the claimants on the other although there is no diversity between the claimants.\footnote{Turman Oil Co. v. Lathrop, 8 F. Supp. 870 (N. D. Okla. 1934), noted in (1935) 48 Harv. L. Rev. 854; Penn. Mut. Life Ins. Co. v. Meguire, 13 F. Supp. 967, 972 (W. D. Ky. 1936) ("The purpose of the interpleader statute was to give the stakeholder protection where adverse claimants resided in different states. The plaintiff in this case could have instituted the action in this court without statutory authority and could have obtained relief against the conflicting claims of the claimants, because all of them happen to be citizens of the commonwealth of Kentucky and the Western Judicial District, but if some of them had been citizens of another state, the plaintiff could have gotten an acquittance from all of the claimants in a single action."). Contra: Eagle, Star & British Dominions v. Tadlock, 14 F. Supp. 933, 940 (S. D. Cal. 1936) ("An interpretation which would, as the statute stands now, allow one form of interpleader under general equity principles based upon diversity of citizenship as between the plaintiff and the defendant, and another form under the statute, in cases involving diversity of citizenship of claimants, would give us two kinds of bills in interpleader; one, dependent upon diversity of citizenship as between plaintiffs and defendants with the jurisdictional minimum of $5000, and another dependent upon diversity of citizenship between claimants, with a jurisdictional minimum of $500. I cannot conceive that the Congress, by enlarging the interpleader statute, has sought to create such a situation. Rather do I believe that they intended to cover the entire field by broadening the scope of what had previ-}
for the first paragraph of the rule, which is in addition to and in no way supersedes the remedy provided for by the Federal Interpleader Statute. For under that statute there must be diversity between the adverse claimants, and the plaintiff cannot deny his liability to them, but must deposit the subject of the action, usually money, in court or give bond that he will comply with the future decree in the action. Inasmuch as the amount in controversy in an action brought under the statute is decreased to $500, process is authorized to run throughout the United States, and the action is permitted to be brought in the district where one or more of the claimants resides, a plaintiff may often find it to his advantage to proceed under the statute. But the first paragraph does implement the statute and fulfill a certain important office.

INTERVENTION—RULE 29

An intervenor is a glorified *amicus curae*: a person who projects himself into litigation and becomes a party thereto. Equity Rule 37 recognized the right, but phrased it in permissive language. Federal Rule 29 attempts to restate the right granted in Equity Rule 37, as that rule has been construed by the courts. That is, the right of intervention is absolute when the applicant is represented in the action, but the representation is inadequate; and when property is within the custody of the court, and the applicant would be adversely affected by the distribution or other disposition of the property, although the judgment in the action would not be binding upon him. But the right to intervene rests in the sound discretion of the court when the applicant desires to come into the litigation to litigate a claim or defense, and his only relation to the pending action is a question of law or fact common thereto."


Equity Rule 37 provided that intervention "shall be in subordination to, and in recognition of, the propriety of the main proceeding." This has been eliminated in the Preliminary Draft and the intervenor is given the right to litigate the claim or defense for which he intervenes on the merits. The elimination seems sound, for if the Equity Rule was taken literally the grant of intervention to come in and defend an action, common in patent litigation, would be illusory, since the defendant seriously questions the propriety of the main action. What the phrase was designed to accomplish, it is believed, was to preclude intervenors from attacking the administrative orders already made and from obstructing or delaying the progress of the main action.

Statements commonly found in textbooks and decisions are to the effect that intervention is auxiliary to the main action and no new ground of jurisdiction is needed to support the intervention.\(^{64}\) This seems correct on principle where the right to intervene is absolute, but not where the intervenor comes in because of a common question of law or fact. If he were joined originally as a plaintiff or a defendant because of that relationship there would need to be grounds to support that joinder. One court, however, has permitted the dismissal of a party in that situation, because his joinder would oust the court of jurisdiction, and then blithely permitted him to come back in as an intervenor without discussion of the jurisdictional problem.\(^{65}\) Federal jurisdiction can be immeasurably broadened by that device, and should receive judicial sanction only after a full analysis of the elements of policy involved.

### CLASS ACTION

Equity Rule 38 on class suits, like the equity rule dealing with intervention, was couched in the most general language, but language common to the codes. In the Preliminary Draft there is no separate rule on the subject. There are provisions on class actions, however, and these are to be found in Rule 26, which deals with compulsory joinder, and in Rule 27, which deals with permissive joinder. The effect of these provisions is this: When

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\(^{64}\) SIMKINS, Federal Practice (1934) 467, cf. 684; 2 Foster, Federal Practice (1920) 1285; Hopkins, Federal Equity Rules (1933) 239, n. 39.

\(^{65}\) Drumright v. Texas Sugarland Co., 16 F. (2d) 657 (C. C. A. 5th, 1927), cert. denied 274 U. S. 749 (1927). It might be urged that the intervenor was more than a proper party, and was a necessary party. At any rate the court held he was not an indispensable party, yet permitted the intervention, so logically it should allow a proper party to intervene without jurisdictional grounds to support the intervention.
proper, necessary or indispensable parties are so numerous as to make it impracticable to include them all as parties, such number of them as will fairly insure the adequate representation of all may, on behalf of all, join as plaintiffs or be joined as defendants.

The law on class actions is inextricably bound up with jurisdiction, and the binding effect of the judgment, and because of these complexities is in a confused state. A real service would be rendered the profession if a rule were promulgated which was really informative. It is difficult, however, to appraise the various problems involved and state a technically sound and thoroughly workable rule. Danger lies in the rigidity of a detailed rule. With full realization of this the writer puts forward the following proposed rule as a tentative draft, in the hope that helpful discussion may be evoked.

Class Actions.

(a) When Action May be Brought. In the following situations, if persons are so numerous as to make it impracticable to bring them all before the court, such a number of them as will fairly insure the adequate representation of all may, on behalf of all, join as plaintiffs or be joined as defendants, when the character or rights sought to be enforced for or against the class is

(1) joint, or common, or derivative in the sense that the owner of a primary right neglects or refuses to enforce such right and the class thereby obtains a right to enforce the primary right;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action;

(3) several, and there is a question of law or fact common to the several rights.

(b) Effect of Judgment. The judgment rendered in the first situation is conclusive upon the class; in the second situation it is conclusive upon all parties and privies to the proceeding, and upon all claims, whether presented in the proceeding or not, insofar as they do or may affect specific property involved in the proceeding; and in the third situation it is conclusive upon only the parties and privies to the proceeding.

(c) Requisites of Jurisdiction. Where jurisdiction is founded upon diversity of citizenship, the citizenship of only the original parties shall be looked to in the absence of collusion.

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66 See Blume, Jurisdictional Amount in Representative Suits (1931) 15 MINN. L. REV. 501; The "Common Questions" Principle in the Code Provision for Representative Suits (1932) 30 MICH. L. REV. 878; Wheaton, Representative Suits Involving Numerous Litigants (1934) 19 CORN. L. Q. 339; Notes (1934) 34 COL. L. REV. 118; (1932) 30 MICH. L. REV. 624 (discussing the federal rule that a common question of law is sufficient); (1922) 36 HARV. L. REV. 89.
Where a specified amount in controversy is a requisite of jurisdiction, the aggregate claim of or against the class in the first situation need only be equal to such specified amount; but in the second and third situations the several claim or claims of or against each member of the class made an original party shall not be aggregated, but each such claim must be equal to or in excess of the specified amount in controversy. 67

As the writer intends, in the near future to discuss and elaborate on this rule in detail, only a general explanation is offered at this time. The present Equity Rule 38 on Class Actions was promulgated on the recommendation of the Bar Committee of the Circuit Court of Appeals of the Second Circuit; the committee advising the omission of the last sentence of former equity Rule 48 which provided: “but in such cases the decree shall be without prejudice to the rights and claims of the absent parties”. Its reason: “in every true ‘class suit’ the decree is necessarily binding upon all parties included in the decree”. 68 The omission is justified. 69 And if the reason therefor is recalled confusion will be avoided in dealing with other types of class actions that have been brought under the broad language of the Equity Rule.

True Class Action. [Subdivision (a) (1)]

Joint Right. A suit by or against A, B, and C as representatives of an unincorporated association is an example. 70 This

67 The rule might go further and attempt to lay down directions for the control of the action. But here probably a discretionary and not an informative rule is desirable, for if the rule were to remain flexible probably the only mandate would be that the actual parties to the litigation should have control thereof, subject to the discretion of the court. The rule also might attempt to state when a class action is pending for various claims, for purposes of the Statute of Limitations. The Rules, however, have avoided dealing expressly with such statutes, but here an exception to that treatment might be desirable. And it has been suggested that the rule be broadened to cover representation of unborn persons. This is a matter which affects property interests, and probably should be worked out by legislation. Furthermore, actions concerning future interests—where the problem chiefly arises—are somewhat unusual in the federal courts. The problem of protecting future interests from judicial action binding upon such interests is treated in RESTATEMENT, PROPERTY (Tent. Draft No. 5, 1934) § 10; (Proposed Final Draft, 1936) § 10. The device of a guardian ad litem for the unborn children, suggested in the Restatement, could not be utilized in federal procedure, where the jurisdiction was founded upon diversity, for the citizenship of the guardian ad litem is immaterial, note 48, supra and the citizenship of the unborn children could not, of course, be made to appear.

68 HOPKINS, FEDERAL EQUITY RULES (1933) 240.


70 See Colt v. Hicks, 179 N. E. 335 (Ind. App. 1932). Street says that a true class suit concerns property, while the spurious class suit is founded on
should not be confused with a suit by or against an unincorporated association in its firm name as permitted by some state statutes.71 Those statutes cannot be utilized to any great extent in law actions in federal courts today by virtue of the Conformity Act, nor, as we have seen, can they be in the future by virtue of Federal Rule 24 (b) if jurisdiction is founded upon diversity of citizenship.72

Common Right. The word "joint" is probably too narrow to cover all situations where true class actions will lie. An example of a right held in common would be a right given to creditors, but not to an individual creditor, to enforce the statutory liability of bank stockholders. If a statute gave an individual right to each creditor, as distinguished from a right given to all the creditors, then a class action predicated upon individual rights would not be a true class action, but would fall under subdivision (a) (3). Rights enforced in such leading class actions as the *Supreme Tribe of Ben Hur v. Caukle* 73 and *Smith v. Swormstedt* 74 would seem to be properly classed as common rights.75

Derivative Right. A suit by A, B, and C as shareholders against a corporation, and directors X, Y, and Z would illustrate this type of right. The primary right which A, B, and C seek to enforce belongs to the corporation, but because of the corporation's neglect or refusal to enforce that right against the directors who control it, A, B, and C, on behalf of all the shareholders, derive a right to enforce the primary right. The proposed rule is, of course, broad enough to cover a derivative class action against an unincorporated association and its officers who may be guilty of negligent mismanagement.76

In the true class action, if the representation is adequate, the judgment is conclusive upon the class—*res judicata*. The amount in controversy is the amount of the claim sought to be enforced by or against the class.77

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71 See text accompanying notes 55 and 56, *supra*.
72 See text accompanying notes 55-57, *supra*.
73 255 U. S. 356 (1921).
74 57 U. S. 288 (1853).
75 In these cases the action is not by or against an unincorporated association, but is by or against a class which feels itself injured by the entity to which it belongs or by another similar class.
76 It would also include a taxpayer's suit to invalidate a bond issue, where it is shown that the political subdivision (like the corporation) is not taking the necessary steps to enforce the primary right—invalidation. See *Brown v. Trousdale*, 138 U. S. 389 (1891).
77 *Brown v. Trousdale*, 138 U. S. 389 (1891); cf. *Colvin v. City of Jacksonville*, 158 U. S. 456 (1895) (where it was held that the plaintiff taxpayer personal liability. 1 *Street, Federal Equity Practice* (1909) § 547, 548. The classification made in the text is, therefore, to be distinguished from his.
**Hybrid Class Action.** [Subdivision (a) (2)]

A good example of this is a bill by a creditor on behalf of himself and others similarly situated to throw a corporation into receivership. The creditor's claim is several. In order to found jurisdiction the creditor's claim must exceed $3,000, and there must, of course, be diversity between him and the corporation. Now if creditors X, Y, Z, etc. come in and present their claims, they along with A, the original plaintiff, and the defendant, are bound. Creditors who do not come in, or who are not privies, are not bound. If there is anything left of the corporate defendant after the receivership, creditors who had nothing to do with the class action could proceed against it on their claims. But this result is usually avoided by organizing a new corporation which purchases the assets of the old corporate defendant, and as the rule states the new corporation gets good title to the specific property involved in the receivership action—all claimants, with notice, are cut off as to that subject matter.

The converse of that might be a bill of peace with multiple parties, turned into a class action. Thus A, a stakeholder, who holds property subject to many claims, puts the property in the custody of the court and names representatives of the class as defendants. There would have to be diversity between himself and all the representatives made defendant. He is urging only one claim—that all those having an interest come in and present the same, so the amount in controversy would be the amount of the stake. The effect of the judgment would be conclusive upon all parties and privies, and upon all claims, whether presented in the action or not, provided adequate notice to come in and present claims was given; and if the claimants did not have a personal claim against the plaintiff, he would be absolved. If they had a personal claim against him, then those who were not parties, original or intervenors, or privies thereto, would still have a claim against the plaintiff, but not against the property distributed.

**Spurious Class Action.** [Subdivision (a) (3)]

Assume that a railroad negligently sets fire to property, and widespread damage to many property owners ensues. Here there

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78 Note (1934) 34 Col. L. Rev. 118, 136.
79 For treatment of bills of peace see Chafee, Bills of Peace with Multiple Parties (1932) 45 Harv. L. Rev. 1297.
is a question of law or fact common to many persons. A, B, and C bring an action on behalf of themselves, and all others similarly situated, against the railroad. A, B, and C each must have a claim in excess of $3,000 and there must be diversity between them as plaintiffs on the one hand and the railroad on the other. Other persons who had been injured could intervene regardless of the amount of their claim, or their citizenship. The judgment would bind A, B, C, and privies, the railroad, all who had intervened, but would not bind others beyond the principle of *stare decisis*, which operates as to all judgments.

The converse situation would be presented where A, who has been depositing foreign matter in a stream, is sued or threatened with suit by a great many riparian owners. A brings a bill of peace against X, Y, and Z, and others as representatives of the class. The judgment would bind all who were original parties, who intervened, and who were in privity.

The spurious class action has not been recognized in such jurisdictions as England, but in such jurisdictions there is no need for the class action, for the injured parties can join as plaintiffs under the common question of law or fact provisions; but in the federal courts where there must be complete diversity between all of the plaintiffs on the one side and all of the defendants on the other, and where each such plaintiff would have to have a claim in excess of $3,000, the spurious class action can be justified in federal procedure. Once jurisdiction attaches the action would not be defeated by interventions, hence, the class action offers the possibility of cleaning up a litigious situation.

On the other hand, despite some decisions it is probably true than an intervenor whose only interest in an action (other than a class action) is a common question of law or fact must have grounds of jurisdiction to support his claim or defense. This type of intervention must be distinguished from an intervention which is auxiliary to the main action, as intervention in a class action, or intervention to claim a share of property or fund in *custodia legis*. Assume this case: A, B, and C each have rights of action against Z, and join as plaintiffs because of a common question of law or fact. A, B, and C each must claim in excess of $3,000, and there must be diversity between them as plaintiffs and the defendant. Now if X wanted to join with them originally as a plaintiff, he would have had to have the requisite diversity.

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80 Markt & Co. v. Knight Steamship Co. 2 K. B. 1021.
and amount in controversy. In the matter of intervention here, there is no real reason to dispense with the jurisdictional requirements which X would have to satisfy as an original plaintiff, and intervention should not be treated as auxiliary. The reason his intervention in the class action, that involves only a common question of law or fact, need not be supported by independent grounds is because of the numerous persons involved. That fact warrants the utilization of the representative concept. There is good sense in the rule that in class actions only the citizenship of those purporting to represent the class will be looked to, because of the numerous persons involved. This latter factor distinguishes the type of class action, here under discussion, from the usual joinder case involving only a common question of law or fact.

CONCLUSION

That there are several, rather difficult matters in connection with the Rules that deserve studied treatment is to be expected. But inasmuch as the rule-making act requires the rules to be laid before Congress at the beginning of a regular session, and since it has become impossible to present a final draft to the regular Congress now in session, approximately a year remains to revise and consider the Preliminary Draft. Thus, ample time is still afforded for the bench, bar and students of procedure to assist the Advisory Committee and the Court in its task of transforming the Preliminary Draft into a Final Draft: a draft which will serve the needs of the federal courts and serve as a model for state procedures. It is hoped that all interested in procedural reform will continue to aid in the drafting of the Federal Rules of Civil Procedure.
CONSTITUTIONAL PRINCIPLES AND JURISPRUDENCE

HESSEL E. YNTEMA *

I

TWENTY-FIVE YEARS AGO, in a remarkable series of lectures on Social Reform and the Constitution, Frank J. Goodnow stated, referring to the theories of social compact and natural rights:

"Both of these theories which were formulated in the eighteenth century have, as a matter of fact, been made the basis of the American constitutional system, which dates from the same time. The courts of this country, further, are permitted to declare unconstitutional acts of the legislature, on the one hand attempting to change the character of our political structure which is regarded as fixed in the social compact, or, on the other hand, violating any of the rights of the individual guaranteed to him by the bills of rights which are formulated the natural rights of man. Inasmuch, therefore, as the constitution of the United States is, on account of the complicated procedure and the large majorities required, very difficult, if not impossible of amendment under ordinary conditions, it must be confessed that Americans are in many respects living under a political system which has been framed upon the theory that society is static rather than dynamic, and that the rights, which individuals perhaps properly possessed in the eighteenth century, are the rights which they should properly possess at the beginning of the twentieth century, although present social and economic conditions are quite different from what they once were."  

This refers to the constitutional aspect of the central problem of modern government. Broadly speaking, this problem, induced by the progressively changing conditions occasioned by the industrial revolution, consists, first, in the need of corresponding social legislation to provide adequate regulation of these conditions and, second, in the vast increase of governmental establish-

† A paper delivered by Professor Yntema before the Round Table Conference on Jurisprudence at the Thirty-fourth Annual Meeting of the Association of American Law Schools in Chicago, December 29, 1936.


1 F. J. GOODNOW, SOCIAL REFORM AND THE CONSTITUTION (1911) 4.
ments required to administer such legislation. This is not a local problem; throughout the civilized world, there has been during the past half century or more a secular drift, acutely accentuated by the War of 1914, from the laissez-faire conception of government as an evil to be minimized by checks and balances towards the fundamentally opposed ideal of government as an instrument of social welfare. Increasingly, abstract political liberty is challenged as a sufficient objective of government by the standard of economic justice.

In the United States, this critical issue has been in a degree isolated until recently by the presence of a bountiful frontier. While there are worlds to conquer, individual liberty is at a premium. But when the frontier is populated by an urban civilization, the conditions of liberty are changed. In 1858, three-quarters of a century ago, Lord Macaulay observed in a celebrated comment upon Jeffersonian democracy in the United States, as follows:

"Your fate I believe to be certain, though it is deferred by a physical cause. As long as you have a boundless extent of fertile and unoccupied land, your labouring population will be far more at ease than the labouring population of the old world; and, while that is the case, the Jeffersonian polity may continue to exist without causing any fatal calamity. But the time will come when New England will be as thickly populated as old England. Wages will be as low and will fluctuate as much with you as with us. You will have your Manchesters and Birminghams, and in those Manchesters and Birminghams, hundreds of thousands of artisans will assuredly be sometimes out of work. Then your institutions will be fairly brought to the test. Distress everywhere makes the labourer mutinous and discontented, and inclines him to listen with eagerness to agitators who tell him it is a monstrous iniquity that one man should have a million while another cannot get a full meal. . . .

"I seriously apprehend that you will, in some such season of adversity as I have described, do things which will prevent prosperity from returning; that you will act like people who should in a year of scarcity, devour all the seed corn, and thus make the next year a year not of scarcity, but of absolute famine. There will be, I fear, spoliation. The spoliation will increase the distress. The distress will produce fresh spoliation. There is nothing to stop you. Your Constitution is all sail and no anchor. As I said before, when a society has entered on this downward progress, either civilization or liberty must perish. Either some Caesar or Napoleon will seize the reins of government with a strong hand; or your republic will be as fearfully plundered and laid waste by barbarians in the twentieth Century as the Roman Empire was in the fifth; — with this difference, that the Huns and Vandals who ravaged the Roman Empire came from without, and that your Huns and Vandals will have been engendered within your own country by your own institutions." 2

There is no need in this place to confront this stark aristocratic pessimism with the more hopeful concept of democratic responsibility enlightened by universal education. Indeed, the sequel has proved Macaulay wrong in substantial respects. When he wrote, Jeffersonian democracy had been for fifty years and was still in the saddle, and the principle of individual liberty was about to reach a triumphant climacteric in the abolition of slavery. But the Civil War, while it vindicated the inalienable rights of man, also reaffirmed the Union, and thereafter, under its aegis, the pendulum of progress was to swing towards the integration of invention and industrial organization in the exploitation of natural resources. This trend to economic unity necessarily produced profound effects upon the political constitution of the country. Under federal protection, the center of power imperceptibly shifted from the agricultural to the mercantile classes, and the fasces of sovereignty correspondingly tended more and more to concentrate at Washington. It was inevitable; an industrial nation requires a sufficient national government. Thus, there came into being a regime of "the rich, the wise, the good", such as Hamilton had idealized, in which the central authority seemed to be based upon the vested interests of its beneficiaries.

So federalism has been achieved, but the republican tradition has not been compromised. There is concentrated wealth, but no aristocracy. There is propaganda of all sorts, but no place for political parties with alien programs. The power of a free press, which may perhaps dethrone a foreign king, circumstances permitting, is unable to make an issue of Jeffersonian democracy as a cloak for undemocratic privilege. There have been differences of opinion, but not of principle. As Jefferson said, "We are all republicans; we are all federalists." The fact at which we may well marvel is that the progressive growth of the national government requisite for modern conditions has occurred without violating the framework of the Constitution and without destroying the republican tradition or the sense of the common welfare; that the weapons of democracy have been so largely employed to promote order and progress. It is this fact which thus far belies Macaulay's dire prediction that the progress of industrial democracy must inevitably be downward to the repugnant choice between Caesarism and chaos,—between civilization and liberty.

Lord Macaulay might therefore be answered that the Constitution is all sail which has so far also served as anchor. But the

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3 In his first inaugural address, March 4, 1801. 8 P. L. Ford, Writings of Thomas Jefferson, 1, 3.
time of the oracle is not yet run. It would be foolish to ignore the possibility that, with the more complete industrialization and interdependence of the national economy, if current conceptions of social justice should be permitted to develop unsatisfied, future depressions may subject our political institutions to a test more severe than they have yet had to suffer. The implication, that there is a relation to be respected between constitutional arrangements and economic conditions, has an immediate bearing upon the specific subject of this discussion, namely, whether the cardinal features of the American constitutional system should be examined in the grand manner of jurisprudence.

II

To preclude misapprehension, therefore, the first postulate of this discussion is that the subject is intensely practical. The Constitution is not dead. Historically an ancient political landmark, it is no mere cenotaph of lost ideals. It is not to be believed, for example, that the Constitution is a closed sequence of logical formulae, self-contained within the four corners of its language; or that its meaning may be deemed to be complete and fixed as of any given time; still less, that it is devoid of current significance because it was written more than fifty years ago. By the same token, it is not to be apprehended that a red flag need be flown above the Supreme Court to make progress. The Constitution has a double function; it is justly revered primarily as the formal symbol and charter of national unity. In substance, however, it is a vehicle of changing values, an instrument which has developed and will develop, by interpretation or by amendment, to answer recognized needs. The central problem in its interpretation is to maintain that balance of liberty and order and progress,—if you will, to effect those successive reconciliations of Jeffersonian democracy with federal authority,—which are essential to the development of the national economy. It would be fatal, if it were not futile, to seek to stifle this process with the precedents and prejudices of yesteryears. In the face of change, there is no surer way to destroy a constitution than to deny its practical significance.

This primary postulate suggests that it would be well, before proceeding with the discussion, to define its terms. The relation between the formal study of jurisprudence and the fundamental principles of the American constitutional system is all too obviously a relation between two uncertain and indeed equivocal concepts, an equation of variable unknowns. A word or two may
therefore first be ventured as to the significance of the term, "jurisprudence", and, secondly, some brief suggestions made as to the methods by which the essential elements of a constitutional system may be defined, before considering, in the third place, the possibilities of an examination of basic constitutional provisions "in the gladsome light of jurisprudence". First then, a definition of jurisprudence.

III

About a century ago, a relatively obscure writer, recalling Burke's definition of the science of jurisprudence as "the collected reason of ages, combining the principle of original justice with the infinite variety of human concerns", observed:

"Jurisprudence is a vast and majestic science, having its roots deep-buried in theology, and interlacing its branches with all metaphysical and physical learning. How arduous and complicated must that science be which undertakes to regulate the economy of mighty nations, will be felt by those who have been called upon to apply its doctrines to the common offices of society. Long years of laborious investigation are required to initiate us in its solemn mysteries; how then is it possible for the unfledged witlings of spurious and upstart popularity to touch its delicate machinery without impairing it?" 5

This statement is an instance of an attitude towards jurisprudence, once not uncommon but now dated. It forms a useful text, since it suggests certain constructions which, it may be indicated without argument, are to be avoided, at least for the present purpose. The first is that conception of jurisprudence which supposes a translation of legal principles to a realm beyond the reality of time and circumstance, a realm where actual social needs are irrelevant and vital consequences may be ignored. This conception is inconsistent with the practical character of constitutional principles which has been postulated. Neither does it serve, in the second place, to identify jurisprudence as a species of philosophy, for we should in that case have to define philosophy. 6 Nor, in the third place, does it appear promising for

4 Co. Litt., Epilogue.
5 2 Barham, The Political Works of Marcus Tullius Cicero (1842) 277-78.
6 It would be a matter of curious interest to trace the origin of this conception of jurisprudence, which appears to have become current in this country relatively recently. In Anglo-American legal thought, it perhaps derives from Austin's definition of general, (as contrasted with particular), jurisprudence as the philosophy of positive law.

Thus, Austin states in the Outline of the Course of Lectures:
"Having determined the province of jurisprudence, I shall distinguish general jurisprudence, or the philosophy of positive law, from what may
the purposes of constitutional interpretation to follow Thurman Arnold's incisive, highly pragmatic, and yet essentially pessimistic analysis of jurisprudence as sanctimonious ceremony. The residuum is the conception of jurisprudence as legal science, an emphasis which, it deserves to be noted, has formed a common element in descriptions of legal study in this country since at least 1816 when Judge Isaac Parker delivered his inaugural lecture as the first professor of law at Harvard. More specifically, as Professor Kocourek has suggested, the term "jurisprudence" may conveniently be limited to the more general or non-utilitarian branches of legal science, as distinguished from the more technical professional subjects. In this sense, it comprizes analytical jurisprudence, legal history, comparative law, and their relatives.

be styled particular jurisprudence, or the science of particular law." 1 AUSTIN, LECTURES ON JURISPRUDENCE (5th ed. 1885) 31.

Austin states that he derived this definition of general jurisprudence from Hugo. Id. at 32. Cf. also 2 id. at 1072, where Austin speaks of "General (or comparative) Jurisprudence, or the philosophy (or general principles) of positive law".

"Jurisprudence is the holy of holies of government, the science of that great symmetrical body of principles which is supposed to constitute the law, the description of its deepest sources, and the unifying element of the law throughout history. Without a science of jurisprudence, law might be considered a collection of man-made rules for practical situations. With it the Law becomes the cornerstone of government . . . .

"In the science of jurisprudence all of the various ideals which are significant to the man on the street must be given a place. . . . Jurisprudence must give a place to all of the economic, and also the ethical, notions of important competing groups within our society, no matter how far apart these notions may be. In its method it must make gestures of recognition to the techniques of each separate branch of learning which claims to have any relation with the conduct of individuals, no matter how different these techniques may be.

"Such a task can only be accomplished by ceremony, and hence the writings of jurisprudence should be considered as ceremonial observances rather than as scientific observations." ARNOLD, THE SYMBOLS OF GOVERNMENT (1935) 46, 69-70.

8 See 1 WARREN, HISTORY OF THE HARVARD LAW SCHOOL (1908) 299.

9 Jurisprudence As an Undergraduate Study, 8 CALIF. L. REV. (1920) 232, n. 1.

10 For discussion of the questions underlying this conception of jurisprudence, the writer refers the interested reader to his articles, The Rational Basis of Legal Science (1931) 31 COL. L. REV. 925; The Implications of Legal Science (1933) 10 N. Y. U. L. Q. REV. 279; Legal Science and Reform (1934) 34 COL. L. REV. 207, which will also indicate further references.
IV

This leaves the second problem of definition. How are the fundamental principles of the American constitutional system to be defined? It would indeed be presumptuous in this schematic discussion to attempt to analyze and evaluate those features which are commonly deemed significant in our constitutional system, such as, for example, the principle of representative self-government, the theory of constitutionally limited authority, the duality of sovereignty in the federal system, the separation of powers, and the supremacy of the judiciary assured by independent judicial review. It is possible, however, to indicate three points of view by reference to which the basic elements in a constitution may be defined. The first is the postulate of Savigny that law is the indigenous product of national evolution; this would suggest, as is probably casually assumed, that the essential elements in a constitution are its distinctive features, the peculiar characteristics which reflect its historical origin and background. A second point of departure, which today is being given increased attention as a basis for the comparative study of legal institutions and ideas, was suggested in effect by Austin a century since; it supposes that the principles of a legal structure are its universal elements, or in other words those respects in which it is comparable to other systems of law at more or less the same stage of development.11

For a third mode of approach, a venerable witness is cited, one of the greatest lawyers of all time, a student of literature and philosophy, a novus homo from a country town, who, despite his plebeian origin, held in succession the highest offices of his time, the last outstanding defender of the Roman Republic, with whose death the last hope of the Republic expired, and, as that Augustus who reluctantly had consented to his proscription said long after, who loved his country well,—Marcus Tullius Cicero. It will be recalled that Cicero, doubtless profoundly stirred by the degeneration of Roman political institutions in his time under the stress of social upheaval, conspiracy, and revolution, wrote two treatises on the constitution of government, the De Republica and the De Legibus. From the passages in these works which have come down to us, it may be gathered with some confidence what his response might have been to an inquiry, corresponding to that before us, as to what were the basic principles of the Roman constitution in the form in which it had then been in existence for more than four centuries.

11 Cf. 2 Austin, op. cit. supra note 6, at 1072.
It is extremely doubtful that Cicero would have pointed to any individual institution or principle of positive law as of itself essential. Thus, although he venerated the XII Tables, which was the nearest to a written constitution possessed by the Romans, (he once wrote, for instance, that their small compass outweighed for legal purposes the libraries of all philosophers), there is no indication that he would have considered the written *formulae* inscribed upon the XII Tables to be fundamental,—they had in fact been too much superseded by his time. And it seems clear from the discussion in the *De Legibus* that Cicero had advanced beyond the Greek conception that the essence of a state is its form of government. The significance of institutions in flux, he realized, is relative.

There are, however, three points which Cicero would certainly have emphasized. The first is the conception of the *ius naturale*, of a law founded in the uniformity of human character and, as such, providing an universal criterion of justice more significant than the actual institutions of any particular state, a powerful conception which was the closest approach of the Romans to a critical or scientific theory of jurisprudence. The second point upon which he would have insisted is the principle of the legal state, of the reign of law, to recall Dicey's expression, as the foundation of government. And the third is his suggestion, which significantly enough is attributed to the austere Cato, that the excellence of the Roman constitution derived from the fact that it was the product not of one genius but of many, established not during the lifetime of one man but by various men in various generations. It is not surprizing that the implications of this subtle conception were not fully comprehended by Cicero, who inferred that a mixed form of government with compensatory checks and balances would constitute the most stable instrument of the legal order. The suggestion involves the principle of growth, of constitutional progress through the construction and adaptation of political institutions in conformity with the development of political and social conditions.

Happily, in the determination of basic constitutional principles, it is not necessary to choose between these three points of view; in fact, it would be prejudicial to accentuate any one of them to

12 "Fremant omnes licet, dicam quod sentio: bibliothecas mehercule omnium philosophorum unus mihi viderit XII tabularum libellus, si quis legum fontis et capita viderit, et auctoritatis pondere et utilitatis ubertate super-are." *De Oratore* i, 44, 195.

13 *Cicero, De Republica* 2, 1.
the exclusion of the others. The historical, national view-point is needed to develop the peculiar environment and specific attributes of each constitution; the comparative method lays a basis for the universalization of political experience; each of these is insufficient without the concept of constitutional change, of the relativity of all institutions, peculiar or universal, to their conditions. In short, legal history and comparative law are incomplete without a theory of legislation.

V

It is now high time to put the question. Should the formal study of jurisprudence, understood as general legal science, include within its scope the basic elements of the American constitutional system? The reaction to this question will largely vary according to the views held as to the adequacy of present methods of dealing with constitutional issues. This is a field where the very angels must fear to tread, and so the answer must be left to the constitutional experts. At most, an interested lay spectator will venture a few scattered queries which may perhaps deserve consideration.

The first query to suggest itself is obvious. Is it not strange and perhaps significant that the question should be raised at all? That it should seem pertinent to inquire whether the most important aspects of public law should be considered in the most comprehensive branch of legal science? Is the motive a lack in legal science itself or some malaise as to current criteria of constitutional discussion? Brief reference to each of these possibilities seems pertinent.

From the side of jurisprudence, if typical texts may be taken as a test, a fact of interest appears. For instance, in the eighth edition of Salmond's *Jurisprudence*, which in default of a standard American treatise may be selected as a specimen, one out of twenty-two chapters, a chapter on *The State*, to which it would be magnanimous to add a chapter dealing with legislation as a source of law, is devoted to public law; the major portion of the work relating to the elements of law is almost exclusively concerned with private law. By and large this is typical; in the general levels of legal thought attention is chiefly absorbed with concepts of private law, with perhaps exception to be noted of those inquiries which follow the somewhat isolated channels of criminal law and constitutional history.

Two historical circumstances partly explain this phenomenon. The first is that the inventors of the alphabet of legal conceptions,
the Roman jurists, evolved a distinctly more complete and satisfactory terminology for private than for public law. This emphasis has been reflected in the later literature of jurisprudence, substantially predicated upon the Roman materials. The second circumstance is that, owing to accidental considerations, the general study of political science has not in this country developed within the law schools. Fifty years ago when proposals were afoot to expand this and other social sciences, the law schools were disposed to abandon their just pretensions in these fields; the imagination of but few of the then leaders of legal education reached beyond a narrow professional curriculum, almost exclusively concerned with technical private law, which, it may be supposed, had been inherited from the Litchfield School. Their attitude was expressed by Theodore Dwight's observation that to incorporate public law subjects in the ordinary law school studies would be like planting a upas tree in the Garden of Paradise. The result has been to encourage the appearance of departments of political science in the colleges and graduate schools and, more recently, of independent schools of public administration. Meanwhile, notably at the Columbia Law School itself as well as at other leading institutions, recognition in the formal professional curriculum has been gradually conceded to a few public law subjects. The multiplication of academic jurisdictions has undoubtedly fostered specialization, but, from the view-point of legal education, the effect has been, first, to isolate the consideration of constitutional and other public law problems within the context of a professional curriculum more or less apart from their general implications in political science and, second,

14 Upon his appointment to the Columbia faculty in 1876, Professor Burgess proposed that the subjects of political and constitutional history and political, economic and social science should be developed as electives in the School of Arts, while the subjects of constitutional, administrative and international law should be included as electives in a third year to be added to the law school program, in Columbia University. This plan was not accepted by either the School of Arts or the Law School; consequently, the Faculty of Political Science was organized in 1880 as an independent department to develop these subjects. See Columbia University Quarterly (1930) 351, 364 et seq.

15 It should be remarked that at Columbia, beginning two years after the founding of the Law School in 1858, instruction in public law was offered in the Law School, first by Lieber (1860-1872), and after 1876 by Burgess. However, substantial recognition was not given until after 1890, when Burgess' initial proposals as to constitutional, administrative and international law were substantially placed in effect upon the introduction of a third year of legal instruction. See Theodore Dwight's article, Columbia College Law School, (1889) 1 Green Bag 141, 158.
to retard the development of public law subjects, such as legislation and administrative law, which, it is belatedly being discovered, enclose the most significant areas of legal activity at the present time.

In sum, the definition of rights and values from the view-point of atomized individuals has too much absorbed the attention of jurisprudence. Under modern conditions, specific emphasis needs also to be given to those aspects of law which express the interests of groups, of the national community, and of the society of nations. This, it may be supposed, is the special message of sociological jurisprudence. The study of public law is even more essential to jurisprudence for another reason. This is that law does not consist of ends in themselves; it relates primarily to the means of the regulation of conduct with reference to given ends. For this reason, jurisprudence cannot eventually ignore the institutions in which law is embodied; indeed, in a sense, its chief concern is to explain their existence and function. Thus, public law, the law specifically defining the means of social regulation, is of primary significance to jurisprudence. This is no more than to remind ourselves that legal science has a practical subject-matter.

From the view-point of constitutional theory, on the other hand, inquiry as to the mutual relevance of jurisprudence and public law may be suggested, not so much by the private law bias of current jurisprudence, as by the advantage of broadening the basis of constitutional discussion. Thus, it may be thought that, under the necessity of recurrent reform, the underlying principles of a constitutional system will be perverted or ignored, unless the rational and historical bases upon which they rest are adequately comprehended. Equally is it to be supposed that objective determination of such principles in the light of jurisprudence will facilitate reform by defining appropriate paths of action. For these reasons, a more comprehensive and impartial endeavor to relate basic constitutional principles to reason and experience will recommend itself as much to the intelligent progressive as to the enlightened Tory. Only those blinded by prejudice, the intransigent reactionaries and the intemperate radicals, will prefer to resolve constitutional issues by naked vote or violence.

We therefore conclude both that jurisprudence should include public law within its purview and also conversely that the consideration of constitutional problems will be clarified by the detached viewpoint of jurisprudence.
This granted, a second query occurs. What possibilities does the study of formal jurisprudence directed to the elements of a constitutional system promise? In general, it may be conceived that the chief benefit of such study will be to suggest relatively objective points of view and to develop pertinent analyses of existent conditions with which to inform constitutional discussion. Without purporting to supply anything like a detailed answer to the question, a few illustrations may be put forward to suggest the potential utility for such purposes of the more obvious methods of inquiry available to jurisprudence,—the historical, the comparative, and the analytical.

The first of these methods, the historical, needs comment rather than illustration; in the form of the doctrine of stare decisis, it is the dominant mode of constitutional interpretation as it is the major presupposition of legal study generally in this country. Even in this artificial form, the historical method has two specific advantages. The first is that, for the most part, the provisions in the Constitution are general, and a relatively large view was early taken of their intendment. Consequently, they have lent themselves to, if not indeed required, liberal construction, and, on many points, the original historical circumstances of the Constitution furnish a basis to correct later illiberal trends. For example, as competent critics have pointed out, the Full Faith and Credit Clause establishes a principle of uniformity in judicial administration, which has been, at least until recently, more narrowly applied by the courts, and confers upon the Congress powers which have been more parsimoniously exercised, than seems to have been initially envisaged. The second advantage of the traditional historical method of interpretation is that it may be employed as a fiction to conceal somewhat the fact that every new problem of interpretation is new; that it permits progress and at the same time saves the symbol of certainty. Both are important.

This very circumstance, however, suggests that historical technique is a treacherous mode of statutory construction. First, there is the temptation to take a superficial view, to predicate conclu-

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17 See, for instance, the brief discussion in the Constitutional Convention, 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1911) 447-8, 488-9.
sions upon mere expressions of opinion without reference to those underlying conditions of fact which lend significance to a statement of institutional policy. As Madison wrote in 1832,—

"In expounding the Constitution and deducing the intention of its framers, it should never be forgotten, that the great object of the Convention was to provide, by a new Constitution, a remedy for the defects of the existing one; that among these defects was that of a power to regulate foreign commerce; that in all nations this regulating power embraced the protection of domestic manufactures by duties and restrictions on imports; that the States had tried in vain to make use of the power, while it remained with them; and that, if taken from them and transferred to the Federal Government, with an exception of the power to encourage domestic manufactures, the American people, let it be repeated, present the solitary and strange spectacle of a nation disarming itself against the effect of the power as used by other nations. Who will say that such considerations as these are not among the best keys that can be applied to the text of the Constitution? and infinitely better keys than unexplained votes cited from the records of the Convention." 18

Second, there is the more serious danger of falling into the fallacy of the school of historical jurisprudence,—of assuming that inferences from the tradition of a single nation are inevitable. The danger is accentuated by a practice of stare decisis; when precedent controls the construction of a constitution, it gradually fades under the gloss. Yet, if a comment of Lord Sankey in a recent case involving the interpretation of the British North America Act may be cited in this connection, "the question is not what may be supposed to have been intended, but what has been said." 19 Third, as the preceding observation may indeed suggest, the historical method, necessary as it is, is inconclusive. Problems of institutional development look to the future, not to the past, and for this reason changed conditions may materially alter the relevance of past tradition. No one would today attribute any possible constitutional significance to the rule that "a man, in a civil case, is not bound to testify against his interest," as Chief Justice Marshall declared in 1806; 20 yet for forty years after 1787 the doctrine was undisputed. 21 Or, to take an illustration of more recent interest, it may be suggested that a choice among Madison's and Hamilton's readings of the General Welfare Clause

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18 Letter to Professor Davis, in 3 Farrard, op. cit. supra note 17, at 518, 520.
20 United States v. Grundy, 3 Cranch 337 (U. S. 1806).
21 For discussion of the cases, see my article, The Antecedents of Examination before Trial in New York (1934) 34 Col. L. Rev. 831, 849 et seq.
and that which has been declared by the majority of the Court in the *Hoosac Mills case,*\(^\text{22}\) is to be settled not merely by history but more specifically by considerations derived from existing conditions. To such conditions, as the Romans long ago perceived, the *voluntas legis*, the intent of the statute itself, applies, and this intent is not necessarily prescribed by the intent of the legislator nor, we should add, of subsequent interpretation.

In sum, the historical method is essential to ascertain the origin and function of a political institution relative to past conditions, but this is the limit of its use.

**VII**

To complement the particularistic historical method, comparative study of legal principles and institutions is obviously desirable. Indeed, from a scientific point of view, it is essential. A purely national science is a monstrosity. Comparison of domestic and foreign constitutional developments enables the significance of local events to be more critically estimated, provides a more representative base from which conclusions may be drawn, corrects the prejudices of peculiar traditions, and facilitates the diffusion of progressive ideas. And there is every reason to suppose that the most influential political theories have little respect for frontiers. Thus, the doctrines as to the natural rights of man, the social compact, the separation of powers, and the reserved rights of local communities, which in a degree have characterized constitutional interpretation in this country, did not originate in the United States.

A comparative examination of the forms in which such doctrines as these have been articulated in particular constitutions would be instructive. It would indicate, among other things, that the specific content of general political ideas is not inherently fixed but varies in particular times and places in response to local conditions. It would disclose, for instance, that the definition in detail of the functions which are to be segregated under the doctrine of the separation of powers is presumably due more to circumstance than to logic. It might even appear that some of these time-honored doctrines no longer have the axiomatic quality which they enjoyed a century ago. In this connection, it would be especially pertinent to notice those instances of federal government, notably the Canadian and the Australian, under written constitutions more recently formulated than our own but responding to conditions not too dissimilar. By way of illustration, allu-

sion may be made to two subjects of special comparative interest in these constitutions.

The first is the relatively wide scope of the powers granted to the federal government. In both the Canadian and Australian constitutions, for example, in addition to substantially all the powers conferred upon the Congress of the United States, banking (excepting local state banking in the Australian constitution), bills of exchange and promissory notes, and marriage and divorce are allocated to the federal legislative authority. Beyond this, the Dominion Parliament of Canada has exclusive legislative power respecting savings banks, interest, criminal law and criminal procedure, penitentiaries, and public works declared by the Parliament to be for the general advantage, while its power to raise money is unrestricted to any mode or system of taxation and its control over trade and commerce is unlimited.\(^ {23} \) Likewise, the legislative power of the Australian Parliament specifically comprehends bounties on the production or export of goods, postal, telegraphic, telephonic and other like services, insurance other than local state insurance, foreign corporations and trading or financial corporations formed within the Commonwealth, invalid and old-age pensions, conciliation and arbitration of industrial disputes extending beyond the limits of any one state, besides certain other matters of general interest or those which may be referred to the Commonwealth Parliament by a state parliament.\(^ {24} \) A comparative study of the scope of federal power as defined in these provisions has an immediate bearing upon the argument sometimes made that any substantial development of federal legislation to meet national problems beyond that exercised in the past will inevitably destroy the indestructible states united under our Constitution.

Another matter of more than incidental comparative interest is the technique of interpretation applied to the Canadian and Australian constitutions. To illustrate, two well-known cases may be cited. The first is the celebrated Engineers' Case,\(^ {25} \) in which the High Court of Australia was called upon in 1920 to determine, among other matters, the question whether the Commonwealth Parliament has power to make laws binding on the states with respect to conciliation and arbitration covering industrial

\(^ {23} \) Cf. British North America Act, 1867, 30 Vict. c. 3, § 91.

\(^ {24} \) Cf. Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict. c. 12, § 51.

disputes extending beyond the limits of one state, viz., so as to bind the states as employers. In answering this question, the High Court took into consideration the doctrine of implied limitations of federal and state power, which the Court had accepted in 1900 upon the authority of Chief Justice Marshall's opinion in *M'Culloch v. Maryland.* The majority of the Court rejected the doctrine with the following observations:

"The more the decisions are examined, and compared with each other and with the Constitution itself, the more evident it becomes that no clear principle can account for them. They are sometimes at variance with the natural meaning of the text of the Constitution; some are irreconcilable with others, and some are individually rested on reasons not founded on the words of the Constitution or on any recognized principle of the common law underlying the expressed terms of the Constitution, but on implication drawn from what is called the principle of 'necessity', that being itself referable to no more definite standard than the personal opinion of the Judge who declares it."  

Speaking more specifically of the doctrine of "implied prohibition", the opinion adds:

"From its nature, it is incapable of consistent application, because 'necessity' in the sense employed—a political sense—must vary in relation to various powers and various States, and, indeed, various periods and circumstances. Not only is the judicial branch of the Government inappropriate to determine political necessities, but experience, both in Australia and America, evidenced by discordant decisions, has proved both the elusiveness and the inaccuracy of the doctrine as a legal standard. Its inaccuracy is perhaps the more thoroughly perceived when it is considered what the doctrine of 'necessity' in a political sense means. It means the necessity of protection against the aggression of some outside and possibly hostile body. It is based on distrust, lest powers, if once conceded to the least degree, might be abused to the point of destruction. But possible abuse of powers is no reason in British law for limiting the natural force of the language creating them. It may be taken into account by the parties when creating the powers, and they, by omission of suggested powers or by safeguards introduced by them into the compact, may delimit the powers created. But, once the parties have by the terms they employ defined the permitted limits, no Court has any right to narrow those limits by reason of any fear that the powers as actually circumscribed by the language naturally understood may be abused.”

The second case to which reference may be made is of equal interest in its bearing upon the judicial function in constitutional

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26 D'Emden v. Pedder, 1 C. L. R. 91 (1900).
27 4 Wheat. 316, 425 (U. S. 1819).
29 Id. at 150-1.
interpretation. The question involved in this case, *Edwards v. Attorney-General for Canada*,\(^{30}\) which was appealed to the Privy Council in 1930, was whether the term, "persons", as employed in Section 24 of the British North America Act, 1867, providing for appointments to the Canadian Senate, includes female persons. In the Supreme Court of Canada, judgment had unanimously been given in the negative, the conclusion being based by the majority of the Court, *inter alia*, upon the propositions:—(a) that the provisions in the Act in question bear today the same construction which they would have been given when enacted; (b) that, by the common law of England, in the light of which, it was held, the Act should be construed, as well as by the civil and canon law, women were disenabled to hold public office; and (c) that, from 1867 to the present time, there was no instance of a practice suggesting that women were eligible to the Canadian Senate.\(^{31}\) These arguments were brushed aside by the Privy Council, and the decision reversed. In the opinion, Lord Sankey L. C. indicated that the extraneous historical evidence drawn from English and Roman law and from an admittedly uniform practice did not establish a conclusive presumption to be restrictively read into the language of the British North America Act, 1867, and, furthermore, described the policy to be followed in constitutional interpretation, as follows:

"The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. . . .

"Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs. 'The Privy Council, indeed, has laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would often be subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British colony'; see Clement's Canadian Constitution, 3d ed., p. 347."\(^{32}\)

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It may be remarked that the emphasis in both the cases to which reference has been made, is, on the one hand, upon the construction of constitutions as ordinary statutes conformably to the natural sense of the language expressed and, on the other hand, against a narrow interpretation of such instruments defeating their purposes under existing conditions through the interpolation of limitations not expressed but implied on the ground of necessity or extrinsic historical precedents or practice. This emphasis delineates a conception of the judicial function in constitutional interpretation, at once logical and liberal, which invites detailed comparative consideration.

VIII

If the comparative method, then, is requisite to set historical inquiry as to constitutional phenomena on a more scientific basis, the significance of both modes of research depends upon critical analysis. This involves the third method of jurisprudence which we have to consider,—the analytical. It should be clear that abstract or theoretical analysis is an integral part of the process by which alone the meaning of constitutional provisions can properly be defined. Without a logical procedure of interpretation, a constitution may be no more than a sequence of sweet but insignificant symbols or, at best, an irrational jumble of arbitrary casuistry.

The great danger of course is to suppose that dialectical analysis and its product, abstract theory, are self-sufficient. There have been schools of philosophy which so hold, supposing that language, the human instrument of communication, expresses phantom categories of thought, which in some mysterious manner enjoy an existence, independent of the physical world and revealed only to the piercing eye of unaided reason. This seems, however, to apotheosize the fact of memory; insofar as it is convenient to conceive of such platonic meanings, it is only because the language employed reflects relative uniformities in physical existence. At least for the purpose in hand, this is an insufficient analysis of legal analysis. We repeat that constitutions are practical instruments, which refer to possible actual events which may be anticipated because the like have occurred in the past. It is not to be supposed that analysis of a constitutional provision into a series of logical propositions which satisfy the aesthetic desire for consistency, is a demonstration of their validity. Unfortunately, such a series of propositions may be logically consistent, yet quite false. Therefore, the sufficiency of constitu-
tional principles and propositions propounded by logical analysis depends entirely upon whether they can be verified, i.e., upon their relation to experience. The usual difficulty in abstract speculation is that this relation is taken for granted.

This point of view suggests that analytical jurisprudence has a three-fold contribution to make to the discussion of constitutional issues. The first and foremost is to hold constitutional interpretation to the ordinary canons of clear thinking. An incisive analysis of the process of interpretation itself is, for instance, a *desideratum*. The second is to create general concepts by which past experience, stated in more detail by legal history and comparative law, can be accurately formulated and readily related to new problems. The third is to project hypotheses, suggested perchance by the observation of particular political phenomena or found in some other branch of science, which may be utilized as the basis for a critique of given institutions or ideas. A familiar and illuminating instance of this mode of analysis as a test of constitutional doctrine is the application of the concept of "commerce" conceived as navigation or as foreign commerce, as developed in the decisions of the Supreme Court, to the doctrines enunciated by the same Court with respect to domestic land commerce under the Commerce Clause.

IX

The possible illustrations of the pertinence of analysis as thus defined, are legion. It will be enough to cite two fairly notorious examples. The first is afforded by the leading American decision as to the divorce jurisdiction under the Full Faith and Credit Clause, the much controverted case of *Haddock v. Haddock*. In this case, it will be recalled, the decision was that a divorce decree issued by the court of the plaintiff's domicil, not being the last matrimonial domicil, is not obligatory under the clause upon the courts in other states, when the defendant has acquired a separate domicil and is not personally served within the jurisdiction. The crucial passage in the undulant logic of the majority opinion, delivered by Chief Justice White, reads as follows:

"... if one government, because of its authority over its own citizens has the right to dissolve the marriage tie as to the citizen of another jurisdiction, it must follow that no government possesses as to its own citizens, power over the marriage relation and its dissolution. For if it be that one government in virtue of its authority over marriage may dissolve the tie as to citizens of another government, other governments..."

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33 201 U. S. 562 (1906).
would have a similar power, and hence the right of every government as to its own citizens might be rendered nugatory by the exercise of the power which every other government possessed." 34

As Mr. Justice Brown pointed out in a dissenting opinion, 35 the logical conclusion from this argument, viz.,—that, in the case, there should be no jurisdiction to decree a divorce at the domicil of either party without personal service upon the other 36—was not drawn, but instead it was concluded that the decree, assumed to be valid in the state where rendered, was not obligatory in other states, a proposition certainly at variance with the usual construction of the Full Faith and Credit Clause.

The passage quoted invites critical analysis on even more substantial grounds. It assumes: (1) that only one state can have power over the same person as respects the same subject-matter at the same time; (2) that a given power or jurisdiction of one state is destroyed by the admission of a concurrent power or jurisdiction in another state, and therefore that such admission renders nugatory the jurisdiction in question of all states; (3) that an "inherent power" of a state controls the interpretation of a clause in the Federal Constitution. These are parious premises. The first is inconsistent with the multiplicity of jurisdictions in a federal system and, indeed, with the existence of transitory actions, in respect of which there is no logical difficulty in supposing potential concurrent jurisdictions of several states over the same cause at one time. The second assumption is a naked assertion that to allow a power in any the slightest degree constitutes its complete exercise. It is not merely that the power to tax, to take the familiar example, is the power to destroy, but that, if a power to tax at 1% be admitted, the tax laid will be 100%. In other words, let Delilah take one hair from Samson's locks and Samson is delivered to the Philistines. Behind this reasoning is the cynical hypothesis, implicit in the laissez-faire theory of government, that any power partially granted to a public officer will necessarily be abused to its full limit. Accordingly, jurisdiction is conceived as something like a cake, which, one piece allotted to one authority, becomes wholly his or else mysteriously vanishes.

34 *Id.* at 573.
35 *Id.* at 615.
36 This would have been in conflict with Maynard v. Hill, 125 U. S. 190 (1887), in which a legislative divorce of the Territory of Oregon was upheld, although one of the parties, the wife, had never been domiciled in the Territory and had been without knowledge of the proceedings. No question was involved under the Full Faith and Credit Clause, however, as the case was a suit to determine equitable rights to land in Oregon.
The third premise, that the Constitution is to be construed by reference to inherent state powers, is of undisguised, cardinal concern. It involves the question whether the Constitution shall be the supreme law of the land, as Article VI declares, or, in other words, whether there is a higher law of inherent state rights, not expressed in the language of the Constitution but implied from precedent or extrinsic historical circumstance. To this suggestion, it might be answered that the Constitution itself defines the many cases in which, as Gouvernor Morris declared in the Federal Convention, "The internal police, as it would be called & understood by the States, ought to be infringed." 27 In any event, it should be supposed that an appeal to a doctrine, so vaguely defined and so formidable in its latent implications, would be supported, in the face of the constitutional mandate upon the judges in every state, by something more than a declared limitation or even destruction of the power of a state in the instant case. But, in the Haddock case, the doctrine of inherent state rights was simply assumed ab initio; indeed, the one material item least considered in the majority opinion is how the purpose of the Full Faith and Credit Clause can be most effectively implemented in a matter assumed to be within its general scope. One cannot but believe that the argument was motivated by an undisclosed consideration, a judgment as to the unwisdom of extending the effect of divorce decrees. However this may be, though we are not here concerned with the merits, it may be added that the majority opinion in this case has contributed in no small degree to perpetuate the confusion and the lack of correspondence between legal doctrine and social convention which enshrouds the sad area of divorce jurisdiction.

In further illustration of the pertinence of analytical jurisprudence to constitutional argument, brief reference may also be made to a second and more recent decision, likewise of major importance, United States v. Butler. 28 In this case, in which a majority of the Supreme Court through an opinion delivered by Mr. Justice Roberts declared the processing taxes and the appropriation for rental and benefit payments provided by the Agricultural Adjustment Act of 1933 29 unconstitutional, the decisive argument is of more than ordinary interest as an instance of judicial logic. For the present purpose, it is sufficient to allude

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27 2 Farrand, op. cit. supra note 18, at 26.
28 297 U. S. 1 (1936).
shortly to those aspects of the argument concerning the construction of the so-called "General Welfare" Clause in Article I, Section 8 of the Constitution. The pertinent passage in the Clause reads as follows:

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

In the construction of this language, it may be indicated, accepting the criterion that the question is "... what powers in fact have been given by the people" and leaving aside the quondam suggestion, involving a point of punctuation which apparently caused a minor scandal in the Federal Convention, to the effect that the Clause contains two substantial grants, one to lay taxes and another to provide for the general welfare, there is in general an election to be made between two logically arguable theories, each taking the words, "to provide ... for the common defence and general welfare of the United States", to be a limitation upon the power granted. The first alternative, derived by Madison from the Convention proceedings, is that these terms of limitation are merely "general terms, explained & limited by the subjoined specifications" as to the powers of the Congress. The other view, attributed to Hamilton, is that a power is conferred separate and distinct from those later enumerated, subject only to the limitation in the Clause itself and to the three express qualifications upon the taxing power elsewhere prescribed in the Constitution. Ostensibly, this view is adopted

40 United States v. Butler, 297 U. S. 1, 63 (1936).
41 S Farrand, op. cit. supra note 18 at 367, 379, 491.
42 Letter, James Madison to Andrew Stevenson, id. at 483, 487.
43 In view of the acceptance of Hamilton's doctrine in United States v. Butler, it is pertinent to reproduce the well known statement in the Report on Manufactures:

"The National Legislature has express authority 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare', with no other qualifications than that 'all duties, imposts, and excises shall be uniform throughout the United States; and that no capitation or other direct tax shall be laid, unless in proportion to numbers ascertained by a census or enumeration, taken on the principles prescribed in the Constitution', and that 'no tax or duty shall be laid on articles exported from any State'...."

"These three qualifications excepted, the power to raise money is plenary and indefinite, and the objects to which it may be appropriated are no less comprehensive than the payment of the public debts, and the providing for the common defence and general welfare. The terms 'general welfare' were doubtless intended to signify more than was expressed or imported in those
in the opinion, apparently upon the authority of Mr. Justice Story and other commentators.

This premised, the logical construction given to the Welfare Clause in the majority opinion may be diagrammed in the following propositions:

1. The tax imposed in the Agricultural Adjustment Act, 1933, forms an indispensable part of a plan of regulation and, therefore, is not a tax within the Clause.

2. The appropriation for rental and benefit payments provided in the Act is a part of a statutory plan of regulation; therefore, its validity need not be measured by the limitation to the general welfare.

3. The plan of regulation in question invades the reserved rights of the states, and its parts, the tax and the appropriation, are therefore invalid as means to an unconstitutional end.

We are here concerned, not with the wisdom, but with the logical consistency of the construction thus delineated. With deference, three suggestions are to be made. The first is that each of these propositions, while comporting with Madison's analysis of the General Welfare Clause, is fundamentally inconsistent with the more liberal thesis which was avowed, namely, that the Clause constitutes a substantial grant of legislative authority. Thus, the gist of the first proposition is that the validity of a tax, deemed to

which preceded; otherwise, numerous exigencies incident to the affairs of a nation would have been left without a provision. The phrase is as comprehensive as any that could have been used, because it was not fit that the constitutional authority of the Union to appropriate its revenues should have been restricted within narrower limits than the 'general welfare', and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition.

"It is, therefore, of necessity, left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper. And there seems to be no room for a doubt that whatever concerns the general interest of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, as far as regards an application of money.

"The only qualification of the generality of the phrase in question, which seems to be admissible, is this; That the object to which an appropriation of money is to be made be general, and not local; its operation extending in fact or by possibility throughout the Union, and not being confined to a particular spot.

"No objection ought to arise to this construction, from a supposition that it would imply a power to do whatever else should appear to Congress conducive to the general welfare. A power to appropriate money with this latitude, which is granted, too, in express terms, would not carry a power to do any other thing not authorized in the Constitution, either expressly or by fair implication." 3 Works of Alexander Hamilton (Lodge) 294, 371.
be part of a plan of regulation, depends upon the validity of the plan. On the contrary, Hamilton stated that the power to tax conveyed by the Clause is "plenary and indefinite", subject alone to the three express qualifications reserved in the Constitution; his intimation that the power conferred "would not carry a power to do any other thing not authorized in the Constitution, either expressly or by fair implication", refers to the power to appropriate and not to the power to tax. A like observation applies to the second proposition; under Hamilton's view, whether an appropriation is within the Clause depends upon whether the object is general, and not local. This, the decisive issue, is dodged in the opinion. A fortiori, the same is to be remarked of the third proposition; Hamilton expressly states that whatever concerns the general interest of agriculture is within the sphere of the national competence, so far as concerns the application of money. The majority opinion, therefore, exhibits a thorough disparity between the general theory of construction adopted and its actual application in the case.

A second matter which deserves analysis is the conception of a tax propounded in the opinion as a basis for the conclusion that the taxes laid by the Act were not taxes within the General Welfare Clause. It is stated:

"It is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the government. The word has never been thought to connote the expropriation of money from one group for the benefit of another." 46

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44 Italics the author's.

45 In the above, no account is taken of a construction, to which an apparent color is given in the majority opinion, namely, that the tax provisions in the Agricultural Adjustment Act, 1933, were held to be not separable. Under this construction, it would follow that the taxes levied, although constitutionally within the power of the Congress, were held invalid merely since the power was deemed not to have been exercised, the tax provisions being incidental to and not separable from an invalid plan of regulation. The obvious objections to this construction are: (a) it is mechanical, i.e., it suggests that the taxes levied might have been upheld if separately enacted; (b) the question of separability is explicitly "passed" in the opinion as a "novel suggestion"; (c) the tax provisions are specifically characterized in the opinion by reference to their purpose and operation as part of the plan to regulate agricultural production, to support the conclusion that the tax, as well as the appropriation, is "but means to an unconstitutional end" and, as such, invalid.

Analysis might indicate that such expropriation is the effect of most taxes. Evidently, the definition was formulated in view of the interpretation placed upon the Head Money Cases and the difficulty resulting from Massachusetts v. Mellon. But it is worth noting in this connection, on the point whether the regulatory purpose, context, or effect is material to the definition of a tax: (a) that any tax may have regulatory effects; (b) that frequently, i.e., when the proceeds of a tax are to be covered into a general fund, it is not feasible to take account of the ultimate destination of the proceeds in determining the nature of the tax; and (c) that, obviously, it is not necessary to invalidate the tax to prevent improper use of the proceeds. In the particular instance before the Court, as Mr. Justice Stone cogently remarked, the tax condemned was not claimed to have any perceptible effect as a regulation of a prohibited subject-matter. These considerations suggest that a tax may well also be a regulation and that, therefore, the two categories are not mutually exclusive as the majority opinion supposes. Indeed, why should not the exaction of a tax under general law be classified as a particular species of regulation, distinguished by the fact that it is such an exaction? In any case, there is no logical necessity that a tax should not be, as such, predicated upon the power to tax and at the same time, as a regulation, predicated upon a specific power to regulate the subject-matter taxed. In such event, as indeed is to be inferred from the opinion in the Head Money Cases upon which reliance was placed, the powers in question may be construed cumulatively; in those cases, it was not deemed necessary to determine the validity of an exaction as a tax, since it was shown to be a lawful regulation under the Commerce Clause. The apparent denial of the converse of this proposition in United States v. Butler is clearly inconsistent with the premise that the power to tax conferred by the “General Welfare” Clause is a substantial grant. Assuredly, this position is not aided by a loose definition, importing an unsatisfactory standard, either quite artificial or else inaccurate, to determine when a tax ceases to be a tax because it forms part of a plan of regulation. At most, a definition of this nature is a conclusion, not a logically effective consideration.

The third and cardinal point deserving of analysis is the reference to the reserved rights of states, which the pivotal passage

47 112 U. S. 580, 595 (1884).
48 262 U. S. 447 (1923).
49 United States v. Butler, 297 U. S. 1, 80 (1936).
50 112 U. S. 580, 595 (1884).
in the majority opinion in *United States v. Butler* develops as follows:

"From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted, are prohibited. None to regulate agricultural production is given and therefore legislation by Congress for that purpose is forbidden." 51

Waiving the possibility, previously noted, that the supposition of inherent rights reserved to the states may logically imply that a body of doctrine derived from relatively extrinsic considerations measurably supersedes the language of the Constitution itself, in its natural intent, as the supreme law of the land, attention is drawn to three questions suggested by the form given to the argument from reserved state rights in the passage cited. The first arises from the circumstance that the constitutional provision to which the argument is attached, appears to supply its answer. The Tenth Amendment prescribes that the scope of the grants to the National Government shall define the powers reserved to the states; not that the powers not reserved to the states or to the people are delegated to the United States. Consequently, to define the grant by reference to the reservation is to beg the question. A second question is whether the proposition that, no federal power to regulate agricultural production having been granted, legislation for that purpose by Congress is forbidden, is not, from a logical point of view, somewhat out of joint with the succeeding branch of the opinion. Here it is intimated that an appropriation to pay bounties under contract to control farm production is invalid, since it constitutes a coercive regulation. The opinion apparently suggests: (a) that regulation by conditional appropriation not under contract may be non-coercive; and (b) that, even in a field reserved to the states, such non-coercive regulation by Congress may be permitted. If so, the constitutional criterion of legislation by Congress purporting to regulate a matter within the reserved rights of the states is not the mere invasion of those rights as is premised, not its substantial consequences, nor even its purpose (which the opinion designates as a criterion), but the form. This, we may agree with Mr. Justice Stone, is a tortured construction.

In its context, and this is a third source of query, the statement which is the real fundament of the argument from the reserved

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51 297 U. S. 1, 68 (1936).
rights of states, namely, that no power "to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden," has startling implications. (We assume that it is no mere peto principi; that it states a technique to define the scope of substantive, general grants of legislative power.) Abstractedly considered, it is that, if the purpose is to regulate, a general grant of legislative authority includes no item, however naturally comprehended within the general terms, the regulation whereof is not otherwise authorized. Notice the implications: first, though the effect may be to regulate, when such is not deemed the purpose (a speculative test), the item may be included within the grant; second, in the presence of the purpose to regulate, any item not specifically authorized to be regulated is excluded. This is a principle which, consistently applied, is enough to undermine the entire structure of federal authority established by the Constitution. If this were true, it should be unconstitutional for Congress to regulate navigation, since no specific power to regulate navigation is given; to impose regulatory excises upon whiskey, since no specific power to regulate whiskey production is given; to enact a protective tariff upon the importation of manufactures, since no specific power to regulate manufactures is given. Indeed, by this logic, every general grant of legislative authority could be emasculated, since the very object of such a provision is to avoid the individual expression of each power to regulate each particular item. Is it unjust to ask that, instead, a constitutional provision, advisedly couched in general terms, be construed primarily according to its natural tenor as part of a great instrument of government, and not restricted by an oblique or obscure logic to what is not expressed? Or shall it perchance be implied, on analogous reasoning, that the Clause which prescribes that "the judges in every State shall be bound" by the Constitution as the supreme law of the land, does not include the federal judges, or at least not those who sit in the District of Columbia, on the ground that they are not expressly named in the Clause?

In other words, there are implications and implications. It is certain that the terms of the Constitution must be construed in the application; even the most rudimentary classification of a case within or without a constitutional term may be said in a sense to involve an implication. Consequently, under the system of constitutional review, the Constitution may fairly be described for technical purposes as what the Supreme Court declares. But we may well disbelieve that this is the last or only test. Wide as must be the latitude of review, it has a measure in common under-
standing, which each citizen is entitled to read. This is the basic meaning of the Constitution. "Or have we found angels," said Jefferson, "in the form of kings to govern us? Let history answer this question." A derivation of the purpose of a grant of federal authority by reasonable implication from the language so as to permit that purpose to be effectuated under particular circumstances, is one thing; it is another to deny that purpose a practical application to new needs by negative implication from what is not found in the lines. Abstract analysis as such does not test the expediency of an extension of federal power, but it can indicate whether an implication is devious and thus serve to straighten the path of interpretation.

It is to be noted that the queries which have been raised as to the logic of two important constitutional decisions, relate primarily to the use of theoretical analysis as a means to clarify argument. The functions of analytical jurisprudence to abstract the results of experience as revealed by historical or comparative research and, in the light of such abstraction, to project more illuminating hypotheses for the development of constitutional doctrine are from certain points of view of more substantial significance.

XI

To summarize the preceding scattered reflections as to the mutual relations between constitutional principles and jurisprudence, the chief points under discussion may be stated in the following theses:

I. That it is desirable, in the formal study of jurisprudence, to lay substantial emphasis upon public law;

II. That the methods of jurisprudence are pertinent to the consideration of matters constitutional;

III. That, of these methods, the function of history is to ascertain the origin and evolution of constitutional phenomena;

IV. That the comparative method is requisite to broaden the basis of inference;

V. That the analytical method serves: (a) to clarify the logic of constitutional discussion; (b) to formulate in general terms the detail revealed by legal history and comparative law; and (c) to establish a theoretical critique for the development of constitutional doctrine;

VI. That the problem of constitutional development is not purely theoretical but also practical, consisting in the adaptation of existing institutions and ideas to new needs, which necessarily involves modification of the institutions and ideas themselves.

Thus, the first is also the final postulate; the Constitution is a vital, practical instrument. In its growth, the initial impulses

62 8 Ford, Writings of Thomas Jefferson 3.
which motivate the political structure proceed from sources within the actual process of government reflecting movements in the national economy, and these are perhaps only incidentally, if at all, energized by constitutional conceptions. But the form and limits within which development occurs are profoundly influenced by the constitutional review of legislation, a mode of control assumed by the judiciary, which is the most distinctive feature of our constitutional system. It should never be forgotten that this is a highly practical method of implementing the Constitution, which has inestimable advantages. It causes the perplexed issues of institutional growth to be deliberated and decided in an open impartial forum where it is feasible to inspect the subtle implications of innovation without haste and on a high, theoretical plane. It is an essential part of that most salutary duty of the judiciary to protect individuals and minorities against the abuse of office and the encroachments of unjust legislation. If only for this reason, jurisprudence has no more important concern than the theory of constitutional interpretation.

In conclusion, passing allusion may be made to two aspects of the logic of constitutional growth. The first is that canon of interpretation by virtue of which practical consequences are deemed irrelevant in the decision of constitutional issues. It is a canon much honored in the breach, a fiction, which authorizes unreality and sometimes, we fear, serves as a subterfuge for wishful thoughts. How is it feasible or proper to measure the constitutionality of legislation regardless of its effects? Indeed, can a governmental power be conceived at all apart from its actual or potential consequences? Doubtless, under the doctrine of the separation of powers, it is for the legislature to determine whether particular objectives are desirable and to fashion the means by which they are to be attained, but, if constitutional review concerns the substance, it should be for the Court to determine whether the means and its consequences are admissible. There is nothing new in this; it was my Lord Coke who held that the argumentum ab inconvenienti has the greatest force in law.88 The second aspect to be noted is the use to be made of the principle of stare decisis in the construction of the Constitution. We may view with more or less equanimity a rule that what has been decided is done, but the question is what analogies are to be drawn from past interpretations given in respect of past conditions to the anxious problems presented by conditions partly new. Whatever justification there may be for the effort to fix the more

88 Co. Litt. 66a.
settled branches of private law by restatement, does not warrant the formalistic application of private law techniques to legislation, so as to project doctrine fixed by the past indefinitely into the future. Pursue the principle of fixation to its bitter conclusion, and it will result, as Bentham once observed,—

"That in process of time, the practice of legislation would be at an end: the conduct and fate of all men would be determined by those who neither knew nor cared anything about the matter; and the aggregate body of the living would remain forever in subjection to an inexorable tyranny, exercised, as it were, by the aggregate body of the dead." 54

No mere mechanical adherence to past precedent nor ephemeral calculus of justicial prejudices is suitable to mark the path of constitutional interpretation. Once again the past furnishes a more salutary precedent; the former glory of the common law was deemed to be the flexible adaptation of its doctrines to new needs. We speak of these things, since we conceive them to be vital to the evolution, and therefore to the perpetuation, of a vital instrument of government. The Constitution is not dead.

54 2 Works (Bowring 1843) 403.
THE VALIDITY OF FEDERAL LOANS AND GRANTS TO MUNICIPALITIES FOR CONSTRUCTION OF POWER PLANTS

FRANCIS X. WELCH *

IS THE UNITED STATES GOVERNMENT by indirect subsidizing actively promoting widespread government ownership of public utilities, especially electric power utilities, in this country? If so, is there a valid constitutional basis for such a program? It not, how can the Federal Government be brought to court in a properly framed case, which will adequately and accurately present to the Supreme Court a complete picture of the activity of the Public Works Administration along these lines?

These were the three challenging questions which legal experts, including some of those engaged in the service of the Federal Government, hoped would be answered when the Supreme Court heard argument early in November, 1936, on a writ of certiorari brought by the Duke Power Company and Southern Public Utilities Company against Greenwood county of South Carolina, the individual members of the county’s board of finance, and Harold L. Ickes in his capacity as the Federal Emergency Administrator of Public Works. Unfortunately for those who anticipated an early settlement of these issues, the decision of the court in Duke Power Company et al. v. Greenwood County et al.¹ (hereinafter called the Greenwood case) remanded the case on technical grounds for further procedure in the lower federal courts. As a result, it appears very doubtful at this writing whether another substitute test case can be submitted in time for a decision by the highest court prior to its usual summer recess for the year 1937.

As the procedural complication mentioned had little connection with the merits of the constitutional questions raised in the Greenwood case, they will not receive further attention in this paper. The factual background of the case, however, is an admirable setting for a discussion of the deeper issues above raised.

It was in Title II of the National Industrial Recovery Act² that Congress in 1933 authorized the creation of the Public Works

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Administration (hereinafter called the PWA) for the disbursement of federal funds in the form of loans and grants to the various states and incorporated political subdivisions. These funds were to be used in the construction of useful public works of various kinds, with the primary purpose in mind of relieving a national emergency of widespread unemployment which Congress found to exist at that time. Incidentally, it will be readily recalled that this Title II was a statutory companion of Title I which set up the National Recovery Administration, and which was invalidated by the U. S. Supreme Court in Schechter Bros. v. United States.\(^3\)

Subsequent congressional legislation provided additional appropriations and confirmed and extended the authority of the PWA. These supplementary laws included: The Emergency Appropriations Act, fiscal year of 1935; \(^4\) the Emergency Relief Appropriations Act of 1935; \(^5\) the First Deficiency Appropriations Act, fiscal year of 1936.\(^6\)

Specific authority for the PWA in the premises was derived also from a series of Executive Orders issued by President Roosevelt: No. 6174, of June 16, 1933, created a special PWA board to execute the purposes of Title II of the National Industrial Recovery Act, \textit{supra}; No. 6198, of July 8, 1933, created Harold L. Ickes Federal Administrator of the PWA; No. 6252 of August 19, 1933, authorized the PWA to make loans and grants for purposes specified by Congress with added restrictions as to labor employed; No. 6929, of December 26, 1934, authorized the PWA administrator to waive at his discretion limitations already imposed; No. 7064, of January 7, 1935, gave the PWA administrator authority under the Emergency Relief Appropriations Act of 1935, \textit{supra}, similar to that enjoyed under the earlier legislation. It was under the latter act that the authority of the PWA was extended to June 30, 1937.

Before going into the particular facts of the \textit{Greenwood case}, it might be of some aid to a better understanding of the entire PWA program to give a few fiscal results of that program to date. An official press release \(^7\) stated that, since it began operation in 1933, the PWA had allotted money for 25,200 projects, costing a total of $4,071,750,926. The total cost, however, does not truly

\(^{3}\) 295 U. S. 495 (1935).
indicate the amount of federal money disbursed for local projects, because in many instances the cost was borne in part by municipalities and other applicants, some of which even did their own financing. Furthermore, the total cost figure above includes some federal as well as non-federal projects.

Segregating the federal from non-federal projects, it appears from the same source that PWA has disbursed (1933 to December, 1936) approximately $874,469,818, which included loans amounting to $479,615,143 and grants amounting to $394,854,675. Some idea of the relatively small amount of this total spent on local non-federal power plants is indicated by the fact that the total disbursed for that purpose was only $55,379,170 of which $32,454,654 was in grants and $22,924,516 in loans. This, of course, was independent of federal moneys spent for federal projects, such as the Tennessee Valley Authority and allied work carried on by the Army Engineers Corps and Reclamation Bureau of the Interior Department. It includes, however, the only sphere where the Federal Government has interested itself in the retail distribution phase of publicly operated power plants as distinguished from the production and transmission phases to which such projects as the Tennessee Valley Authority are necessarily restricted.8

Compared with the total investment of approximately thirteen billion for the electric industry in the United States, this federal contribution and financing of a mere $55,379,170 for publicly owned plants seems scarcely a major threat to private industry. When it is further considered that the private industry furnishes well over 90 per cent of all electric utility service consumed in the United States, the PWA disbursement seems unlikely to alter drastically the ratio of public to privately owned distribution plants. Again, much of the amount mentioned was disbursed for the improvement or expansion of existing (and, therefore, generally non-competitive) publicly owned electric plants.

Greenwood county is a subdivision of the state of South Carolina, lying in the Piedmont section of the state, principally devoted to the agriculture and manufacturing of cotton. For over twenty years the territory has received electric utility service over the lines of the Duke Power Company. In the summer of 1933, the county’s finance board, after a survey, concluded the section could receive cheaper service if the county built and operated a hydro-electric plant on the Saluda river at a site known locally as Buz-

zard’s Roost. To this end an application was filed in November, 1933, for a loan and grant from the PWA.

The Duke Power Company, anticipating competition from the proposed plant, filed a protest against the granting of the application before the PWA at Washington, based chiefly on the argument that the project was not economically sound. After considering this protest the PWA nevertheless entered into a contract with Greenwood county and an allotment which included a loan of $2,195,000 (collateral security for which was to be in the form of revenue bonds issued by the county) and $675,000 as an outright gift. The Federal Power Commission on November 4, 1934, granted a license to the county to develop the proposed site.

In the ensuing litigation in the federal courts, the Duke Company obtained preliminary relief in the district court 9 and an injunction on the merits.10 Pending appeal from this decree, certain changes were made in the contracts between the county and the PWA which required the circuit court of appeals to remand the cause for further proceedings. However, subsequent proceedings did not result in any material change in the views of the district court, with the result that the circuit court of appeals overruled the district court 11 in a split decision (2 to 1, Judge Soper dissenting). This opinion and order were the basis of the abortive test case in the Supreme Court which resulted in remand ing the case for further proceedings in the district court which are pending at this writing. On February 3, 1937, the district court once more granted an injunction to the power company to restrain the proposed construction by the county and thus further protracted appellate litigation is again in prospect.

So much for particular facts of the Greenwood case. Consider it now simply as a convenient model upon which to hang a discussion of the fundamental question at issue—the validity of federal loans and grants for the construction of municipally owned and operated utility properties. The question immediately resolves itself into two sections: (1) the right of a power company to question the validity of the federal program; (2) the validity of the federal program on its constitutional merits. Let us discuss them in that order.

10 12 F. Supp. 70 (1935).
11 81 F (2d) 986 (C. C. A. 4th, 1936).
I. THE RIGHT OF A PRIVATE UTILITY COMPANY TO RESTRAIN FEDERAL SUBSIDY FOR LOCAL GOVERNMENT UTILITY COMPETITION

The Supreme Court has definitely decided that one’s mere status as a federal taxpayer presents no justiciable controversy and confers no right to challenge the constitutionality of an act of Congress. To authorize such challenge in a court of equity, it is necessary that the complainant, because of the exercise of an unconstitutional act authorized by Congress, shall have suffered, or be threatened with subjection to, some special injury, differing in character and degree from that suffered in common with other taxpayers.12 As the court stated in Cherokee Nation v. Georgia,13 "... it is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief.

"This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation, upon rights properly falling under judicial cognizance, or a remedy is not to be had here."

The plaintiff power companies in the Greenwood case did not base their rights upon their status as federal taxpayers, but as taxpayers of the State of South Carolina and of the counties in which the enterprise sought to be enjoined would be established. Although a self-liquidating project, the contract requires of the county certain outside expenditures to which the plaintiffs, as taxpayers, must contribute. As such, their right to maintain an action to challenge the constitutionality of a state statute seems to have been long an established principle in South Carolina, in the states generally, and in federal courts vested with jurisdiction. As to the additional ground (other than that of local taxpayers) that the plaintiff power companies in the Greenwood case were holders of valuable franchises, it would appear that their right to contest in the federal courts, illegal competition which would be detrimental to their enjoyment of such franchises, is amply supported by the Supreme Court’s decision in Frost v. Corporation Commission.14

Assuming, however, the soundness of the proposition that private utility companies may, in their dual capacity of local tax-

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13 5 Pet. 1, 75 (U. S. 1831).
14 278 U. S. 515 (1929).
payers and local franchise holders, contest the legality of the inauguration of a competitive service by a local political subdivision, there still remains the more difficult question of whether this right to sue would prevail against a third party (in this case the Federal Government) who merely desires to assist the project financially.

In other words, the right of the power companies to maintain suit against the local government agency which is doing the actual construction of the competitive project does not necessarily include the right to maintain similar suit against third parties of the class mentioned. In this connection it is first necessary to determine whether the proposed action of the local political agency is valid under state law. In the Greenwood case, this question was resolved conclusively in favor of the county by the South Carolina supreme court, in Park v. Greenwood County. The state court found, in brief, that the state legislature had properly and constitutionally, by a series of acts, specifically authorized Greenwood county: (1) to construct and operate the proposed hydro project; (2) to issue revenue bonds for the financing of such construction; (3) to accept loans and grants from the Federal Government and to contract with the PWA with respect to the same.

Thus, we have a situation wherein a private power company, confronted with the prospect of competition from a project which the county admittedly has the right to build and operate in its own right, is objecting to the Federal Government in the role of banker. (It was practically admitted in argument on the Greenwood case that the power companies would have no right to complain if funds for the project had been advanced to the county by a private banker instead of the Federal Government.) Under such circumstances, it would seem that private utility companies have no standing to attack the constitutional validity of proposed loans and grants unless it can be shown that the respondent federal government official, as a private individual, is threatening violation of a legally protected interest of the petitioning companies. As franchise holders, we have noted that the companies would be entitled to sue only to restrain threatened competition of an illegal nature.

That the competition by Greenwood county (conceded lawful under state law) is made possible by advances of funds by third parties alleged to be acting beyond their lawful authority would seem to give no additional right to the petitioning utilities. The coincidental fact that the third party happened to be a public official could hardly alter this principle.

Of course, if it could be shown that a third party, under such circumstances, was inducing the consummation of the transaction by fraud, intimidation, or solely with malicious intent, to cause damage to the petitioner, the third party might be held answerable. Thus in *Hitchman Coal & Coke Co. v. Mitchell*, a mine owner was allowed injunctive relief against labor union representatives who were allegedly attempting to induce the petitioner's employees to go on strike. Similar rulings were made in *Truax v. Raich* and *Hammer v. Dagenhart*. In the latter case, it should be noted, it was a federal government official who was restrained, upon suit by a working minor's father, from exercising indirect pressure upon the minor's employer to dismiss the minor. In *Pierce v. Society of the Sisters* the Court likewise approved injunctive relief for a congregation of nuns operating a private school against the enforcement of a state law which required all parents to send their children to public schools.

Whether the financing and partial subsidization by the Federal Government of the construction of competitive public utility plants, assuming the illegality of such federal action, would be such as to create a justiciable interest in complaining private competitive utilities under the reasoning in such cases as the Pierce case is rather doubtful. The court of appeals in the Greenwood case distinguished between the Pierce case and the case at bar by the statement that injury in the former resulted "not from lawful competition but from unlawful coercion of parties." This explanation, however, scarcely bears serious analysis. It fails to dispose of the contention that the federal action in the Greenwood case would be the proximate cause of the plaintiff's injury (it being conceded that without federal aid the county plant would not be built). There is the further argument that, assuming the lack of constitutional warranty for federal action,

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20 245 U. S. 229 (1917).
21 239 U. S. 33 (1915).
22 247 U. S. 251 (1918).
23 268 U. S. 510 (1925).
the inducement held out to the county would likewise be tainted with illegality.24

Nevertheless, the fact that Greenwood county could at any time, on its own right, lawfully construct and operate the plant in question might well be viewed as placing its case in a somewhat different category from cases involving desertion of patronage or employees, in that the injury resulting from the latter situation would only arise as a result of concerted action of the patrons or employees, respectively, a circumstance in itself suggesting a motivating inducement akin to conspiracy, inspired for malicious purpose.

It is difficult to bring the position of the Federal Government in the Greenwood case within the category of a malicious conspiracy, notwithstanding the argument, discussed later, that its program of loans and grants for municipal power plants is based upon a desire to lower electric rates throughout the United States, even granting that that objective is beyond the constitutional functions of the Federal Government. A federal policy which seeks to obtain lower power rates may be unconstitutional but it is not necessarily nefarious. Thus there is some plausible ground for distinguishing the position of the Federal Government from the Pierce case, or other cases such as United States Fidelity & Guaranty Co. v. Millonas,25 Angle v. Chicago, St. P., M. & O. R. Co.,26 and Deon v. Kirby Lumber Co.27

These cases, which upheld the principle that one who injures another by persuading a third party to do something which the third party has a legal right to do, is liable for the injury, are mentioned in passing to direct attention to the fact that malicious intent runs like a bright red thread through all of them. Is it possible to erect a malicious intent upon the premise that the Federal Government in making loans and grants for the ostensible purpose of relieving a national economic emergency

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24 Smith, Legal Cause in Actions of Tort (1911) 25 Harv. L. Rev. 103, 223, 303.
25 206 Ala. 147, 89 So. 732 (1921) (wherein an insurance company was held liable for compelling an employer, under threat of cancelling a policy, to discharge an employee who refused to settle a claim against the company).
26 151 U. S. 1 (1894) (wherein an action was sustained against a grantee where a state legislature had been wrongfully persuaded to exercise its discretion to withdraw a land grant).
27 162 La. 671, 111 So. 55 (1926) (wherein a business competitor was held liable for social ostracization practiced by his employees against a rival at his instigation).
resulting from widespread unemployment has, in the process, striven to reduce rates charged by electric utilities in the United States?

Whatever one might conclude as an answer to the foregoing proposition, there were at the writing of this article a number of lower federal court decisions to the effect that privately owned power companies are without standing to challenge loans and grants by the Federal Government (through the Public Works Administration) for the purpose of erecting competitive municipally owned power plants.28 No appellate court has held to the contrary, but it is well to consider the view taken by Judge Soper (4th Circuit Court of Appeals) in his dissenting opinion in the Greenwood case:

"The power company has such an interest in the business as to justify its suit. The practical effect upon its valuable property interests is manifest. It has an interest far more weighty than that of a Federal taxpayer, which in Frothingham v. Mellon, 262 U. S. 447 was held to be too remote, uncertain and insignificant to entitle him to injunctive relief against an invalid Federal appropriation. The plaintiffs here conform to the rule laid down in that case since they show not only that the act of the Administrator was invalid, but that they are in danger of sustaining a direct and substantial injury therefrom." 29

Speaking from a strictly legal viewpoint, the attempt made by the power company in the Greenwood case to show that the real intent of the Public Works Administration was to reduce power rates rather than relieve unemployment was scarcely impressive. There was introduced testimony of a subordinate PWA official, excerpts from a book (designed for popular sale) written by the Public Works Administrator, and the original contracts between the PWA and Greenwood county, passages of which were said to reflect an intent on the part of the Federal Government, through the PWA, to regulate local rates of utility properties constructed with federal funds.

The claim of the PWA was that its interest in local rates charged by properties which it helped to finance was the same as that of any other bondholder, i.e., to see that the rates were sufficiently high to enable the borrowing agency (in this case Greenwood county) to pay off its indebtedness to the Federal Government, but not too high to discourage a reasonable growth of business.

29 81 F. (2d) 986 (C. C. A. 4th, 1936) at 1001.
As a practical matter, it seems apparent that the PWA did, in its program for loans and grants to local government agencies for power plants, start out with an incidental policy of securing lower electric rates. The record of loans and grants made would indicate that the PWA did not, generally speaking, finance the building of power plants in localities where the rates of private electric utilities were already low, or where the existing utilities were disposed to lower such rates.

Evidently the PWA thought better of such an obvious secondary policy and moderated it to the point of view of the "mere bondholder" already mentioned, after litigation (such as the Greenwood county case) threatened to focus attention on the issue of whether the PWA, in financing such plants, was really concerned with making jobs for the unemployed or lowering rates for utility consumers who were already under the theoretical protection, at least, of state regulatory commissions. To this end the PWA repudiated some of its earlier statements and made haste to substitute corrected contracts with local borrowing agencies.\(^{30}\)

It is not certain, however, that such a careful reversal in policy was necessary in order to protect the PWA's legal position. Granted that the Federal Government has no authority to regulate local utility rates as such, it does not follow that a lender of funds to build a local utility plant cannot, in the first instance, require certain promises as to rates to be fulfilled as a condition to the giving of financial aid. Such rates, in turn, would always be subject to the reserved police power of the state to fix different rates in the public interest.

By analogy, the Federal Government has long followed the practice of requiring certain conditions to be fulfilled as a condition to the reception of federal aid. Thus in 1862 the Morrill Act\(^ {31}\) made certain land grants for state colleges with certain limitations as to financial management.\(^ {32}\) Likewise, federal aid for forest fire prevention, for highway construction, and for other

\(^{30}\) Thus in Washington Power Co. \textit{v.} City of Coeur d'Alene, 9 F. Supp. 263 (D. C. D. Idaho 1934) in the record on appeal in the Ninth Circuit Court of Appeals, there is contained a letter from the Administrator of Public Works to the city which explained that the PWA did not make any requirement as to rates where general obligation bonds of a city were taken unless the financial condition of the city was in doubt. The letter further stated that in the PWA contract with Coeur d'Alene, the provision concerning rates had been included "by inadvertence" and offered the city a new agreement in which all provisions as to rates were eliminated.

\(^{31}\) 12 \textsc{Stat.} 503 (1862), 7 U. S. C. § 301 (1934).

\(^{32}\) Cf. Hamilton \textit{v.} Regents of the University of California, 293 U. S. 245 (1934).
purposes specified certain conditions. But this line of analysis brings us closer to the argument on the constitutional merits of the question of Federal aid for local power plants. Suffice for purposes of this section of our analysis to say that the mere requirement that certain reasonable conditions (or perhaps even unreasonable conditions, if the contracting parties agree) as to the management of a project should be fulfilled in return for financial aid would not seem of itself to disqualify legally the Federal Government from taking the rôle of banker for projects to relieve national unemployment.

After all, the construction of competitive power projects would, admittedly, make jobs to some extent—thus carrying out the intent of Congress. If incidentally the Federal Government sought to play the rôle of rate fixer (the state authority not conflicting) in return for its dollars, it is difficult to see why a competitive power company should have standing to complain on that account. The right of the banker to insist on incidental policies of management is as old as the maxim: "Who pays the piper calls the tune." In this connection it might also be in point to recall a passage from the late Mr. Justice Holmes: "For instance, a man has a right to set up a shop in a small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established there already." This privilege, as Justice Holmes explained, rests on the economic postulate that free competition is worth more to society than it costs. Would the situation of the new entrepreneur be any less solid if he embarked upon the village venture with funds advanced by a banker who required that he keep his retail prices at a low level?

II. THE MERITS OF THE CONSTITUTIONAL QUESTION CONCERNING FEDERAL AID TO LOCAL GOVERNMENTAL AGENCIES FOR THE CONSTRUCTION OF COMPETITIVE UTILITY PLANTS

The petitioning power companies in the Greenwood case assailed the legality of the position of the PWA on its merits on three chief points: (1) that the National Industrial Recovery Act was invalid as an unconstitutional delegation of legislative power to the Public Works Administration; (2) that the General Welfare Clause of the Constitution of the United States does not authorize gifts and so-called loans of federal money for the con-

35 Holmes, Privilege, Malice and Intent (1894) 8 Harv. L. Rev. 1 at 3.
struction of local intrastate electric utilities; (3) that the National Industrial Recovery Act, as applied in the instant case, violates the Tenth Amendment in that it would supplement or supplant lawful state regulation of electric utility rates and local terms and conditions of labor. There was also urged as an additional ground that the National Recovery Act, properly construed, did not authorize federal aid for new commercial projects of a competitive and duplicative character. This latter ground was so clearly answered by the record of the legislation in Congress as cited by the government's brief as to require little serious attention.

The first constitutional objection as to alleged improper delegation of constitutional authority, likewise seems to have, upon analysis, little substance. The petitioning companies relied chiefly on Panama Refining Co. v. Ryan 38 and Schechter Corp. v. United States 37 wherein other sections of the National Industrial Recovery Act were found to contain no sufficient statement of policy or guide for the responsible executive official comparable to that found in the Public Works Section of the same statute. In the Schechter case, the nature of the code of fair competition was left without definition or standard. In the Panama case, likewise, no policy concerning the regulation of petroleum production or distribution was discernible to the court.

Compare this to the definite guides and standards as to policy contained in the Public Works provisions. The intent of Congress with respect to public works as a relief for unemployment was first noted in the Emergency Relief and Construction Act of 1932 38 conferring powers upon the Reconstruction Finance Corporation "to make loans to, or contracts with, states, municipalities, and political subdivisions . . . to aid in financing projects authorized under Federal, state and municipal law which are self-liquidating in character, such loans or contracts to be made through the purchase of their securities or otherwise and for such purpose the Reconstruction Finance Corporation is authorized to bid for such securities." This same act contained restrictions as to convict labor, labor hours, and veterans' preference.

Coming back to Title II of the National Industrial Recovery Act, we see an even more detailed formulation of the same underlying policy. Section 202 requires the Administration to prepare a comprehensive program of public works which must be limited

38 293 U. S. 388 (1935).
to five types of projects specifically described by the Act. Section 203 limits the operations of the Administration to the projects included in the program required under Section 202. Section 203 also restricts the amount of grants to 30 per cent of the cost of labor and materials on all qualified projects. Detailed labor and financial standards are required by Section 206, including a requirement that all transactions must be in compliance with local state law.

In fact, about the only broad general field of discretion left for the PWA under Title II was the segregation of the appropriations for particular types of projects, the final determination of the amount of separate transactions and the details of contracts with the borrowing agencies. Even this sphere of discretion was, as we have seen, further narrowed by executive order of the President but enough has been set forth here to indicate the plain intent of Congress to safeguard the execution of the law along lines clearly marked by reasonable standards. They might well compare with the standards laid down by Congress for the granting of radio licenses and upheld by the Supreme Court in Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., and other regulatory legislation likewise sustained in Buttfield v. Stranahan, and in New York Central Securities Corp. v. United States. Again, it must be recalled that in the establishment of financial agencies for the disbursement or investment of federal funds, Congress may vest in administrative officials a larger measure of discretion than in the passage of laws not concerned with the proprietary disposition of federal property.

Probably the most substantial argument made by the private power companies in the Greenwood case assailed the power of the Federal Government to make constitutional loans or grants in aid of local political agencies and designed for the purpose of constructing projects which by their very nature appear to be of a local or provincial character. Admittedly the principal authority for such federal action would be based upon the General Welfare Clause of the Constitution. In United States v. Butler the Supreme Court decided the controversial issue (first seriously raised by Alexander Hamilton) concerning the proper construction of

39 289 U. S. 266 (1933).
40 192 U. S. 470 (1904).
41 287 U. S. 12 (1932).
43 297 U. S. 1 (1936).
this clause, by holding that the General Welfare Clause authorizes taxation and appropriation for purposes not within the powers specifically enumerated in the balance of the Constitution. However, in the Butler case, the Court pointed out that the power of taxation and appropriation may be exercised only for a general not a local benefit. The opinion stated in part:

"That the qualifying phrase must be given effect all advocates of broad construction admit. Hamilton, in his well known Report on Manufacturers, states that the purpose must be 'general and not local'. Monroe, an advocate of Hamilton's doctrine, wrote: 'Have Congress a right to raise and appropriate the money to any and to every purpose according to their will and pleasure? They certainly have not.' Story says that if the tax be not proposed for the common defense or general welfare, but for other objects wholly extraneous, it would be wholly indefensible upon constitutional principles. And he makes it clear that the powers of taxation and appropriation extend only to matters of national, as distinguished from local, welfare."\(^{44}\)

This raises two questions: (1) whether a power plant is by its very nature a local matter; (2) whether the broad objective of Congress, i. e., to relieve national unemployment, is controlling in the matter of justifying federal loans and grants for the construction of physical properties which would themselves be considered only the local manifestations or results of the broader underlying national purpose. To answer these questions intelligently, it is first necessary to determine whether there was a national emergency created by widespread unemployment at the time of the enactment of Title II of the National Industrial Recovery Act. Seemingly, the Supreme Court had taken notice of the fact that the economic depression and unemployment did exist in such cases as Atchison, Topeka, & Santa Fe Ry. Co. v. United States \(^ {45}\) and Home Building & Loan Ass'n v. Blaisdell.\(^ {46}\) It was to relieve this emergency, with which private charity could no longer cope, that public funds were disbursed in the form of direct relief. By July, 1933, according to the Report of the Federal Emergency Relief Administration \(^ {47}\) 13 per cent of our national population was receiving relief from public funds. It was to curb the upward spiral of direct relief that Congress adopted the

\(^{44}\) Id. at 66.
\(^{45}\) 284 U. S. 248 (1932).
\(^{46}\) 290 U. S. 398 (1934). According to the Monthly Labor Review, May 1935, factory employment had shrunk from 104.8 per cent in 1929 to 62.6 in May 1933, based upon the 1923-1925 volume. It has been further estimated—American Federationist, January 1936—that between 1928 and 1933 the number of unemployed rose from 1,864,000 to 15,653,000.
theory of Public Works so as to provide useful and gainful reemployment of jobless citizens upon self-liquidating projects.

There is neither space nor need to detail here the reasons for the adoption of such a policy. Whether such a policy was economically sound or socially desirable is, of course, a matter within the province of Congress rather than the courts to decide. Suffice to conclude that there was unquestionably a national emergency of unemployment, that Congress decided to cope with it in the manner described, and that the general scope and purpose of Title II of the National Industrial Recovery Act were reasonably and substantially related to the attempted solution of the national problem to be justified under the heading of "general welfare".\textsuperscript{48} Granting, however, the validity of a public works program as a proper solution, under the General Welfare Clause, for a national unemployment crisis, is the Federal Government under obligation to aid in the construction of only such projects (such as national highways, perhaps) which are clearly, directly, and by nature, national in their resulting benefits? The petitioning power companies in the Greenwood case contended that where the benefits of projects were by their nature limited to a local territory, federal aid for the same could not be justified under the General Welfare Clause. A power distribution plant for a municipality or county, it was held, would be within this category.

This argument, it would seem, fails to distinguish between the purpose of the federal aid and the results. The purpose of the PWA program, for example, was not the construction of power plants but the relief of unemployment. In carrying out the general purpose, local power plants as well as many other projects, such as schools, highways, jails, etc. were included, but the choice was coincidental. If the PWA had set out primarily to build or aid in building a national system of power plants, doubtless one

\textsuperscript{48} Incidentally, the theory of Public Works as a relief for unemployment during a period of economic depression is neither a novel doctrine in other countries, nor, as we have already seen, an innovation in our own. As early as 1846, during the so-called potato famine in Ireland, the British Parliament adopted a similar principle to relieve the suffering of the Irish people (9 & 10 Vict. c. 107). Subsequent British Acts carried out the same principle for relief within England (Act of 1905, 5 Edw. VII, c. 18; Act of 1909, 9 Edw. VII, c. 47). In 1931 the Federal Employment Stabilization Act provided for a six year program of Federal public works with a view to taking up the slack in general employment. More elaborate plans on the same order were widely urged throughout the Administration of President Herbert Hoover. Cf. Clark, ECONOMICS OF PLANNING PUBLIC WORKS (U. S. Government Printing Office 1935), also various discussions on the subject in (1928) 89 ANNALS 175, 209.
might point to the purely local benefits from such projects as a basis for objecting to the alleged national purpose of public welfare. A power plant is, admittedly, distinctly local in its operation and physical benefits. However, the mere fact that the PWA failed to emphasize one type of project rather than any of several other general types, and the actual fact that the PWA disbursed its Federal aid widely as between the various general types of projects deemed convenient for the construction purposes of the Act, would strongly suggest that the Federal Administration was primarily interested in creating jobs, whether on new power plants, new schools, new hospitals, or what not.

In other words, the achievement of such local benefits resulting from the use of public works was not the purpose of Congress in enacting the statute. Its purpose was the national general welfare flowing from the construction of these projects. The case law on the subject is well analyzed in the brief of Respondent Harold L. Ickes in the Greenwood case (before the Supreme Court):

"It is true that in certain of the earlier state cases taxation for the relief of group distress was classified with unconstitutional grants of aid to individual enterprises, without consideration of the public concern in the alleviation of common disaster. Lowell v. Boston, 111 Mass. 454; Feldman & Co. v. City Council, 23 S. C. 57; In re Relief Bills, 21 Colo. 62; The State v. Osawkee Township, 14 Kan. 418. But these cases are contrary to the weight of authority and to the modern trend of permitting municipalities and states a wider range in undertaking to promote the public welfare or enjoyment (Egan v. San Francisco, 165 Cal. 576, 581). The courts have recognized that the wants and necessities of the people change and that what could not be deemed a public use a century ago may, because of changed economic and industrial conditions, be such today. Green v. Frazier, 253 U. S. 233, 242; Sun Publishing Assn. v. Mayor, 8 App. Div. (N. Y.) 230, 236; Lauglin v. City of Portland, 111 Me. 486, followed in Jones v. Portland, 113 Me. 123, affirmed 245 U. S. 217; Stevenson v. Port of Portland, 82 Ore. 576; State ex rel. Reclamation Board v. Clausen, 110 Wash. 525; Wheelon v. Land Settlement Board, 43 S. Dak. 551, 560-561; New York City Housing Authority v. Muller et al., 270 N. Y. 333. Accordingly, in the more recent decisions, taxation for the relief of group distress has been upheld, these later decisions expressly disapproving the earlier cases as being opposed to the weight of authority and the more enlightened view of the subject. Kinney v. Astoria, 108 Ore. 514; State ex rel. Cryderman v. Weinrich, 54 Mont. 390; North Dakota v. Nelson County, 1 N. Dak. 88; State ex rel. New Richmond v. Davidson, 114 Wis. 563; Cobb v. Parnell, 183 Ark. 429.

"After all, the question is not one of exclusive legal logic, but is one more or less of policy and wisdom, properly determinable in the light of public welfare, present and future, in a broad sense' (State ex rel. Reclamation Board v. Clausen, 110 Wash. 525, 532), and ordi-
narily the courts will not disturb the determination of the legislature if there be the ‘least possibility’ that it will promote the public welfare in any degree. *Booth v. Woodbury*, 32 Conn. 118, 128; *Brodhead v. The City of Milwaukee*, 19 Wis. 624, 652; *Schenley v. City of Allegheny*, 25 Pa. St. 128, 130; *Perry v. Keene*, 56 N. H. 514; *State v. Cornell*, 53 Neb. 556. It is significant that this Court, in cases where it has held taxes not to be for a public purpose, has never taken a view contrary to that urged by the public body appearing in the litigation. See *Loan Association v. Topeka*, 20 Wall. 655, 664-665; *Parkersburg v. Brown*, 106 U. S. 487; *Cole v. LaGrange*, 113 U. S. 1; *Cf. Green v. Frazier*, 253 U. S. 233, 242."

Some argument was also raised by the petitioning power companies in the *Greenwood case* against the practicability of the construction of power plants as a reemployment device compared with other types of public works construction. Admittedly the cost per man employed on power plant construction is relatively more expensive because of the skilled type of labor required for such construction. However, when consideration is given to the indirect employment created (that is, work made away from the construction site, such as the manufacture of electric equipment, etc.) and the fact that discretion in such matters is within the province of Congress rather than the courts, this line of argument does not seem very impressive.49

Summing up the argument that federal aid for power plant construction is not national enough in character to qualify as a “general welfare” proposition, it is doubtful if many types of public works construction would escape similar objection if such an argument were sound. Libraries, city halls, hospitals, schools, jails, parks, sewage disposal plants—in short virtually all other types of non-federal projects, with the possible exception of trunk highways and airports, are projects which are essentially local as far as resulting physical benefits are concerned. If the power company argument were sustained, it would seem that the public works program would be so restricted as to collapse for lack of properly qualified projects. Certainly the construction of new highways and new post offices and such unquestionably “national” projects would scarcely make any appreciable showing as a solution for a national unemployment problem.

The final constitutional objection urged by private power companies in the *Greenwood case* against federal aid for publicly owned power plants was based upon the charge that the Federal Government would thereby unlawfully supplant state regulation

49 For a discussion of direct and indirect labor employment on power plants as compared with construction of other types of public works, see Doying, *Municipal Electric Plants and Unemployment* (1936) 18 P. U. Fort. 473.
of local utility rates and local labor conditions. The argument was based principally upon certain evidence (subsequently repudiated by the PWA) to the effect that the PWA in addition to a national construction program to relieve unemployment was also engaged in a nation-wide power program designed to bring about the reduction of electric power rates. Specifically, it was charged that the PWA through its contracts with the local borrowing agencies sought to control retail rates.

Assuming the competence of such evidence, the utility companies argued that the Federal Government could not under the guise of relieving unemployment indirectly accomplish an objective (the regulation of local utility rates) which was denied to it under the Tenth Amendment. Cases such as Bailey v. Drexel Furniture Co.\(^{60}\) were cited to show that the Federal Government cannot under subterfuge of exercising a valid power, indirectly accomplish a result which it could not validly accomplish directly.

To make such authority relevant, however, it would be necessary to show that the regulation of local electric utility rates was, in effect, the actual and primary objective of the Federal Government in making PWA loans and grants, and that the relief of unemployment was only a subterfuge. When we hark back to an earlier portion of this paper and recall that of $874,469,818 expended by the PWA in loans and grants for non-federal projects of all types, only $55,379,170 was disbursed in loans and grants for projects of this particular type (power plants), the suggestion that the Federal Government is really concerned with utility regulation rather than construction employment seems scarcely credible. A more legal defense to such an argument is contained in the fact that in each instance, where PWA loans and grants, for any purpose whatever, have been made, the undertaking is purely voluntary on the part of the local political agency.

The Federal Government has, admittedly, encouraged states, counties, cities, and others to participate in its public works program, but in no case has the Federal Government ever attempted to cram its dollars down the unwilling throat of a local borrower, so to speak. The decision is necessarily free, not only as to whether the local borrower wants to participate, but also as to what type of projects it wants to sponsor. This freedom of choice is again reflected in the total of PWA loans and grants for various purposes, of which power plants constitute a small part. Participation by local agencies also followed, as a general rule,

\(^{60}\) 259 U. S. 20 (1922) (federal child labor regulation under guise of taxation held void).
approval of the local electorates on specific proposals, as evidenced by the results of special or general elections. As the court said in Massachusetts v. Mellon\(^51\) (which involved a federal act for extending federal relief in maternity cases):

"Probably, it would be sufficient to point out that the powers of the state are not invaded, since the statute imposes no obligation but simply extends an option which the state is free to accept or reject."

Again, even assuming the competence of evidence to the effect that PWA contracts sought to regulate retail rates to be charged by power plants built with federal aid, it is clear that no power is assumed or could be assumed by the Federal Government over the continuing level of such rates. The terms even if fixed in the first instance by contract between the Federal Government and the constructing agency would necessarily be subject to the continuing regulatory control of the proper state agency just as rate contracts are often made between privately owned utility companies and their large industrial consumers—subject always to supervision of the state commission.\(^52\) To consider the power companies’ argument would also be tantamount to agreeing that the traditional federal grants for local educational institutions would be unconstitutional because they aided competition with private schools. The court has often held that a statute which represents a valid exercise of constitutional power is not voided because competition with private industry may indirectly result.\(^53\)

\(^51\) 262 U. S. 447, 480 (1923).
\(^53\) Emergency Fleet Corp. v. Western Union, 275 U. S. 415 (1928); M’Culloch v. Maryland, 4 Wheat. 316 (U. S. 1819).

It is unnecessary in this paper to give details of different Acts of Congress granting federal aid to the states for various purposes. That such grants are a recognized means of expending federal funds to promote the general welfare seems well established. An interesting note appeared in the United States Daily of August 14, 1928, which contained references to 74 statutes and resolutions passed by Congress from the period of 1862 to April, 1923, which contained various provisions for cooperation with the states. The purposes of these congressional Acts, all of which included grants of money or federal lands, covered a wide range including aid for destitute immigrants, schools, colleges, universities, and various kinds of charitable institutions, interim censuses, animal and plant disease prevention, quarantine enforcement, contract labor restrictions, game law enforcement, timber and animal preservation, highway construction, flood control, irrigation and reclamation, cooperation in railroad regulation, human disease prevention, Indian care, regulation of food, drugs and other industrial standards, cooperative marketing, criminal identification and topographic surveys. This list was compiled by the Legislative Reference Section of the Library of Congress and did not include periodic appropriations to carry out the purpose of basic statutes.
The foregoing discussion suggests a favorable verdict for the Federal Government upon both the jurisdictional and constitutional defenses which it will, undoubtedly, interpose in future suits by privately owned utility companies to restrain the Public Works Administration from making further loans and grants of federal funds to municipalities and other public bodies for the purpose of constructing competitive power generating and distributing systems.

I. As to the jurisdictional defense, it would appear that a private power company, either as a local taxpayer or as holder of local operating franchises has no standing in court to question the disbursement by a federal agency of federal funds to a local public body for the purpose of doing something which the local body (under state law) may lawfully do and which it wants to do of its own volition.

II. As to the constitutional issue, the Federal Government, under the General Welfare Clause of the United States Constitution as interpreted by the Supreme Court, may properly disburse federal funds to local public bodies for the purpose of constructing useful public works including power plants, which construction will, by the creation of local jobs, help to relieve a national emergency caused by widespread unemployment.

In conclusion it might be well to distinguish between the situation discussed, wherein the PWA appears merely in the rôle of financier, and wherein it is the local public agency which takes title to, and responsibility for the enterprise in its own name—and other current situations; such as, slum clearance and federal housing projects, wherein a federal agency directly and in the name of the Government undertakes to engage in an apparently proprietary enterprise.64

If the foregoing distinction is observed it will be less likely to confuse arguments against socialistic trends in activities of the Federal Government through emergency spending with mere financing of public ownership of utilities by local public bodies, a field in which public ownership has long been no novelty. Such arguments, where relevant at all, can only be applied fairly to direct activities of the Federal Government in its own right.

Of course, one may well contend on the broader proposition as

to whether unbridled appropriations can always be justified for "emergency" purposes by Congress under the General Welfare Clause. With the return of some measure of prosperity to the United States in 1936, the question might well be raised as to whether Congress would be justified in continuing the PWA loan grant policy as an "emergency" measure.65 The point at which alleged abuse of spending power may come within the practical scope of judicial review is a question so delicate as to have been, in the opinion of one writer, "studiously avoided by the Supreme Court throughout its entire history".66 However, the increasing tendency to use the General Welfare Clause, to justify indirect Federal Government operations in fields otherwise barred to it by the Constitution, raises the serious question of whether the Federal Government is in truth a government of granted powers when it may accomplish almost any end, provided only that this is done through the raising and spending of money.67 As Professor Corwin in "The Twilight of the Supreme Court" has cynically observed,68 Congress may continue to spend money without restraint so long as it lays and collects taxes without specifying the purposes to which the proceeds from any particular levy are to be used. Clearly the continued extension of this principle over a long range in our national history may one day result in the "enumerated powers" of the Constitution, such as they are, becoming more or less meaningless relics of restriction.

68 Corwin, The Twilight of the Supreme Court (1934) at 176.
PROPOSED REVISION OF THE NATIONAL BANKRUPT
ACT: CORPORATE REORGANIZATION AND
STOCKBROKERS †

GARRARD GLENN *

THE CHANDLER BILL 1 revises a statute which, enacted so many years ago as 1898, is now a patchwork of amendments and case law. The revision, too, bears direct relation to the spread of jurisdiction which our federal courts now exercise under color, as one might put it, of the Bankruptcy Act; the result being that the national tribunals handle many matters that once were left to other courts and other ideas. This is particularly true with respect to corporate reorganization and a problem that arises in the stockbroker’s bankruptcy. Both subjects are for the federal courts nowadays; but as to one of them there was not the scratch of a legislative pen until 1933, and as to the other nothing as yet has been expressed in the form of a statute. But anyone who reads the Chandler Bill will feel sure that there is need for legislative expression upon both topics.

As to corporate reorganization, the initial difficulty is that our Act of 1898 treated the corporation exactly as though it were an individual debtor. It could apply for a discharge from its debts and it could submit a composition, but neither method met the realities in the case of a corporation that needed re-organization; and that is why the consent receivership formerly played a part that should have been assigned to statute. The statutory method of reorganization that was introduced by amendments made in

† A paper delivered by Professor Glenn before the Round Table Conference on Commercial Law at the Thirty-fourth Annual Meeting of the Association of American Law Schools in Chicago, December 29, 1936.

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1 H. R. 12889, 74th Congress, Second Session. When introduced with the present Congress, this bill will be given a new number.
1933 and 1934 to the Bankrupt Act superseded the equity receivership, and provided a means of ending the particular enterprise, but preserving the asset structure for the benefit of parties in interest. Logically, this sort of thing should be covered by the law under which a corporation is organized; and whenever there is such a Part II of a state law, we know now that it is really a part of the charter itself. But as many state laws do not have good provisions of this nature, the miracle is that we are constitutionally entitled to bring under the head of "bankruptcy" a procedure that really consists of winding up.

The Chandler Bill leaves railroads (interstate carriers) where they were, so that section 77, as it was enacted in 1933, will be found in the new Act without change. That is as it should be. Reorganization of the interstate carrier should be left to the capable group which drew the 1933 amendment; it is for those gentlemen to propose their own changes. But with regard to other corporations the reader of the Chandler Bill must look at Section 12 rather than Sections 74, 77A and 77B, which represent the amendments of 1933 and 1934. These numbers will be repealed, but their spirit will be found in Sections 12 and 13. The latter, as they now stand in the present Act, cover "compositions in bankruptcy"; but the Chandler Bill proposes to rewrite them entirely, so that they will contain what is now in the amendments of 1933-4, but with interesting alterations.

The change is pictured by the very caption of Section 12. At present it refers to "compositions, when confirmed". As rewritten, the caption of Section 12 will be, "Arrangements; Corporate Reorganizations; Real Property Arrangements; and Wage Earner Amortization". A separate subsection will be devoted to each of these heads; and so Section 12 will be expanded to take in not only the extension proposed by the individual debtor and the amortization desired by the wage earner, but also reorganization of the corporation, the business trust, and the partnership. I will not go into the distinctions that are possible in that regard, but will confine myself to the corporation.

Now as to this the revisers profess no intention to rewrite the terms of Section 77B (hereafter to appear as Subdivision II of Section 12) but rather to clarify. They have set up, as they say, the provisions of Section 77B in a more logical and procedural order, assembling "the related concepts which are now scattered throughout that section in hopeless confusion". The need of

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3 Analysis of H. R. 12889 (U. S. Gov't Printing Office, 1936) at 56.
such a revision is shown by the appalling mass of case law, dealing wholly with Section 77B, which has arisen since the spring of 1934. Thus an editorial which features the May number of the Harvard Law Review, in which there is scarcely an unnecessary word or sentence, occupies eighty-five pages, and requires an index, although its title is simply, *Developments in the Law—Reorganization under Section 77B . . . 1934-6.* Yet there is room in the November numbers of the Yale Law Journal and the Virginia Law Review, for editorial discussion of two special topics. One of these editorials dealt with a case which was mentioned in the Harvard Law Review, but the other is devoted to a case decided after that Journal had gone to press. There are articles in other law reviews as well; and finally, we have the benefit of two competent text books; I refer to the works of Mr. Gerdes and of Judge Johnson. It is against this background of decision, opinion and suggestion that we should for our own satisfaction project the Chandler Bill. I have not the time for a complete analysis, but the following may be of some help.

In the provisions that begin with the petition and end with presentation of the plan, the problem of parent and subsidiary companies is met at last. It is recognized that while the reorganization of each company may be connected with that of the other, yet conceivably the reorganization of a subsidiary may be entirely separate as to scope and purpose. It is made clear, too, that a secured creditor may petition for a reorganization of his debtor if he so pleases. This proposition is quite within the scheme of reorganization laws; and it is important because it presents the fundamental difference between the mortgage creditor who elects to stand upon his security alone and the mortgagee who finds that his security is inadequate. Of the former I shall speak later;

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4 (1936) 49 Harv. L. Rev. 1111.
7 (1936) 49 Harv. L. Rev. 1111, 1188.
8 (1936) 23 Va. L. Rev. 54.
9 *Gerdes, Corporate Reorganizations under Section 77B of the Bankruptcy Act* (1936).
10 *Johnson, Bankruptcy Reorganization Including Section 77B with Forms* (1936).
11 Chandler Bill (cited supra note 3) at 60-8.
12 Id. at 61n.
but the mortgagee who is not fully secured has direct interest in his debtor's affairs at large,\textsuperscript{13} and so there is no reason why he should not be a petitioner.

The plan as filed must contain certain provisions, of course; and in the Chandler Bill I note a new provision for amortization which I am afraid will not be adopted because it is so sensible. Anyhow, the revisers propose that where indebtedness is created or extended for more than five years, it shall be retired by means of a sinking fund, "(a) if secured, within the expected useful life of the security therefor, or (b) if unsecured, or if the expected useful life of the security is not fairly ascertainable, then within a specified reasonable time, not to exceed thirty years." The reason for this, as given in the revisers' notes, should be read, and it is a pity it was not put forth during the era when every garage had two cars, neither paid for. "A debt incurred for the purchase of property, whether it be an automobile, or a utility system," say the revisers, "should be repaid during the life of the property purchased."\textsuperscript{14} What could be sounder than that, and what is more likely to be rejected under the urge of happy days that are here again?

I have only further to observe, as to this part of the statute, that there should be plain provision for the hearing and determination of objections to claims before the plan is approved. So far there is a division of opinion on this question.\textsuperscript{15} This, I think, is closely connected with other points, fundamentals of all liquidation, which I would like to present later.

Meanwhile let us consider the confirmation or rejection of the plan. Until this takes place, all statutes of limitation regarding claims that are provable, and all limitations upon acts of bankruptcy, preferences, fraudulent liens and fraudulent conveyances are suspended; to that effect is the present law, but the Bill puts it more clearly.\textsuperscript{16} The reason is evident. If the plan is confirmed, well and good. But if not, then the pending bankruptcy must go on; if there is none, the debtor is turned loose.\textsuperscript{17}

Here is to be observed, however, a relic of the old idea. Bankruptcy, as distinct from corporate winding up, meant a human

\textsuperscript{13} Because of the bankruptcy rule that he has a provable claim for the deficiency.
\textsuperscript{14} \textit{Id.} at 60.
\textsuperscript{16} Chandler Bill, \textit{supra} note 3 at 69.
\textsuperscript{17} Chandler Bill at 80.
debtor who would like to be discharged from his debts. And so he was,—after the idea of a discharge entered the legislative system,—provided he had not been guilty of specified offenses. As a result, when corporations, in our own course of time, were allowed to be bankrupt, it was quite possible for them also to obtain a discharge. The revisers have stuck to that idea, I think too closely. They provide that upon confirmation of the plan, the decree not only shall discharge the trustee, etc., but also shall "discharge the debtor from all its debts and liabilities". I doubt the advisability of this. I had occasion once to point out the possibility of corporations getting away with murder as to certain obligations and then starting up again; amendments cured these particular defects, but others are possible. I think it would be better to say nothing about a discharge at all.

Finally, there is a new provision that there shall be no income tax, state or federal, by virtue of any income or profit accruing to the debtor "by reason of a modification in, or liquidation in whole or in part of, any indebtedness of the debtor in a plan" approved and put into effect. This will bind the states for the future; but as to future Congresses it will have only a moral effect, for what that may be worth.

It is made a ground for reorganization that the debtor's assets are in the hands of a mortgage receiver or trustee in the course of foreclosure. Section 77B as it now reads, speaks only of "an equity receiver", which led the Supreme Court to conclude that the lawmakers intended to refer only to the case of a general receivership on creditors' bill, excluding wholly the case where a general mortgage was being foreclosed. Now, the proposed amendment illustrates the need for revision of Section 77B, which was drawn against the background of the equity receivership. By that method control of the corporate assets was gained on the consent bill of the general creditor, coupled with a foreclosure suit (if there happened to be a general mortgage); the two causes then being consolidated, with one receiver holding all assets, for the mortgagee so far as they were covered by the lien of the indenture, and for the general creditors at every point where that lien failed. But it was the general receivership that bulked most largely in the judicial eye; and so the mortgage receiver, although often on the scene, and owing his appointment to a court of equity under a foreclosure bill, was viewed from first

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18 Id. at 82.
19 Liquidation §§ 368, 374b.
20 Chandler Bill, supra note 3 at 82.
21 Chandler Bill at 91.
to last as the mortgagee's agent, and not as an "equity receiver"; that term being reserved for the receiver appointed on a general creditors' bill.\textsuperscript{22} But as this new process of reorganization gains ground, the old "equity receivership" will fade away as to actual use, whereas the mortgage receivership will be with us always.

And that makes me mention two general propositions that are very close to me, and another of equal importance, although with the latter I am not so concerned. This last topic is future rents; but fortunately it is now for the Supreme Court to guide us aright, several cases on that subject having lately been argued in that forum. It is possible, of course, that the decisions rendered in these cases will lead to a change in some parts of the Chandler Bill; but we cannot guess as to that now. It is more useful to speak of the other two points, because they illustrate the fact that the amendments of 1933 and 1934 were passed in a spirit that has now died away. Certain ideas that obtained several years ago will no longer hold, and the point is illustrated by the case of the secured creditor, and also by a consideration of fraud, with all the possibilities that inhere in that word.

As to the secured creditor, I have no doubt that many reformers of 1933 and 1934 thought that he could be forced into a reorganization at the instance of junior lienors. Of course such people overlooked many principles, to say nothing of reported cases; but the whole subject has been thrown into sharp relief by recent judicial action. The question presented was whether the secured creditor interest—not a minority fraction of it, but the whole or a substantial part—can be deprived of the right to realize the lien of its mortgage and thus to procure a judicial sale at which it can buy in the property as of old. Recent decisions of lower courts have treated this right as constitutionally assured.\textsuperscript{23} Lately the Supreme Court avoided a constitutional determination by saying that any such plan, when offered by junior interests, should be rejected as not "fair and equitable".\textsuperscript{24} That, of course, is a good

\textsuperscript{22} DuParquot Huot & Moneuse, Co. v. Evans, 297 U. S. 216 (1936). See (1936) 49 HARV. L. REV. 1111, 1116; Chandler Bill at 60, 63.


way of getting out of it; but the result is that the position of the secured creditor is probably so well protected that all the revisers will have to do is to make no change in the language of Section 77B that touches upon his rights.

But the other case I mentioned above, the case of fraud, is not fully covered by the language of Section 77B as it stands, or by the wording of the Chandler Bill in its present form; and so I would like to repeat what I said on a previous occasion. Just because the debtor is a corporation it does not follow that it will love its creditors as itself; corporate officers and directors often help themselves from the chest, before the ship goes on the rocks; and so it is possible, after a reorganization is confirmed and the debtor discharged, that fraudulent conveyances and preferences will later be discovered. The present Section 13 of the Bankruptcy Act provides that a composition may be reopened within six months after confirmation upon discovery that the debtor had been guilty of fraudulent conduct, but the amendments of 1933 and 1934 are deficient on this point. In the present Section 74, that relates to the individual debtor and the partnership, this six months provision is retained, but there is not a word to that effect in the present Section 77B, relating to corporate reorganization. Hence, while the court can hold up a reorganization under Section 77B if it appears that the debtor corporation has been guilty of fraudulent concealment of assets, there is no redress in case the discovery is not made until after the confirmation of the plan. Now in the Chandler Bill, as it reads at present, the individual debtor, the partnership and the smaller corporation are covered by Subdivision I of Section 12; and as to those, Section 13 provides, as heretofore, that the plan shall be set aside, and the debtor adjudged bankrupt, if it has been guilty of fraud in procuring the arrangement, provided the fraud is discovered within six months after confirmation. But there is no such provision with respect to corporations that are reorganized under Subdivision II of Section 12 as revised; and so the present

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27 In re Wisun & Golub, Inc., 84 F. (2d) 1 (C. C. A. 2d, 1936). In Johnson on Reorganization (1936), at § 238, it is said that a fraudulent purchase of goods with intent not to pay for them would justify dismissal of the debtor's reorganization petition as not having been filed in good faith, but no authority is cited. Of course the defrauded vendor in such a case can rescind and reclaim the goods from the estate: In re James Butler Grocery Co., 10 F. Supp. 809 (E. D. N. Y. 1935).

Section 77B needs a correction, which it will receive, as I am told by Mr. McLaughlin and Mr. King, Chairman of the National Bankruptcy Conference. In that connection, however, I repeat what I said above, that objections to claims should be made, and decided, before confirmation of the plan. It sometimes happens that fraudulent claims (of the president's wife or son-in-law, say) are part of a larger scheme involving the larceny of assets; and often the truth comes out in the trial of objections to such a claim.

But while the revisers are at it, perhaps it might be well to go further than the previous laws ever went with respect to old style compositions. Section 13 simply provides that in case of fraud the whole composition may be vacated, thus restoring all parties to their original situation. That was a survival, doubtless, of the idea that informed the old composition by agreement. In that case, if the debtor had been guilty of fraudulent conduct the creditors were allowed to treat the composition as terminated; but no theory was available by which the missing assets could be brought back into the pot so that the composition could go on with the estate thus enlarged. But as those difficulties do not present themselves with reorganizations or arrangements as perfected under the protection of a statute, we do not have to upset the whole arrangement, which might be hard upon creditors who had changed their positions in reliance upon the reorganization scheme. What justice really requires is to let the plan remain, but enlarge the estate by recovery of the property that has been fraudulently or preferentially transferred. The amendment therefore should be that as to all property fraudulently or preferentially transferred within four months prior to the filing of the petition, but concealed for any period up to six months subsequent to confirmation of the plan, the new corporation, or the trustees appointed under the plan, shall be vested with all the rights that, as to preferences and fraudulent conveyances generally, are vested in the trustee in bankruptcy under Sections 60, 67 and 70.

Thus the Bill will round an amendment it now offers as to control of the debtor. You cannot assume, as I have said before, that a corporate debtor is going to come into reorganization free of fraud. It should be thoroughly examined, and to that end its officers and directors should be under the control that is exerted in the case of the individual debtor. You have provided for that in your rewriting of Section 10, because you have placed within the definition of a bankrupt, for all purposes of apprehension and

29 *Glenn on Liquidation*, §§ 94-103.
extradition, the directors and officers in the case where the bankrupt is a corporation, thus overcoming the unfortunate decision in Ginsberg v. Popkin.\textsuperscript{30} Now all you have to do is to button up Section 13 as above suggested.

Speaking of fraud, I am reminded of the bankrupt stockbroker, to whose case is devoted the other subdivision of which I am to speak. I do not mean to say that all stockbrokers "make crooked failures"; but unfortunately many have done so within the past thirty years, and I would not depend upon recent federal legislation as a complete preventative for the future. Hence the liquidation of such a person's estate will probably continue to present problems that relate, not to proofs of debt, but to reclamation on the part of customers.

Those who have purchased upon a margin basis seek to trace securities as purchased for their account, or to reclaim securities pledged with the broker as security; and while customers who have sold short cannot specifically claim stock that the broker has borrowed in order to make delivery,\textsuperscript{31} nevertheless they also may have put up collateral with the broker to secure their accounts. Some customers may have paid cash in full, in advance; and other people have a way of leaving securities with a broker for safe-keeping merely, their accounts being balanced and inactive. Yet these claimants are apt to find that their broker has assembled all such securities into a mass, which at the date of his failure secures a loan made by an innocent bank. The latter, upon being notified of the bankruptcy of its borrower, the broker, exercises its rights as pledgee and sells so much of the collateral as may suffice to discharge the loan, and turns over the balance to the trustee in bankruptcy. It does this before any customer has a chance to say, personally or by the aid of equity, "Don't sell my security unless you have to; sell Mr. X's before you sell mine." The bank's position is secure under the rule of McNeil v. Tenth National Bank,\textsuperscript{32}—and yet it all depends upon the choice made in the loan cage whether one man's stock will go in the liquidating sale and another's will remain.

Now, if the rights of the parties to this massed collateral are to be left wholly to chance as thus outlined, there is no equity stirring. While there is at least one decision to that effect,\textsuperscript{33} how-

\textsuperscript{30} 285 U. S. 204 (1932).
\textsuperscript{31} Provost v. United States, 269 U. S. 443 (1926).
\textsuperscript{32} 46 N. Y. 325 (1871); see also Asylum of St. Vincent de Paul v. McGuire, 239 N. Y. 375, 146 N. E. 632 (1925).
ever, the result is too shocking to be accepted. Yet if we apply
the theory of marshalling that is so often used in the case of
successive mortgages covering different parcels, then we must
resort to some sort of classification. But just how successful
have the courts been as to that?

Not very, in the opinion of one who was of counsel in an early
case and attempted to formulate the rules as he gathered their
import in 1912.\footnote{In re Ennis, 187 Fed. 720 (C. C. A. 2d, 1911); Glenn, Rights of Defrauded Customer of an Insolvent Broker (1912) 12 Col. L. Rev. 422.} Let us realize two things, first, that the position of the American stockbroker is peculiar, and second, that
the law on this subject is comparatively new. Our own stock-
broker is different from his brother of London, nor does he re-
semble the brokers who operate upon our commodity exchanges.
All of those people deal in contracts, but the American stock-
broker deals in purchases and sales, with deliveries just twenty-
four hours ahead. Thus he can serve his margin customers only
by the use of loans obtained from the banks, and he cannot get
such a loan unless he puts up collateral. People who deal with
him know that,—or rather they should, because the protection
of fools which God extends through Chancery cannot be stretched
too far. Nevertheless, the courts have done their best to balance
the equities in situations of the sort I have mentioned. Accord-
ing to the rule that now prevails, the bankruptcy court enters
a “bar order” with respect to the surplus collateral surrendered
by the bank; the order inviting reclamations with respect to this
fund, and fixing a time limit within which these reclamations may
be filed. Afterwards the court divides the claimants into two
classes as to priority. Into Class B goes the margin customer,
unless he can show that in his case something more had happened
beyond the mere fact that he was a margin customer. Into
Class A go those who can show more, together with others, such
as the man who has left his securities for safekeeping.

But this idea is new, and therefore its outlines are still vague.
The first instance of such a classification that was afforded by a
state court appeared in 1904, and several years elapsed before
(1904); In re Schmidt, 298 Fed. 314 (S. D. N. Y. 1923); Tillinghast, Bank-
r uptcies of Stockbrokers (1930) 44 Harv. L. Rev. 65, 66. Judge Learned Hand
says that the practice first appeared in the federal courts in In re Ennis, 187 Fed. (C. C. A. 2d, 1911); In re Schmidt, supra. I recall, however, an
earlier case, in which I was of counsel, in which the same thing was done:
In re Brown, 185 Fed. 766 (C. C. A. 2d, 1910).} And it is a grave ques-
tion to-day whether the rules that have resulted are as sharp as they once were, or have lost their edge. On the one hand we have In re Ennis,36 where two margin customers had pledged stock to secure their accounts. One of them got into Class A simply because a point in the account had arrived when the customer did not owe the broker anything and at that moment it was the broker's duty to withdraw this customer's collateral from the bank loan. In the case of the other customer no such point had arrived, and therefore he was relegated to Class B. In literature of recent date it has been suggested that the sting of this case has been taken away by the effect of later decisions above and below.37 Undoubtedly the Supreme Court, once it adopted the New York rule that the broker who makes a purchase for account of a margin customer occupies as to the latter the position of pledgee rather than vendor,38 has made easier the customer's path, because, as the broker acts for many customers, shares of the same species which he may hold in this security relation are treated as fungible, so that any delivery out of the mass will satisfy the customer's demand.39 Hence, if in the bankrupt broker's "box" one should find "certificates in an amount greater than those which should have been on hand for this customer", with no other claimant, then the lucky customer is rewarded by getting the shares upon paying up the balance;40 and the rule has been further relaxed so as to let several of such customers share in the


37 As to recent literature upon the whole subject, one may advantageously read the following: In Myer, STOCKBROKERS AND STOCK EXCHANGES (1931), §§157-181, the subject is treated, and rules are formulated. HANNA, CASES ON SECURITY (1932), at 102 et seq. presents a valuable discussion and arrangement of material. Perhaps the earliest article upon the subject is Glenn, Rights of Defrauded Customer of an Insolvent Broker (1912) 12 COL. L. REV. 422. Then came Hagar, Bankruptcy Law as Applied to Stockbrokerage Transactions (1920) 30 YALE L. J. 488. Since then the Harvard Law Review alone has published three articles and a note. Smith, Margin Stocks (1922) 35 HARV. L. REV. 485; Oppenheimer, Rights and Obligations of Customers in Stockbrokerage Transactions (1924) 37 HARV. L. REV. 860; Tillinghast, Bankruptcies of Stockbrokers (1930) 44 HARV. L. REV. 65; Note, Two Views of Stockbrokerage Bankruptcies (1936) 50 HARV. L. REV. 99.


39 Hence when the customer is quick witted, and the insolvent broker is obliging, the customer can be protected although he has full knowledge of the insolvency, if he pays up his debit balance and the broker withdraws "his" stock from the bank loan and delivers it. Richardson v. Shaw, supra, n. 36. It is not a preference because the broker is simply doing what, as pledgee, he ought to do.

discovery *pro rata*. But just where that leaves us is doubtful; at least that is my opinion, and so I am a convert to Mr. McLaughlin's idea that the revised Bankrupt Act should say something upon the subject.

The Chandler Bill proposes to enlarge Section 60 (which deals with the preferential transfer) by a new subdivision, Section 60e. Now, what this section does is to assemble all securities in the broker's hands, or which he has pledged, in one single fund, insofar as they had been "at any time acquired or received (by the broker) from or for the account of" his customers. If any one of them can specifically identify his property, he may have it. But he specifically identifies it only when it appears that "such property was, at the time of its receipt or acquisition", or later, provided the broker still was solvent, "allocated to or physically set aside for such customer, and remained so allocated or set aside at the date of bankruptcy." What remains "shall constitute a single and separate fund", available to "the claims of the margin and cash customers", who shall constitute "a single and separate class of creditors, entitled to share ratably in such fund on the basis of their respective net equities as of the date of bankruptcy." The Bill, as it now reads, does not define the term "net equities", but I understand that it will be done by reference to the position which the margin customer, whether "long" or "short" of the market, would have had on the date of the bankruptcy if the broker had duly executed his orders and had available the requisite securities. All these customers form one class, regardless whether they had secured their account by specific collateral, or had merely made payments on account of margin requirements. If the fund does not pay off these people in full, they shall prove for the deficiency ratably with other creditors, against the outside assets; if there should be a surplus, of course it would fall into the general estate. In like manner, if it appears that the broker has fraudulently or preferentially transferred any asset which, had it remained on hand, would have constituted part of the fund, the trustee may set aside the transfer, and the proceeds of his recovery will go into the fund to the extent necessary to meet in full the claims established against it, the surplus recovery to go into the general estate.

What the amendment does, as I read it, is to take the courts at their word. The rule that the broker is a pledgee to the extent that he acts for a margin customer is not repealed, and indeed it

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42 Chandler Bill, at 191-2.
remains valuable in the case of a solvent broker. But in the case of an insolvent broker, there are other verities which must be respected in order to attain equality. The securities being treated as fungible and not specific, no customer who has put in a purchasing order should be allowed to say, "there is my stock and not another's." He knows that is not so, and so does the broker. Nor should the cash customer or any other person in the like case be given preference over the margin buyer. If you have paid your debt to the broker, you had better take your stock out, and you have no business leaving it in the shape of book entries, even if there are certificates of that species in the broker's box. And it is the same way with certificates left for safekeeping; a broker's office is no place for that, unless you see to it that he keeps your treasure segregated and labelled as yours.

There is nothing contrary to bankruptcy ideas in the notion of a fund being shared in by a specified class, or in the provision that the trustee may, by plenary suit, bring back into the fund such portions of it as the debtor may have fraudulently transferred. Before the trustee was accorded the status of a judgment creditor by the 1910 Amendment, it was held that he could assert, as against an unfiled chattel mortgage only the rights of such creditors as may have obtained judgments prior to the bankruptcy. It is true that in Moore v. Bay the Supreme Court seemed to put a stop to this idea of class recovery; but after all, the decision was based entirely upon the present wording of the Bankrupt Act, which requires that all assets brought into the estate shall be distributed equally among all claims on file. But nothing was said against the proposition that there can be a recovery for the benefit of a class, if the statute is so worded.

Finally, the theory of this section is that the court has custody of a fund in which various equities are capable of assertion; hence, before the fund is thrown into the general estate, the holders of these equities should be heard. As the bankruptcy court has jurisdiction itself to adjudge their claims, it also has power to fix a time limit for the assertion of them. This rule also applies to many other cases; it has been recognized in practice and established by decisions of the lower courts; and it has lately been settled by the Supreme Court, even as to tax claims asserted by Government. This leads me to suggest that, so long as the revis-

43 E. g., Content v. Banner, 184 N. Y. 121, 76 N. E. 913 (1906).
45 284 U. S. 4 (1931).
ers are dealing with one kind of fund which is subject to reclama-
tions or a particular type of claim, they should deal generally
with all. That is, now is the time to insert, somewhere in the Act,
a general provision as to all reclaims which are capable of assertion against any fund that may find its way into a bank-
ruptcy court.

That last suggestion, however, was outside of my province. I
undertook to deal with only two features of the revision, reor-
ganizations and stockbrokers' failures, and I am quite aware that
neither topic has been adequately covered. But I shall be satisfied
if my suggestions have conveyed the thought which is foremost
with me, that our Bankrupt Act needs revision, that this task is
in competent hands, and that the final result will be satisfactory.\textsuperscript{6}

\textsuperscript{6} The above was written before I became a member of the National Bank-
ruptcy Conference, to whose efforts we are indebted for the Chandler Bill. I
will leave the statement as it stands in the text because the real work was
finished before I came along, and such revision as may be necessary will be
made by the same gentlemen, I being only an advisory conferee. What I said
about the "cash customer" in the stockbroker situation was intended to refer
to the case where such a customer who never had a chance to do this because
the broker's failure was so close in point of time to his execution of the
customer's order, is quite another matter. That situation is now under con-
sideration, as I understand from correspondence with the gentlemen men-
tioned in the text,—Professor James A. McLaughlin of Harvard and Hon.
Paul A. King of Detroit.
STATE INSURANCE DECISIONS IN DIVERSE CITIZENSHIP CASES IN FEDERAL COURTS

CLAUDE H. BROWN *

IN CASES INVOLVING INSURANCE POLICIES tried in the federal courts by reason of the diversity of citizenship of the parties,¹ the problem frequently arises whether the state law as determined by the highest court of the state whose law governs by the principles of the Conflict of Laws ² is controlling or whether the federal court will determine for itself what the law is as a matter of "general commercial law" or "general jurisprudence" within the doctrine of Swift v. Tyson.³ That doctrine has been succinctly stated by Mr. Justice Pitney: ⁴

"... in matters of commercial law and general jurisprudence, not subject to the authority of Congress or where Congress has not exercised its authority, and in the absence of state legislation, the federal courts will exercise an independent judgment and reach a conclusion upon considerations of right and justice generally applicable, ... ."

The problem involves the construction of the "Rules of Decisions Act", enacted in the first Judiciary Act in 1789, which states:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." ⁵

¹ A. B., Drake University (1927), LL. B., Id. (1928), J. S. D., Yale University (1929); Associate Professor of Law, University of Oregon School of Law; member of the Bar of Iowa; author of Iowa Annotations to the Restatement of Conflict of Laws 15 (1929-30) IOWA L. REV. 309, 454.


⁴ Southern Pacific Co. v. Jensen, 244 U. S. 205, 249 (1917).

It is recognized that the principles of the law of contracts have supplied the basic principles of the law of insurance and that the same problem as to applicability of state court decisions in federal court cases arises in numerous types of cases other than those involving insurance contracts and that therefore cases dealing with other varieties of contracts are pertinent and not to be disregarded in insurance cases. It is further recognized that much has been written concerning the doctrine of Swift v. Tyson, most of the articles being vigorously critical of the case both because of its promotion of diverse legal principles in the same territorial jurisdiction and because of its unsound interpretation of "laws" as not embracing judicial decisions of the state courts. But the problem is of frequently recurring importance in insurance cases, especially in recent years because of the tremendous growth of the insurance business and because the federal courts hear a large proportion of litigated insurance cases. The use of the federal forums is traceable to the fact that many insurance companies do a business of national scope and are able to bring most of their actions in, or transfer cases in which they are defendants to, the federal courts on the ground of diversity of

6 Vance, Handbook of the Law of Insurance (2d ed. 1930) 89.


8 Most cases commenced by insurance companies involving insurance policies are probably suits commenced on the equity side of the courts in which cancellation of policies is sought. The same problem arises since the "Rules of Decisions Act" is applicable to trials in equity as well as trials at law notwithstanding the language in the statute, "... shall be regarded as rules of decision in trials at common law,...". Mason v. United States, 260 U. S. 545 (1923); Jackson v. Vicksburg, S. & T. R. R. Co., 99 U. S. 513 (1879).

9 The Judicial Code, § 28, 36 Stat. 1094 (1911), 28 U. S. C. § 71 (1934), permits removal only by a non-resident defendant. Resident here means citizen and the citizenship of a corporation is that of the state of its incor-
citizenship. Therefore it is believed that a reexamination of the federal insurance cases on the problem of applicability of state decisions might be of some value especially in view of what appears to be a trend toward the limitation of *Swift v. Tyson*.

Mr. Justice Story, while a Judge of the Federal Circuit Court, had announced that the doctrine was applicable to insurance contracts, in two cases involving marine insurance decided four years preceding *Swift v. Tyson*. In the same year as *Swift v. Tyson* the United States Supreme Court said, by Mr. Justice Story, in *Carpenter v. Providence Washington Insurance Co.*, that the construction of insurance contracts came within the operation of the rule of *Swift v. Tyson*. Although the court said that the state decisions cited were distinguishable from the case before the court, yet the case has many times been followed as authoritative on the point that insurance is a matter of “general commercial law”. In this connection Mr. Justice Story said:

> “The questions under our consideration are questions of general commercial law, and depend upon the construction of a contract of insurance, which is by no means local in its character, or regulated by any local policy or customs. Whatever respect, therefore, the decisions of State tribunals may have on such a subject, and they certainly are entitled to great respect, they cannot conclude the judgment of this court. On the contrary, we are bound to interpret this instrument according to our own opinion of its true intent and objects, aided by all the lights which can be obtained from all external sources whatsoever; and if the result to which we have arrived differs from that of these learned State courts, we may regret it, but it cannot be permitted to alter our judgment.”

The questions involved were the effect of the existence of a voidable policy in another company as violating the condition that the policy sued upon should be void unless the existence of any other policy should be endorsed on the policy, and whether actual notice on the part of the company was sufficient compliance with the condition. Since this pronouncement down to 1934 when

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A case is removed from the state court to the federal district court sitting in the district in which the state court is located, regardless of the locality of the plaintiff’s residence. 36 Stat. 1095 (1911), 28 U. S. C. § 72 (1934); Lee v. Chesapeake & Ohio Ry., 260 U. S. 653 (1923).


11 16 Pet. 495 (U. S. 1842).

12 Id. at 511.

Mutual Life Insurance Co. v. Johnson was decided, it has been almost unanimously held that all insurance problems are matters of "general commercial law" in the absence of a controlling state statute on the particular question involved. This has been held to be the rule as to marine insurance, fire insurance, life insurance, including disability provisions contained in life insur-

14 293 U. S. 335 (1934).
15 Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1, 15 (1900) (construction of rider on margin of policy, "free of particular average, but liable for absolute total loss of a part, if amounting to 5 per cent", in connection with a memorandum by which goods were "warranted by the assured free from average unless general", said to be a matter of "general commercial law"). The Barnstable, 181 U. S. 464, 470 (1901); Gloucester Ins. Co. v. Younger, Fed. Cas. No. 5,487 (C. C. D. Mass. 1855); Mutual Safety Ins. Co. v. Cargo of The George, Fed. Cas. No. 9,981 (D. C. S. D. N. Y. 1845).


17 Aetna Life Ins. Co. v. Moore, 231 U. S. 543 (1913); Gordon v. Ware Nat. Bank, 132 Fed. 444 (C. C. A. 8th, 1904); Russell v. Grigsby, 168 Fed. 577 (C. C. A. 6th, 1909), (reversed as to what the applicable "general law" was) Grigsby v. Russell, 222 U. S. 149 (1911); Lawrence v. Travelers' Ins. Co., 6 F. Supp. 428 (E. D. Pa. 1934) (these three cases involved the question whether the assignee of the policy must have an insurable interest in the subject-matter of insurance); Spinks v. Mutual Reserve Fund Life Ass'n, 137 Fed. 169 (C. C. E. D. Ky. 1905) (whether provision that no action should be brought on policy after lapse of one year from date of death is against public policy of the state); Kansas City L. Ins. Co. v. Adamson, 24 F. (2d) 712 (N. D. Tex. 1928) (whether divorce terminated insurable interest of wife upon life of former husband); Fountain and Herrington, Inc. v. Mutual Life Ins. Co., 55 F. (2d) 120 (C. C. A. 4th, 1932) (enforcement of limitation on agent's power to waive matter stated in application
ance policies,\textsuperscript{18} accident insurance,\textsuperscript{19} and health insurance.\textsuperscript{20} “General commercial law” has been held to embrace the question whether or not an insurance company is estopped to set up the defense that the insured property was mortgaged and that therefore the insured was not the sole and unconditional owner, by reason of the knowledge of the facts by the agent of the insurance company,\textsuperscript{21} the federal courts holding that the company is not 


\textsuperscript{18} See Metropolitan Life Ins. Co. v. Foster, 67 F. (2d) 264, 266 (C. C. A. 5th, 1933); Pilot Life Ins. Co. v. Owen, 31 F. (2d) 862, 864 (C. C. A. 4th, 1929).

\textsuperscript{19} See Hawkeye Commercial Men's Ass'n v. Christy, 294 Fed. 208, 211 (C. C. A. 8th, 1923) (construction of exception where death resulted from “poisonous substances, gases, or anything accidentally, or otherwise, taken or inhaled”); King v. New York Life Ins. Co., 72 F. (2d) 620, 624 (C. C. A. 8th, 1934) (construction of similar clause); O'Brien v. Mass. Bonding and Ins. Co., 64 F. (2d) 33, 36 (C. C. A. 8th, 1933) (whether death caused by germs unintentionally ingested with food is within coverage of policy insuring against death by external, violent and accidental means); Travelers' Ins. Co. v. Thorne, 180 Fed. 82, 87 (C. C. A. 1st, 1910) \textit{cert. denied}, 220 U. S. 614 (1911); Long v. Monarch Accident Ins. Co., 30 F. (2d) 929, 930 (C. C. A. 4th, 1929) (but a local state case was cited as argumentatively in support of the court's decision).

\textsuperscript{20} See Long v. Monarch Accident Ins. Co., 30 F. (2d) 929, 930 (C. C. A. 4th, 1929) (but the court discusses a local state case as argumentatively in support of the court's opinion).

estopped to make such defense; 22 whether double insurance exists where one policy covers property in addition to that covered by another policy; 23 whether the insured may validly agree that no person other than the executive officers of the insurance company can vary its terms; 24 whether the assignee of the policy must have an insurable interest in the subject matter of the insurance 25 or in the life of the person insured; 26 whether the insured is disabled within a life policy which contains a provision for waiver of premiums in event of disability; 27 the effect of misrepresentations in the procurement of the policy; 28 whether compliance with a fire insurance policy requirement concerning the furnishing of proofs of loss is a condition precedent to the commencement of an action on the policy; 29 and whether payment of the premium and delivery of the policy to insured are conditions precedent to the existence of the insurance contract. 30

*Mutual Life Insurance Co. v. Johnson* 31 was an action on a life insurance policy delivered in Virginia to a resident of that State. The policy provided that if the insured, before attaining the age of sixty years and while no premium was in default, should furnish the company due proof of his being totally and per-

22 See cases in note 21; Lawson *v.* Twin City Fire Ins. Co., 2 F. Supp. 171, 173 (E. D. Ky. 1932) (attempt to show knowledge of agent that insured was only one of joint owners).


27 See Pilot Life Ins. Co. *v.* Owen, 31 F. (2d) 862, 864 (C. C. A. 4th, 1929) (but it is pointed out that the local state court was in accord).


29 Bank of So. Jacksonville *v.* Hartford Fire Ins. Co., 1 F. (2d) 43 (S. D. Fla. 1924); see Niagara Fire Ins. Co. *v.* Pospisil, 52 F. (2d) 709, 712 (C. C. A. 8th, 1931); Fidelity-Phenix Fire Ins. Co. *v.* Haywood, 71 F. (2d) 834, 836 (C. C. A. 6th, 1934) (but as to whether the title of insured was such that he was unconditioned and sole owner, held governed by state decisions).


31 293 U. S. 335 (1934).
manently disabled, the company would pay him a certain monthly income so long as he remained disabled, and would also, after receipt of such proof, waive payment of each premium as it thereafter became due during such disability. Before the expiration of a period of grace allowed for payment of a premium, the insured became totally and permanently disabled, both physically and mentally, to such an extent that he was unable to give notice to the company in advance of default and thus procure the waiver called for by the policy. The disability continued until his death. The Court cited cases from ten states supporting the plaintiff's contention and cases from eight states and one lower federal court case holding that the privilege of waiver of premiums was lost by failure to give notice of disability within the time limited in the policy, regardless of the reason for such failure. The Virginia Court was among the former group. The Court followed the decision reached by the Virginia Court, allowing recovery on the policy. Mr. Justice Cardozo stated the reason for not making an independent construction of the pertinent provision of the policy:

"In this situation we are not under a duty to make a choice for ourselves between alternative constructions as if the courts of the place of the contract were silent or uncertain. Without suggesting an independent preference either one way or the other, we yield to the judges of Virginia expounding a Virginia policy and adjudging its effect. The case will not be complicated by a consideration of our power to pursue some other course. The summa jus of power, whatever it may be, will be subordinated at times to a benign and prudent comity. At least in cases of uncertainty we steer away from a collision between courts of state and nation when harmony can be attained without the sacrifice of ends of national importance. No question as to a rule of the law merchant is present in this case. . . . No question is here as to any general principle of the law of contracts of insurance, . . . with consequences broader than those involved in the construction of a highly specialized condition. All that is here for our decision is the meaning, the tacit implications, of a particular set of words, which, as experience has shown, may yield a different answer to this reader and to that one. With choice so 'balanced with doubt,' we accept as our guide the law declared by the state where the contract had its being."  

The expression, "balanced with doubt" is not new in this connection; its first use by the Supreme Court was in 1882. Prior to the Johnson case the Supreme Court either found that the

32 Id. at 338.
34 293 U. S. 335, 339-340.
particular case did not call for application of the rule 36 or re-stated the phrase merely in support of a determination of the case independently reached by the Court, which result happened to be in accord with the state decisions.37 In lower federal courts, the "balanced with doubt" rule has been applied because of the prevalence of a split of authority on the particular proposition,38 because of the combination of no general trend of authority and absence of any authoritative federal holdings contrary to the state decision,39 and because of the absence of any good reason for

36 Burgess v. Seligman, 107 U. S. 20 (1882), held that the federal court was not required to follow the state decision because it was handed down after the federal circuit court had decided the instant case.

The Court, in Kuhn v. Fairmont Coal Co., 215 U. S. 349, 360 (1910) said, "... the Federal court should always lean to an agreement with the state court if the question is balanced with doubt ", but the Court held that "when contracts ... are entered into and rights have accrued ... when there has been no decision by the state court on the particular question involved, then the Federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of the parties accrued." Mr. Justice Holmes wrote a dissenting opinion, with Justices White and McKenna concurring, to the effect that the state courts make the state law and after they have decided a particular proposition, such decision should be followed by the federal courts. But cf. Hawks v. Hamill, 288 U. S. 52 (1933) (state decision, construing state constitution followed although decided after transaction litigated in federal court).

In Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U. S. 518 (1928), the majority opinion used the expression, "while inclining to follow the decisions of the state court ", yet the Court refused to follow the Kentucky rule that the granting by a railroad company of the exclusive privilege of soliciting patronage at its railroad station to one transfer company is void as against public policy. There was a dissenting opinion by Mr. Justice Holmes, concurring in by Justices Brandeis and Stone, based upon the realistic contention that it is a "fallacy and illusion" to suppose that the common law of a state is "a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute ". Id. at 533.

37 Trainor Co. v. Aetna Casualty & Surety Co., 290 U. S. 47 (1933); Sim v. Edenborn, 242 U. S. 131 (1916). In the Sim case the three dissenting justices said: "... the questions involved are of general, not local law; ... there has not been such restoration of the status quo as is essential to a recovery at law upon a remission ..." Id. at 136. But the majority opinion pointed out that the state decision was "not in direct conflict with any declared views of this court and some expressions in our former opinions tend to support them ". Id. at 135.


refusing to follow the state decision. But in the Johnson case the Court did not investigate the substantive question independently, the state court decisions being followed both because of the different meanings which could be given to the particular words in the policy and because of the split of authority in other states as to the interpretation of such language. Apparently either of the two reasons is sufficient to invoke the "balanced with doubt" rule. Thus, if the particular words of a policy were susceptible of two or more meanings and the only case on the point was that of the highest court of the state whose law would control under Conflict of Laws rules, then the question could be said to be "balanced with doubt" so that the state decision should be applicable. Also, whether or not the federal court thought the particular words of the policy were reasonably susceptible of more than one interpretation, yet if the courts of the states were quite evenly divided on the proposition, then the applicable state law should control. But the Johnson case makes the added qualification in the Court's statement, "No question is here as to any general principle of the law of contracts of insurance, . . . with consequences broader than those involved in the construction of a highly specialized condition." That "highly specialized condition" involved the extensively used condition: "If, before attaining the age of sixty years and while no premium on the policy is in default, the Insured shall furnish to the Company due proof that he is totally and permanently disabled, . . . the Company will grant the following benefits during the remaining lifetime of the Insured as long as such disability continues."

Only a year preceding the Johnson case the Circuit Court of Appeals in the Fifth Circuit affirmed the trial court in its view that this identical substantive law question was a matter of "general commercial law", and that a prior Supreme Court

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40 Fidelity and Columbia Trust Co. v. Lucas, 66 F. (2d) 116 (C. C. A. 6th, 1933).
41 See note 2, supra, for application of principles of Conflict of Laws.
42 293 U. S. 335, 340 (1934).
43 The Supreme Court previously had construed language similar to that contained in the Johnson policy and had held that the proof of total and permanent disability must be furnished while no premium was in arrears, as a condition precedent to disability benefits, and that the occurrence of such condition precedent was not waived or excused by misfortune which overtook the insured. Bergholm v. Peoria Life Insurance Co., 284 U. S. 489 (1932) (but no question of applicability of state law was involved).
case was controlling to the effect that inability to furnish proof of disability because of insanity does not constitute a waiver of such proof while no premium is in arrears as a condition precedent to recovery on the policy.\textsuperscript{45} The Circuit Court of Appeals does not discuss the question of whether or not state law is applicable, but assumes that it is not, since the trial court did discuss the matter and the policy was a Virginia contract, as was that involved in the \textit{Johnson case}, in which state it had been held that the policy condition as to proof of loss became inoperative where there was such mental inability to furnish proof. The trial court held that "The urge that because this contract was made in Virginia it should be construed by the laws of Virginia and not by the general commercial law is answered adversely by the Supreme Court of the United States . . ." \textsuperscript{46}

Since the \textit{Johnson case} overrules the \textit{Egan case} in the fifth Circuit as to whether that particular problem was a matter of "general commercial law", and since that phrase and the expression "highly specialized condition", contained in the \textit{Johnson case}, are quite nebulous, it would seem that there usually will be a difficult problem in the allocation of any particular set of facts to one of these two categories.

Apparently any case involving the furnishing of proofs of loss in any type of insurance policy would constitute a "highly specialized condition". Hence, it is submitted that cases refusing to follow the state decisions as to time within which proofs of loss may be furnished under fire policies, would have been decided \textit{contra} under the \textit{Johnson case}. An illustrative case is \textit{Bank of South Jacksonville v. Hartford Fire Insurance Company}.\textsuperscript{47} This case held that failure to furnish proofs of loss within sixty days after the loss prevented recovery notwithstanding the state court had held that failure to furnish the proofs within the sixty days merely postponed the date of payment and did not forfeit the rights of the insured, where the proofs were furnished within such time as to enable the insured to bring his suit within the time limited by the policy.\textsuperscript{48} The court conceded that the state courts were divided on the proposition\textsuperscript{49} so that the question

\begin{itemize}
  \item \textsuperscript{45} Bergholm \textit{v. Peoria Life Insurance Co.}, 284 U. S. 489 (1932).
  \item \textsuperscript{46} 60 F. (2d) 268, 269 (N. D. Ga. 1932).
  \item \textsuperscript{47} 1 F. (2d) 43 (S. D. Fla. 1924); see \textit{Niagara Fire Insurance Co. v. Pospisil}, 52 F. (2d) 709, 712 (C. C. A. 8th, 1931); \textit{Harris v. North British & Mercantile Insurance Co., Ltd.}, 80 F. (2d) 94 (C. C. A. 5th, 1929).
  \item \textsuperscript{48} \textit{Hartford Fire Insurance Co. v. Redding}, 47 Fla. 228, 37 So. 62 (1904).
  \item \textsuperscript{49} 1 F. (2d) 43, 45 (S. D. Fla. 1924). For a collection of cases, see Note, L. R. A. 1915 F. 1210.
\end{itemize}
could be said to be "balanced with doubt." It has been pointed out by Judge Parker of the Circuit Court of Appeals for the Fourth Circuit that the state decision was controlling for the further reason that the local decision construed a policy, the form of which was prescribed by statute.\(^{50}\)

Another situation which seems to involve a "highly specialized condition" and which we believe would be decided according to state law, is represented by *Meigs v. London Assurance Company*,\(^{51}\) which was decided *contra* to a state case involving the same plaintiff and involving a claim arising out of the same fire.\(^{52}\) The state case was decided first and the court did not see fit to overrule "the settled law of the state that when two policies insure the same property, but one of them covers other property also, without specifying how much of the insurance applies to each property, a case of double insurance is not presented and the policies do not prorate."\(^{53}\) Nevertheless the federal court refused to follow the state decision. There are probably more cases supporting the federal decision, but there are not many cases on the point,\(^{54}\) so that it could be said to be "balanced with doubt." Is not the matter "local" since it involves a custom concerning fire insurance on property in Pennsylvania, in view of the language of the state court?

> "The result reached by the trial judge in this case is sustained by the rule enunciated in all our decisions, and unless we overrule them, the judgment of the court below must be affirmed. This we have no intention of doing. For thirty-eight years the losses covered by insurance policies in this state have been adjusted in conformity with the doctrine of *Sloat v. Insurance Company*. The rule announced in that case is recognized and well understood as the law of the state by both the insurer and the policy holder, and to modify or change it now, with the vast interests depending upon its enforcement, would require stronger and more convincing reasons than have yet been presented."\(^{55}\)

It is believed that the *Johnson rule* would require the following of state decisions which declare void because contrary to public policy a provision in a policy that no action shall be brought after

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\(^{53}\) *Id.* at 384, 54 Atl. at 1054.

\(^{54}\) VANCE, HANDBOOK OF THE LAW OF INSURANCE (2d ed. 1930) 728.

\(^{55}\) 205 Pa. 378, 384-5, 54 Atl. 1053, 1054.
the lapse of a stated time from the date of loss, which time is less than the statute of limitations. The contrary has been held prior to the *Johnson case*. In *Spinks v. Mutual Reserve Fund Life Association* it was held that the validity of a provision in a life insurance policy that no action shall be brought after the lapse of one year from the date of insured's death is a question of "general public policy", as to which the federal courts will not follow state decisions. The court said:

"Is the question as to whether a provision similar to the one involved herein is against public policy one of general or local law? It seems to me that it is one of general law. Statutes of limitation are universal. The principles upon which they have been enacted are universal. And it seems to me to follow that the principles involved in determining the question whether a contract providing a different limitation from that prescribed by the statute is against that policy of the statute, or otherwise against public policy, are equally universal. If this be true, the question itself is one of general jurisprudence, and not one of local law. The opinion of the Court of Appeals is not based upon any peculiar feature of the statutes of limitation of this state differentiating them from similar statutes in other jurisdictions. The reasoning upon which it is based is equally applicable to any jurisdiction."  

Thus, in Kentucky there were two kinds of "public policy"—one for litigants in the state courts and another for those in the federal courts; and it is to be noted that that "general public policy" concerned a Kentucky statute whereas it has always been conceded that *Swift v. Tyson* is not applicable to state decisions construing state statutes.

Would it now be held that the question of whose agent was an insurance broker, at the time of effecting an insurance policy, is a matter of general commercial law? It was so held in 1910 and certiorari was denied by the Supreme Court. The same

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58 The Kentucky Court in Union Central Life Insurance Company v. Spinks, 119 Ky. 261, 83 S. W. 615 (1914), held that such policy provision was invalid.

59 See statement of the doctrine by Mr. Justice Pitney in the first paragraph of this article. In Kansas City Life Insurance Co. v. Adamson, 24 F. (2d) 712 (D. C. N. D. Tex. 1928), the court refused to follow the Texas rule that it is contrary to public policy to allow a divorced wife to recover as beneficiary on the erstwhile husband's insurance policy, where the company deposited the proceeds of the policy in federal court and filed a bill of interpleader.

plaintiff, the same broker, the same facts, but different insurance companies defendants, were involved in a state case decided prior to the commencement of the federal case.\footnote{Thorne v. Casualty Company of America, 106 Me. 274, 76 Atl. 1106 (1909). Plaintiff was solicited for accident insurance by the broker, one Burns. Burns applied to one of the companies whom he regularly represented, but was refused. Plaintiff did not know of such refusal. Burns then went to the offices of the Casualty Company and of the defendant company and procured policies after filling out applications in which it was stated that the plaintiff was without deformity and had not been refused insurance. Burns knew that plaintiff had eye and hand deformities. Burns received commissions from both insurance companies. In the prior suit in the Maine Court against the Casualty Company plaintiff won, on the theory that the Casualty Company was estopped to set up breach of warranties by reason of the knowledge of Burns, who was held to be the company's agent. The Casualty Company case was decided before the trial of the federal case and plaintiff contended it was controlling in the federal case. However, the court refused to follow the state court and held that Burns was plaintiff's agent.}

The \textit{Johnson} case is only one of the recent cases showing the trend of the U. S. Supreme Court to make deep inroads upon the doctrine of \textit{Swift v. Tyson}. The Court has held in three recent cases that a state interpretation of the Negotiable Instruments Law will be applied in the federal courts, notwithstanding such statutes merely codify the law merchant or the common law and are intended to establish uniformity in that branch of the law.\footnote{Burns Mortgage Company v. Fried, 292 U. S. 487 (1934); Marine National Exchange Bank v. Kalt-Zimmers Manufacturing Co., 293 U. S. 357 (1934); Graham v. White Phillips Co., 296 U. S. 27 (1935).} Prior to the first of these cases, \textit{Burns Mortgage Co. v. Fried}, the lower federal courts were quite evenly divided on the question.\footnote{The cases are collected by the Court in notes 11 and 12, 292 U. S. at 495. It had always been conceded that state court interpretations of state statutes not codifying common law or law merchant would control federal courts. Elmendorf v. Taylor, 10 Wheat. 152, 159 (U. S. 1825); Jackson ex dem. St. John v. Chew, 12 Wheat. 153, 167 (U. S. 1827); Swift v. Tyson, 16 Pet. 1, 19 (U. S. 1842); Hawks v. Hamill, 288 U. S. 52 (1933).} The Court indicated that the same result would follow as to the codification of any common law or law merchant rule \footnote{"We think the better view is that there is no valid distinction in this respect between an act which alters the common law and one which codifies or declares it. Both are within the letter of § 34 of the Judiciary Act. And a declaratory act is no less an expression of the legislative will because the rule it prescribes is the same as that announced in prior decisions of the courts of the state. Nor is there a difference in this respect between a statute prescribing rules of commercial law and one concerned with some other subject of narrower scope." 292 U. S. 495.} and among the cases cited in support of its position is a case involving the interpretation of a standard fire insurance policy,
the form of which was prescribed by statute. *Niagara Fire Insurance Co. v. Raleigh Hardware Co.*\(^65\) held that if the form of policy permitted to be issued in the particular state is set forth in the statute and the state court has held that failure to file proofs of loss within the sixty days fixed in the statutory form merely delays and does not bar the action, then the federal court is bound by such decision.

In more than half the states there are prescribed statutory forms of fire insurance policies \(^66\) and the decisions of their courts as to the meaning of standard policies are therefore controlling on the federal courts under *Burns Mortgage Co. v. Fried* and *Niagara Fire Insurance Co. v. Raleigh Hardware Co.* It could be well argued that the rule of those two cases should be extended to include state court constructions of policies the forms of which are prescribed as standard by the Insurance Commissioner, under statutory authority, since the act of the Commissioner in establishing a standard form of policy is the factual equivalent of a form enacted verbatim in a statute.\(^67\)

Another significant case in the United States Supreme Court is *Trainor v. Aetna Casualty and Surety Company*,\(^68\) decided in 1933, which held that the measure of damages recoverable against a surety on a building bond was governed by state decision. Previously the federal courts have not followed state decisions as to the measure of damages in cases in which the substantive rights of the parties were said to be governed by "general law".\(^69\)

\(^65\) 62 F. (2d) 705 (C. C. A. 4th, 1933).

\(^66\) A list of states having statutes containing the Revised New York Standard Fire Policy, also called "Commissioners' Policy", may be found in *Patterson, Cases on Insurance* (1932), 786. States having statutes adopting the Original New York Standard Fire Policy may be found at p. 792; those enacting the Massachusetts Policy, at p. 795. Some states have enacted statutory policy forms peculiar to the particular state; still others have enacted certain requirements for fire policies without having enacted complete forms. State decisions construing such enacted provisions would control federal courts.

\(^67\) *Patterson, The Insurance Commissioner in the United States* (1927) 248-258.

\(^68\) 290 U. S. 47 (1933).

These recent United States Supreme Court cases limiting the scope of *Swift v. Tyson* are the culmination of the many dissenting opinions written in cases involving its application, and of the numerous vigorous criticisms of that case by legal writers. One writer, Mr. Charles Warren, contends that the result reached in *Swift v. Tyson* is the one which was not intended by the framers of Section 34 of the Judiciary Act, and in support of that contention he has shown that the words "statute law" were eliminated from the proposed draft and the word "laws" substituted before its enactment and he has pointed out statements of persons concerned with the enactment of the Act in support of his contention. Furthermore, it is to be noted that long before Mr. Justice Story wrote the decision in *Swift v. Tyson* he stated:

"The process used in these courts is, in general, the same as in the State courts; and the laws of the states are expressly declared to be the rules of decision in trials at common law in cases where they apply. And the same doctrine must have been held without this express provision, and must now be implied in all suits, where the lex loci is to regulate the rights or remedies of the parties."


71 See citations of articles in note 7, *supra.*


73 *Ex parte Biddle,* Fed. Cas. No. 1391 (1822) (Italics the author's). However, the case involved a state statute so that the remarks can be reconciled with *Swift v. Tyson.*
The United States Supreme Court has on two occasions made similar statements. The only method of reconciling these statements with *Swift v. Tyson* and the cases which follow it is to realize that the federal courts purport to be applying the state "laws", both statutes and decisions, but that the federal courts have determined that they are compelled to follow state decisions only when such decisions construe state statutes or decide matters of local usage or rules of property law, but that the federal courts actually determine for themselves what the remainder of the law of the state is. It is this residuum of the state law which they have called "general commercial law" or "general jurisprudence". This of course is based upon the glaring illusion that there can be a state law even though it is not enforced by the courts of the particular state, which fallacy has been well pointed out by Mr. Justice Holmes.

It has been said by the Supreme Court that the sole object of the grant of diversity of citizenship jurisdiction to the federal courts was "to secure to all the administration of justice upon the same principles upon which it is administered between citizens of the same State". But the result many times has been that different rules of substantive law have been applied in

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75 Hawks v. Hamil, 288 U. S. 52 (1933), followed state decision construing state constitution notwithstanding the transaction litigated in the federal court ante-dated the state decision.

76 Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co., 276 U. S. 518 (1928). "Books written about any branch of the common law treat it as a unit, cite cases from this court, from the circuit courts of appeal, from the state courts, from England and the Colonies of England indiscriminately, and criticize them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any court concerned. If there were such a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute, the courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a state, whether called common law or not, is not the common law generally but the law of that state existing by the authority of that state without regard to what it may have been in England or anywhere else." *Id.* at 533.

77 Polk's Lessee v. Wendel, 5 Wheat. 293, 302 (U. S. 1820).
state and federal courts in the same territorial jurisdiction because of the fact that one of the parties was the citizen of another state than that in which the case was tried. That this is an undesirable result has been recognized by the United States Supreme Court, it is believed, as well as by several lower federal courts. It would seem to be extremely difficult to determine in advance of a court decision involving substantially identical


The application of different rules of substantive law in state and federal courts in the same territorial jurisdiction may force the plaintiff to reduce his claim to the $3,000 maximum to preclude removal of the case to the federal court. Wood v. Massachusetts Protective Association, 34 F. (2d) 501 (E. D. Ky. 1929).


80 Sims v. American Central Insurance Co., 296 Fed. 115 (C. C. A. 6th, 1924), followed state decisions holding that a conditional vendee was "sole and unconditional owner" within the condition of a fire policy, on the theory that a state statute was being construed. However, the state statute merely limited the common law effect of misrepresentations and warranties and the weight of authority is contra to the Tennessee cases. Vance, Handbook of the Law of Insurance (2d ed. 1930) 711-12.

In many cases where the statements are made that the particular question is one of general jurisprudence or general commercial law, the courts point out pertinent state decisions which accord with the "federal rule". See Long v. Monarch Accident Insurance Co., 30 F. (2d) 929, 931-2 (C. C. A. 4th, 1929); Pilot Life Insurance Co. v. Owens, 31 F. (2d) 862, 864 (C. C. A. 4th, 1929); Inter-Southern Life Insurance Co. v. McElroy, 38 F. (2d) 557, 560 (C. C. A. 8th, 1930).

In American National Bank & Trust Co. v. United States Fidelity & Guaranty Co., 7 F. Supp. 578 (S. D. Ala. 1934), District Judge Ervin said, "I feel that in contracts, parties' rights are to be determined by the language used, and . . . there should be only one construction so as to make it certain, and that construction must be determined by where the contract was made and intended to be performed. It was by this law they contracted to be bound. "Where parties make their contracts in contemplation of the law of the state, such law of the state becomes a part of the contract, and certainly would be so enforced by the state court."

"To hold that a federal court shall apply a different rule of construction of the terms in such contract is to give the contract a meaning wholly different from that which the parties themselves intended and agreed on.

"If the federal court does not follow the state construction on such propositions, it will enforce a contract not agreed on by the parties or deny enforcement of one the parties did agree on." Id. at 582-3.
facts, whether or not a particular problem concerns a "highly specialized" portion of the insurance policy or involves a "general principle of the law of contracts of insurance", within the language of the Johnson case. Since the court in the Johnson case did not investigate independently the merits of the substantive law question, but followed the state decision, after pointing out that there was a dispute of authorities on the question, it is submitted that the expressions "balanced with doubt", and "benign and prudent comity", coupled with the statement, "at least in cases of uncertainty we steer away from a collision between courts of state and nation when harmony can be obtained without sacrifice of ends of national importance", indicate that the deleterious effect of Swift v. Tyson will be avoided in most insurance cases.
THE SUPREME COURT OF THE UNITED STATES

Interstate Commerce—Federal Regulation of Convict-Made Goods

The unanimous decision of the Court in the case of Kentucky Whip and Collar Co. v. Illinois Central Railroad Co.,\(^1\) upholding the constitutionality of the Ashurst-Sumners Act,\(^2\) has attracted nation-wide attention. Certain so-called liberals see in the decision a possible avenue for approaching two of the objectives of the present administration, namely, abolition of child labor in industry and the fixing of minimum wages and hours of work without resorting to a constitutional amendment. The statute in the case under consideration makes it unlawful, among

* Written February 23, 1937.
\(^1\) No. 138, Oct. Term, 1936, decided January 4, 1937.
other things, for one knowingly to transport in interstate or for-

eign commerce goods made by convict labor into any state where 

the goods are intended to be received, possessed, sold, or used in 

violation of state laws. The Court, following a previous decision 3 

which upheld the Webb-Kenyon Act,4 involving shipments of in-

toxicating liquors into states having dry laws, declared in the 

present case that Congress may regulate interstate commerce so 

as to prevent that commerce from being used to bring into a state 

articles the traffic in which the state has constitutional authority 

to forbid, and has forbidden.5 The Supreme Court further ruled 

that Congress, having plenary power to deal with interstate com-

merce, has formulated its policy and established its own rule, and 

the fact that it adopted a rule to aid the enforcement of valid 

state laws would not render such action unconstitutional.

Neutral Resolution—Delegation of Authority to the President

In a decision granting the existence of broad discretionary 

powers in the President, the Supreme Court of the United States 

upheld the validity of a Joint Resolution of Congress 6 empow-

ering the President to prohibit the sale in the United States of arms 

and munitions of war to countries engaged in armed conflict in 

the Chaco.7 The opinion of the Court, written by Mr. Justice 

Sutherland, with only Mr. Justice McReynolds dissenting, stated 

that the President in making the proclamation 7a acted not only 

within the authority vested in him by the joint resolution but 

also by reason of his plenary and exclusive power as the sole 

organ of the Federal Government in the field of international re-

lations. The Court differentiated between the conduct of domestic 

and foreign affairs, and held that as applied to foreign affairs 

the resolution was not an unconstitutional delegation of power 

to the President, and that in the conduct of international rea-

tions congressional legislation must often accord to the chief ex-

ecutive of the nation a degree of discretion and freedom from 

statutory restriction which would not be admissible were domes-

tic affairs alone involved.

3 Clark Distilling Co. v. Western Maryland Railway Co., 242 U. S. 311 

(1917).


(Supp. 1936).


7 United States v. Curtiss-Wright Export Corporation, No. 98, Oct. Term, 

1936, decided December 21, 1936.

7a 48 Stat. 1744 (1934).
Public Utilities—Effect of State Rate Regulation when Fixed by Contract

The Missouri Public Service Commission Law, as construed by the state supreme court to empower the commission to fix rates abrogating existing contract rates, was held by the Supreme Court in Midland Realty Co. v. Kansas City not to be unconstitutional, as so construed, either on the ground of impairment of the obligation of contracts or that it authorized the taking of property without due process of law. Through Mr. Justice Butler, the Court reasserted the doctrine that a state has the power to annul and supersede rates previously established by contracts between utilities and their customers.

Mortgages—Deficiency Judgments—Impairment of Obligation of Contracts

A statute of the State of North Carolina providing that when the "holder of a mortagor's obligation" secured by a deed of trust becomes the "purchaser" of the property under a power of sale contained in the mortgage or deed of trust and then sues the mortgagor for any deficiency on the obligation, the mortgagor may show as an offset the fair value of the property at the time and place of sale and thus defeat the claim in whole or in part, was under consideration by the Court in Richmond Mortgage and Loan Corporation v. Wachovia Bank and Trust Co. It was contended by the mortgagee-purchaser in the case that the statute violated the Federal Constitutional clause against impairment of the obligation of contracts since the deed of trust in question was executed prior to the passage of the law. Mr. Justice Roberts, who delivered the opinion of the Court, in upholding the validity of the statute, declared that a state may not, of course, deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right of a creditor, but there may be a complete abrogation of a remedy existing at the date of the contract if there remains another

8 R. S. 1929, c. 33, § § 5121-5145, 5190 (12), 5209.
9 No. 217, Oct. Term, 1936, decided February 1, 1937.
11 N. C. CODE ANN. (Michie, 1935) § 2593 (d).
13 U. S. CONST. Art I, § 10.
equally effective for the enforcement of the obligation or if there is substituted another of like force or effectiveness. The statute in dispute was found not to fall beyond the boundary of permissible regulation of the remedy for enforcement of the contract. The opinion stated that the mortgage contract contemplated that the lender should make itself whole, if necessary, out of the security, but not that it should be enriched at the expense of the borrower or realize more than would repay the loan with interest. It was pointed out that, in addition to the trustee’s sale, there was at the time of the contract the right on the part of the mortgagor to proceed in equity to foreclose the security, and the chancellor there could set aside a sale if the price bid was inadequate, or render a money decree for the difference in the sale price and the amount of the indebtedness, and his decree would be governed by well understood principles of equity. It was added that “The procedure to foreclose in equity is, and has been, the classical method of realization upon mortgage security and has always been understood to be fair to both parties to the contract and to afford an adequate remedy to the mortgagor. If, therefore, the legislature of the state had elected altogether to abolish the remedy by trustee’s sale we could not say that it had not left the mortgagor an adequate remedy for the enforcement of his contract.”

_Municipal Corporations—Regulation of Weights and Measures_

In _Hague v. Chicago_, it was contended that an ordinance of the City of Chicago requiring merchandise sold by weight and delivered in trucks or other vehicles to be weighed and certified by a public weighmaster violated the Fourteenth Amendment to the Federal Constitution. The reason given was that it unreasonably required the rehandling of coal after it had been previously weighed at the mines upon state-tested scales. The petitioner delivered coal directly from the mines to homes in the city. The ordinance was upheld as a proper regulation, the Court indicating that, between the mine and the consumer’s home, there was ample opportunity for manipulation and the public welfare warranted such a regulation.

_Bankruptcy—Corporate Reorganization Proceedings_

In an opinion delivered by Mr. Justice Roberts, the Supreme Court held in _City Bank Farmers Trust Co. v. Irving Trust Co._

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14 No. 175, Oct. Term, 1936, decided January 4, 1937.
that a landlord, in proceedings for the reorganization of a corporation under Section 77B of the Bankruptcy Act, has an allowable claim for damages which may result from the rejection of a lease by the trustee in bankruptcy of the corporation in proceedings pending prior to the institution of the reorganization proceedings. Under the change effected by Section 77B, providing for corporate reorganization, it was held that the provability of the claim is unaffected by any termination of the leasehold subsequent to rejection of the lease, and creates a claim provable in a reorganization proceeding for injury due to a trustee's rejection, thus granting a remedy for the loss of future rents due to supervening bankruptcy and subsequent rejection of the lease.

Constitutional Law—Criminal Syndicalism

The rights of free speech and of peaceable assembly, guaranteed by the Federal Constitution against abridgement by the states, were upheld by the Supreme Court of the United States in De Jonge v. Oregon. The so-called Criminal Syndicalism Law of the State of Oregon was held to be unconstitutional in so far as it denounces as a crime the assisting in the carrying on of a meeting at which criminal syndicalism is not advocated, as therein defined, though the meeting was held under the auspices of a communistic organization which does endorse criminal syndicalism. The statute defines criminal syndicalism as "the doctrine which advocates crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution", and describes a number of offenses, including the presiding at, or the assisting in the conduct of a meeting of an organization advocating criminal syndicalism as so defined. The Court declared, through Mr. Chief Justic Hughes, that the petitioner was within his rights in assisting in the conduct of a meeting held for the purpose of protesting against certain illegal police raids then being made in the City of Portland on the homes and halls of workers and against the shooting of striking longshoremen by the police. The conviction of De Jonge for criminal syndicalism simply as a re-

17 U. S. CONST. Amendment XIV.
result of his membership in the Communist Party, regardless of what was said or done at the meeting promoted by that group, was held to be erroneous. It was pointed out that under such a doctrine De Jonge would be equally guilty if the Communist Party had called a local public meeting to discuss the tariff, or relief, or foreign affairs, or other entirely innocent matters.

"While the states are entitled to protect themselves from the abuse of the privileges of our institutions through an attempted substitution of force and violence in the place of peaceful political action in order to effect revolutionary changes in government ", the opinion reads, "none of the decisions of the Supreme Court go to the length of sustaining such a curtailment of the right of free speech and assembly as the Oregon statute demands in its present application." Though the rights of free speech and assembly may be abused by inciting violence and crime, and the people through their legislatures may protect themselves against such abuse, "the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. . . . The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects."

Insurance—Cancellation of Policy—Jurisdiction in Equity

In American Life Insurance Co. v. Stewart, 20 a case involving a fraudulent misstatement as to the insured's health, the policy containing a two-year incontestability clause, and the insured dying within the first year, it was held by the Supreme Court, in an opinion delivered by Mr. Justice Cardozo, that the insurance company was entitled to seek relief in a Federal court of equity by a decree cancelling the policy, though the period of contestability would not become absolute for a year and a half after

20 No. 440, Oct. Term, 1936, decided February 1, 1937.
the commencement of the suit. The company was not required to postpone the commencement of the proceedings until immediately prior to the expiration of the period on the theory that the fraud would constitute a defense in an action at law upon the policy instituted within such period. The remedy at law was not considered to be adequate, since it did not exist except at the pleasure of an adversary. A remedy at law does not exclude one in equity, it was asserted, unless such legal remedy is equally prompt and certain and in other ways efficient. And the fact that an action at law on the policy was "filed" within the period of contestability does not prevent a decree in equity, as equitable jurisdiction existing at the filing of a bill is not destroyed because an apparently adequate remedy may become available thereafter.

Federal Taxation—Tobacco Sold to State Institution

Tobacco sold by a manufacturer to the Commonwealth of Massachusetts for distribution without charge to the patients in a state-owned hospital was held to be subject to the tobacco stamp tax imposed by Section 401(a) of the Federal Revenue Act of 1926. In the opinion, written by Mr. Justice McReynolds, the Court sustained the contention of the Government to the effect that the tax was not upon the sale but rather upon the manufacture of the tobacco with the duty of payment postponed until removal or sale, whichever first occurred; consequently there was no direct burden placed upon the state, the effect being incidental, indirect, and permissible.

Constitutional Law—Production Regulation of Oil and Gas

Under consideration in Thompson v. Consolidated Gas Utilities Corporation were certain orders of the Railroad Commission of Texas made under authority of a statute relating to the production of natural gas for the avoidance of underground waste. The Court, speaking through Mr. Justice Brandeis, held the orders to be unconstitutional as to producers who operate their own pipe lines and are prevented by such orders from producing a sufficient amount of gas to meet their market requirements under existing contracts and are required thus to purchase gas

23 No. 89, Oct. Term, 1936, decided February 1, 1937.
from other producers who have no pipe lines and who can produce, under the orders, more gas than they can market. The operations of the producers owning pipe lines were neither causing nor threatening any overground or underground waste, it was disclosed. The sole purpose of the limitation on production was to compel those who may legally produce, because they have market outlets for permitted uses, to purchase gas from potential producers whom the statute prohibits from producing unless they secure a market for their possible product. It was stated that the use of the pipe line owner's wells and reserves was curtailed solely for the benefit of other private well owners. The pipe line owner was, by the orders, in effect, ordered to pay money to another private well owner for the purchase of gas which he had no wish to buy. Moreover, the pipe line owner is prevented from protecting himself, to the extent that he is able to market his gas, against the losses occurring as a result of the drainage from the high pressure area, wherein the plaintiff's wells are located, to the existing low pressure areas, in which are located the majority of the wells not connected to pipe lines. "There is here no taking for the public benefit; nor is payment of compensation provided. . . . Our law reports present no more glaring instance of the taking of one man's property and giving it to another."

Constitutional Law—Railroads—Fee for Expenses of Regulation by State

One of the outstanding cases decided by the Court during its present term is that of Great Northern Railway Co. v. Washington.25 The validity of a statute of the State of Washington,26 imposing upon all public utilities subject to its regulation an annual fee to defray expenses of regulation and inspection, was questioned by an interstate railroad on the theory that since all collections go into a single fund and are disbursed indiscriminately for the support of the many branches of the enforcing department that the amounts derived from the railroads are in excess of the legitimate expenses of their inspection and regulation. In the majority opinion, delivered by Mr. Justice Roberts with the concurrence of four other members of the Court, it was said that this fact of general collection and indiscriminate disbursement does not of itself prove that the amounts obtained from

25 No. 20, Oct. Term, 1936, decided February 1, 1937.
the railroads are in excess of the legitimate expenses of inspection and regulation. The statute then is not, on its face, unconstitutional as to interstate railroads on the ground that the amount of the exaction is unreasonable because disproportionate to the expense of supervision and regulation of railroads. It was declared, however, that while a state is at liberty to intermingle fees involving costs properly chargeable to railroads, with others involving costs not so chargeable, if it does so, and the exaction is challenged, it must assume the burden of showing that the sums so exacted do not exceed what is reasonably needed for the service rendered. The decision of the state supreme court upholding the validity of the statute was reversed and remanded for further proceedings to determine whether the railroads were subjected to an unreasonably excessive charge for inspection and regulation with the direction that the burden rests upon the state to prove that in the operation of the statute it is not unreasonable, in view of the fact that some part of the exaction is to be used for a purpose other than the legitimate one of supervision and regulation.

In the dissent to the majority holding, Mr. Justice Cardozo was of the opinion that when the state is acting well within the field of legislation where entry is not forbidden by the Constitution, there is every presumption of validity back of such a statute. Thus the burden of making good a claim of invalidity is on the assailants of the statute and not on the state. There must be a showing of an overpayment not merely possible but actual, and one substantial in amount. To hold otherwise would be to go counter to the settled rule that "one who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him". 27

Federal Taxation—Silver Purchase Act—Retroactive Operation

In United States v. Hudson, 28 it was held that Section 8 of the Silver Purchase Act of 1934, 29 which provides for the taxation of transfers of interest in silver bullion where the transfer yields a profit over the cost and allowed expenses, and which subjects to the tax transfers made within 35 days of the date of the statute, is not, in its retroactive operation, violative of the due process clause of the Fifth Amendment to the Constitution. The conten-

tion of the Government which was sustained was that the tax is a special income tax and that the Court has long recognized and declared it to be within the power of Congress to make income tax statutes retroactive for reasonable periods.

**Taxation—State—Stock Exchange Seat**

A New York statute, a taxing the profits realized upon the sale of a right appurtenant to membership in the New York Stock Exchange, was held by the Supreme Court of the United States to be constitutional in *Whitney v. Graves*, although the individual contesting the validity of the tax was a resident of Massachusetts and transacted no business on the floor of the Exchange, all buying and selling being handled for him through other members. In the opinion, delivered by Mr. Chief Justice Hughes, the tax was said not to be void on the theory that membership on the Stock Exchange is intangible personal property without a taxable situs in New York, and thus taxable only at the domicile of the owner. The dominant attribute of the membership was said to be so linked with the situs of the Exchange, however, so as to localize it within the taxing power of the State of New York.

**Federal Reserve Banks—Making False Entries**

In *United States v. Giles*, a bank teller who, to cover a shortage in his cash, deliberately withheld deposit slips from the bookkeeper, thus causing false entries in the books of a federal reserve member bank, was held to come within the meaning of Section 5209, Revised Statutes, as amended, which declares such an act to be a misdemeanor. In the opinion, written by Mr. Justice McReynolds, it was declared that the rule that criminal statutes must be strictly construed does not require the words of an enactment to be given their narrowest meaning. To hold the words of the statute, "makes any false entry", to be broad enough to include deliberate action from which a false entry by an ignorant intermediary necessarily follows, gives the words employed their fair meaning. To hold that it applies only when the accused

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32 See Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930); First National Bank v. Maine, 284 U. S. 312 (1932); Wheeling Steel Corporation v. Fox, 298 U. S. 193 (1936).
person writes the false entry or affirmatively directs another so to do would emasculate the statute. It was said that Congress was not seeking to punish the innocent bookkeeper who copies items into the records as part of his daily task, but the officers who conceive and carry out the fraudulent scheme which the false entry is designed to conceal. It is wholly immaterial whether such officer acts through a pen or a clerk controlled by him.

State Tax on Income of Employee of Federal Instrumentality

Although the Panama Rail Road Company, a wholly-owned instrumentality of the Federal Government, engaged in maintaining, operating and protecting the Panama Canal, accepts private freight and carries passengers, and operates a dairy and an hotel, nevertheless, it was held in Rogers v. Graves that its operations were so essential to the functions of the Panama Canal as to possess the same immunity which the canal enjoys as an instrumentality of the Government. The Court, speaking through Mr. Justice Sutherland, held that it necessarily results that compensation paid to its officers and employees in their capacity as such are likewise immune, and in this instance that the salary of the general counsel of the Panama Rail Road Company is not subject to taxation by the State of New York.

R.McM.

AVAILING THEMSELVES of the opportunities afforded by the recent decision of the Supreme Court in the prison-made goods case, members of Congress have lost no time in drafting legislation patterned after the Ashurst-Sumners Act with the regulation of goods produced by child labor as its objective.

* Written February 20, 1936.


There are now pending before the 1st Session of the 75th Congress several bills, originating in both the House of Representatives and the Senate, which are intended as partial cures in the cause of federal regulation of the child labor situation. This paper specifically refers to a bill introduced in the Senate by Mr. Clark (of Missouri) on January 11, 1937 (S. 592), and a companion bill, containing identical language, introduced in the House by Mr. Connery (of Massachusetts) on January 12, 1937 (H. R. 2685). This has been deemed advisable in view of the fact that the language of both bills most nearly corresponds to that employed in the Hawes-Cooper Act, 45 Stat. 1084 (1929), 49 U. S. C. A. § 60 (Supp. 1936), and the Ashurst-Sumners Act, 49 Stat. 494 (1935), 49 U. S. C. A. §§ 61-64 (Supp. 1936), differing only with respect to the commodity regulated. The bill sponsored by Mr. Clark has been referred to the Senate Committee on Education and Labor, and that of Mr. Connery to the House Committee on Labor. A report concerning the bills, at the time of this writing, has not been submitted to the respective houses. The bill reads as follows:

"A BILL

"To Regulate Interstate Commerce in Goods, Wares, and Merchandise Manufactured, Produced, or Mined by Persons under Years of Age, and for Other Purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all goods, wares, and merchandise manufactured, produced, or mined, wholly or in part, by persons under years of age, transported into any State or Territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise.

"Sec. 2. That it shall be unlawful for any person knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods, wares, and merchandise manufactured, produced, or mined
The proposed legislation seeks to ameliorate conditions caused by child labor by first divesting the products produced by such labor of their interstate character, whether in their original package or not, so that they may be controlled by the laws of the wholly or in part by persons under years of age from one State, Territory, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof into any State, Territory, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, where said goods, wares, and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof.

"Sec. 3. All packages containing any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by persons under years of age when shipped or transported in interstate commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the plant, factory, or other establishment where produced wholly or in part may be readily ascertained on an inspection of the outside of such package.

"Sec. 4. Any person violating any provision of this Act shall for each offense, upon conviction thereof, be punished by a fine of not more than $1,000, and such goods, wares, and merchandise shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for seizure and forfeiture of property imported into the United States contrary to law.

"Sec. 5. Any violation of this Act shall be prosecuted in any court having jurisdiction of crime within the district or territory in which said violation was committed, or from or into which any such goods, wares, or merchandise may have been carried or transported contrary to the provisions of this Act."

On January 12, 1937, Mr. Capper (of Kansas) introduced in the Senate of the United States a bill (S. 668) "To divest the products of child labor of their interstate character and to prohibit the interstate transportation of such products in certain cases, and for other purposes." This bill omits any reference to an age designation by Congress by reason of the fact that if the laws of the state are to govern the regulation, the age limit specified by such state should be controlling. Section 3 of this bill defines the term "child labor". Section 4 also differs from the aforementioned bills by taking the precaution to stipulate that: "If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby." Section 5 states that the Act shall take effect three years after the date of its enactment. This bill has been referred to the Senate Committee on the Judiciary.

Another bill (H. R. 2883) was introduced in the House of Representatives on January 13, 1937, by Mr. Culkin (of New York). This bill embodies substantially the provisions of the Clark and Connealy bills with the exception that it omits any mention of Section 1 relating to divestiture of goods of their
state of importation; and secondly, by making it unlawful for any person knowingly to transport or to cause to be transported merchandise produced by child labor to any state the laws of which prohibit such manufacture.

interstate character upon arrival in the state of consignment. It also designates 18 years as the minimum age requirement for exemption from its operation. Otherwise its provisions are analogous. The above bill has been referred to the House Committee on Labor.

A similar bill (H. R. 2499) was introduced in the House of Representatives on January 11, 1937, by Mr. Wigglesworth (of Massachusetts). This bill is essentially the duplicate of the Culkin bill with the exception that the age limit designated is 16 years instead of 18. This bill has also been referred to the House Committee on Labor.

No attempt is made in this paper to consider legislation proposed prior to the 75th Congress for the reason that only by the recent prison-made goods decision has any legal encouragement been offered by the United States Supreme Court. That decision, as has been mentioned, has stimulated the renewed interest manifest by Congress in the field of child labor regulation by federal statute.

Mrs. Rogers (of Massachusetts) on January 22, 1937, introduced in the House of Representatives a bill (H. R. 3475) seeking to provide a census to determine the extent of child labor in the United States. This bill may be viewed as complementary to the foregoing bills in endeavoring to provide members of Congress with an adequate picture of the child labor situation as it exists in the several states today. This bill has been referred to the House Committee on the Census.

In connection herewith a report prepared by the Children's Bureau of the United States Department of Labor ("State Child Labor Standards", U. S. Dept. of Labor, 1936), relative to child labor standards and compulsory school attendance standards throughout the several states, is of interest. The report provides a summary of the main provisions of the several state laws and regulations governing the employment of minors. For the most part the minimum age limit is 14 years, with some states specifying higher age limits for hazardous employment. The age limit is also generally 16 years for work to be performed at night. Information also indicates an increase in the employment of children in industry in the last year.

The answer to the low age level existing in a great majority of the states indicates that states hesitate to raise these age limits in their own acts regulating employment of children because other states might profit by the competitive advantage of using cheap child labor. This is strongly demonstrated by reason of the fact that twelve states today permit children under 14 to be employed during school hours in non-agricultural and non-domestic occupations, while eight states permit children under 14 to work in factories. It may also be stated that eleven states permit children under 16 years to be employed in dangerous occupations and thirty-two states have no laws protecting children between the ages of 16 and 17 years from hazardous jobs in industry. See in this connection 81 Cong. Rec., February 1, 1937, at 765.

* § 1 of S. 592, supra n. 3.
* § 2 of S. 592, supra n. 3
The power of Congress to remove the impediment to state control presented by the unbroken-package doctrine may legitimately be said to have always existed, but it remained for court decisions adequately to clarify the distinction between former federal regulation of child labor and that proposed at the present time. A resurrection of federal attempts to regulate this all-important problem seems to have been inspired by the prison-made goods decision. The problems respecting control of merchandise produced by convict labor are so closely akin to the task of regulating goods produced by child labor that the remedy constitutionally applicable to the former may be efficaciously pursued with respect to the latter. This similarity induces a retrospective review of federal regulation heretofore attempted relative to the important problem of child labor.

In 1912 the Federal Children's Bureau was established and directed by Congress to investigate and report upon all matters pertaining to the welfare of children, including all phases of child employment. Pursuant to the findings of this Bureau and a previous report by the Department of Labor, Congress, in September 1916, passed the Keating-Owen bill. By the terms of this bill it was made unlawful to ship in interstate commerce any articles (with certain exceptions) produced in mines, quarries, factories, canneries, or work shops in which children were employed in violation of specified age and hour standards. The Supreme Court of the United States subsequently held the law unconstitutional as an attempt by Congress to regulate the internal affairs of the states rather than an effort to control interstate commerce. Mr. Justice Day, speaking for the majority in *Hammer v. Dagenhart*, declared:

"In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely State authority. Thus the Act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the Federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the

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8 247 U. S. 251, 276 (1918).
movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed."

This decision made it quite clear that the power of Congress to regulate interstate commerce could not be invoked to control the states in their exercise of the police power over local trade and manufacture.

The next effort to control child labor by the Federal Government occurred in 1919 when an act of Congress 9 provided for a levy of a ten per cent tax on the annual net profits of any establishment employing children contrary to the provisions of the act. This act was declared unconstitutional by the Supreme Court on the ground that the levy was not a tax, as it purported to be, but a penalty.10 This patent attempt to regulate had already been held invalid in *Hammer* v. *Dagenhart*, and the court held that the same thing could not be accomplished by calling the penalty a tax.11

With these two decisions of the Supreme Court before it, Congress turned its attention to the proposal of an amendment to the Constitution giving it the desired power over the evils attendant upon employment of child labor. In the Sixty-eighth Congress, by action of the House of Representatives on April 26, 1924, and the Senate on June 2, 1924, there was submitted to the legislatures of the several states a constitutional amendment providing as follows:

"Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under 18 years of age.

"Section 2. The power of the several states is unimpaired by this article except that the operation of state laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress." 12

Over twelve years have elapsed since the submission of this amendment to the state legislatures. During this period 27 states

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11 "Where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another." Id. at 804. See discussion of the "child-labor cases" in THE SOCIAL SECURITY ACT AND THE CONSTITUTION, Legis. (1936) 24 GEORGETOWN LAW JOURNAL 665.
have ratified the amendment.\textsuperscript{13} But the proposed amendment has received unfavorable action in nineteen of the remaining states.\textsuperscript{14} However, if nine more states decide to ratify the proposed amendment (and this does not appear unreasonable at the present time), it seems highly probable that the amendment will become a part of the Constitution, although contentions to the contrary have been advanced.\textsuperscript{15}

\textsuperscript{13} The following states have ratified the amendment: Arizona, on January 29, 1925; Arkansas, on June 28, 1924; California, on January 8, 1925; Colorado, on April 28, 1931; Idaho, on February 7, 1935; Illinois, on June 30, 1933; Indiana, on February 8, 1935; Iowa, on December 5, 1935; Kentucky, on January 13, 1937; Maine, on December 16, 1933; Michigan, on May 10, 1933; Minnesota, on December 14, 1933; Montana, on February 11, 1927; New Hampshire, on May 17, 1935; New Jersey, on June 12, 1933; New Mexico, on February 11, 1937; Nevada, on January 27, 1937; North Dakota, on March 4, 1933; Ohio, on March 22, 1933; Oklahoma, on July 5, 1933; Oregon, on January 31, 1933; Pennsylvania, on December 21, 1933; Utah, on February 5, 1935; Washington, on February 3, 1933; West Virginia, on December 12, 1933; Wisconsin, on February 25, 1925; Wyoming, on February 1, 1935. Dept. of State, Press Release, Pub. No. 728, April 20, 1935, at 249-251.

\textsuperscript{14} In the following states the proposed amendment has been rejected by one or both of their houses: Connecticut, Delaware, Florida, Georgia, Kansas, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New York, North Carolina, South Carolina, South Dakota, Tennessee, Texas, Vermont, and Virginia. In Alabama and Rhode Island no definite action has been taken.

\textsuperscript{15} See recent report of a special committee of the American Bar Association contained in 79 Cong. Rec. 1737 (1935). The report undertakes to declare the proposed amendment dead because of the lapse of time since its reference to the several states, and also because of adverse action taken at one time or another by certain state legislatures. It is thought desirable to consider the contention that the proposed amendment is no longer open for ratification.

If we look to the Constitution we find no express provision with respect to a limitation of time for ratification. The power to amend the Constitution and the method of doing so are set out in Article V, which reads: "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments of this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of equal suffrage in the Senate."

It will be seen that Article V contains no provision relative to the time of ratification. However, this does not imply a limitless period. In Dillon v.
In order that we may properly consider the question of the constitutionality of the proposed act, it is first necessary to examine the grounds upon which the previous acts have been declared unconstitutional.

Gloss, 256 U. S. 368 (1921), the limitation clause of 7 years, inserted with the submission of the eighteenth amendment, was seized upon by one convicted under the National Prohibition Act as an invalidating feature of the amendment. Mr. Justice Van Devanter, speaking for an unanimous Court, stated at page 375 of the reported opinion: "We conclude that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal."

Quoting from Judge Jameson, the rationale behind this fair implication exists in the fact that "an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress". JAMESON, CONSTITUTIONAL CONVENTIONS (4th ed. 1877) § 585.

Mr. Justice Van Devanter further pointed out, at page 376 of the Dillon opinion, that the Court entertained no doubt as to the power of Congress, keeping within reasonable limits, to fix a definite period for ratification: "As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and Article V, is no exception to the rule. Whether a definite period for ratification shall be fixed so that all may know what it is, and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified."

From the opinion in this case we must admit that a proposed amendment is not open to ratification indefinitely, but must be acted upon within a reasonable time if the ratification is to be valid. What is a "reasonable time" is, of course, a matter of speculation, chiefly dependent, no doubt, upon the circumstances surrounding the proposed amendment. The problem of how long a reasonable time can be is made more predictable if it is remembered that neither laws nor amendment are unconstitutional per se, but are only declared so to be. Such invalidation is a duty "of great delicacy", and only to be performed where the repugnancy is clear and the conflict irreconcilable. Courts have several times expressed their deep reluctance to hold unconstitutional an act of Congress or of a state legislature. Mayor v. Cooper, 6 Wall. 247, 251 (U. S. 1867); Aiken v. Kansas, 191 U. S. 207, 223 (1903); Williams v. Mayor, 289 U. S. 36, 42 (1933).

With respect to the objection of "prior rejection" invalidating subsequent ratification the question seems to have been fairly settled to the contrary. In West Virginia, despite Senate rules of procedure which forbade reconsideration of a measure during the session in which it was defeated, the Senate ratified the proposed nineteenth amendment subsequent to an earlier rejection in the same session. The Supreme Court, in Leser v. Garnett, 258 U. S. 130 (1922), refused to look behind the certification of the Secretary of
The pivotal question relates to the survivability of the proposed act when compared with the conclusions reached by the Court in its consideration of the Keating-Owen Act in the Dagenhart decision. As has been mentioned, the Court viewed the regulation attempted by the aforesaid bill, not as a regulation of commerce warranted by the commerce clause, but as a regulation of the business of production and manufacture and, as such, an unauthorized attempt by Congress to regulate the internal affairs of the state. The decision makes it quite plain that the Court did not recognize the power of Congress to exclude articles from interstate commerce as a plenary power. The grounds upon which the exclusion rest are very material in the consideration of the constitutionality of the attempted regulation. In the Dagenhart decision the Court referred to other instances in which Congress had successfully excluded commodities from interstate commerce, and pointed out that in each of those instances the use of interstate commerce had been necessary to the accomplishment of harmful results. A long line of decisions recognizes the fact that regulation of certain articles and practices can only be accomplished by complete prohibition of the use of interstate commerce to transport such goods or to facilitate such practices. It is necessary to distinguish between regulation which involves an absolute prohibition of transportation in interstate commerce and that which involves prohibition only in part—that is, prohibition of interstate transportation into those states whose laws forbid the manufacture or sale of the articles prohibited. Instances of complete prohibition may be found in several cases, in which the validity of such measures was pointed out.¹⁶ In The Lottery Case (Champion v. Ames)¹⁷ the Court upheld the validity of the State, or to allow him to look behind the official notices sent him. It said at page 137 of the opinion: "As the Legislatures of Tennessee and of West Virginia had power to adopt the resolution of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him, and being certified to by his proclamation, is conclusive on the courts."

This decision by the Supreme Court may well be advanced as a complete foreclosure to any challenge to the validity of subsequent ratifications following prior rejections.

In the light of the foregoing, we must necessarily view the proposed constitutional amendment as at best a suspended measure dependent upon the will of 36 state legislatures for a practical solution of the difficulties presented by child labor.

¹⁶ It is perhaps interesting to note that the Keating-Owen Act, declared invalid by the Supreme Court in Hammer v. Dagenhart, is the only instance in which a statute within the category of complete prohibition has been declared unconstitutional.

¹⁷ 188 U. S. 321 (1903).
Act of March 2, 1895,\textsuperscript{18} prohibiting the use of the channels of interstate commerce for transportation of "any paper, certificate or instrument" purporting to be or represent a lottery ticket. In the course of the opinion the Court stated:

"We are of the opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce. . . . If lottery traffic, carried on through interstate commerce, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the states, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the states. . . . We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end."\textsuperscript{19}

It is noted that the Court did not base its decision upon the ground that the "paper, certificate, or instrument" was inherently harmful. The conclusion rather was predicated on the fact that many states had recognized the evils inherent in lotteries and had prohibited their drawing, sale, or circulation, and that therefore the federal regulation only supplemented the already existing state legislation.

In the case of \textit{Hippolite Egg Co. v. United States},\textsuperscript{20} the Court held it to be within the regulatory power of Congress to prohibit the transportation in interstate commerce of adulterated or misbranded articles of food.\textsuperscript{21} This legislation also simply supplemented and aided similar state prohibitions with respect to such articles.

In \textit{Hoke v. United States},\textsuperscript{22} the Court sustained the constitutionality of the \textit{White Slave Act},\textsuperscript{23} whereby the transportation in interstate commerce of any woman or girl for the purpose of prostitution or debauchery or other immoral purpose was forbidden. The constitutionality of the act was challenged on the ground that it is the right and privilege of a person to move from state to state, and the motive or intention of one so moving, or of one aiding or inducing such moving, either before, during,
or after completing the journey, is not a matter of interstate commerce. The Court replied, at page 322:

"... it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions; and surely, if the facility of interstate commerce can be taken away from the demoralization of lotteries, the debasement of obscene literature,\textsuperscript{24} the contagion of diseased cattle or persons,\textsuperscript{25} the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls."

The Court further stated that it fully recognized that a power existed in the states to control the morals of its citizens, even to the extent of making prostitution a crime. But the Court further recognized that such control could be exercised only within the jurisdictional confines of the individual state. It remained therefore for Congress to render that power effective by exercising its control over that domain which the states could not reach.

Such regulation, far from encroaching upon state sovereignty, actually supplements and aids it by concurrent action.\textsuperscript{26}

In \textit{Brooks v. United States},\textsuperscript{27} the "National Motor Vehicle Theft Act"\textsuperscript{28} was held constitutional upon the authority of the cases upholding the exclusion of lottery tickets, misbranded and adulterated foods, etc. The Court said:

"Congress can certainly regulate interstate commerce to the extent of forbidding andpunishing the use of such commerce as an agency to

\textsuperscript{26} In \textit{Caminetti v. United States}, 242 U. S. 470 (1917), the Court held the transportation of a woman for an immoral purpose to be within the purview of the White Slave Act even though no pecuniary element had been involved. It stated that "the transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question". \textit{Id.} at 491.
\textsuperscript{27} 267 U. S. 432 (1925).
\textsuperscript{28} 41 STAT. 324 (1919), 18 U. S. C. A. § 408 (1926).

The federal kidnapping act, 47 STAT. 326 (1932), subserves a similar object in aiding in the protection of the personal liberty of one who has been unlawfully seized or carried away. The amending Act of May 18, 1934, 48 STAT. 781 (1934), 18 U. S. C. A. § 408 a, b (Supp. 1936), enlarged the scope of this Act by nullifying the requirement of detention for "some pecuniary consideration or payment of something of value". The constitutionality of this Act was sustained in \textit{Gooch v. United States}, 297 U. S. 124 (1936).
promote immorality, dishonesty, or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce.”

The Court went on to point out that the use of interstate commerce as an aid to removing stolen automobiles from one jurisdiction to another was a gross misuse of that commerce and was fully susceptible of federal control.

In all of these cases the use of interstate commerce was necessary to the accomplishment of harmful results. The exceptional nature of the subject-matter, or the effect the business of dealing in such articles had on the public welfare, afforded the basis for federal regulation. In each of these cases, the subject of the regulation retains, while moving in commerce, and at its commercial terminus, the inherent capacity to further the evil. And it was the absence of that very feature in goods produced by child labor which caused the Court in the Dagenhart case to deny the power of Congress to regulate such goods and, by so doing, to regulate a condition which was subject to state control alone. The Court refused to allow the claim of unfair competition to operate as a basis for federal regulation, and definitely stated that neither the articles themselves, nor the business of dealing in such articles, were inimical to the general welfare, material or moral. It is significant to note, however, that in this case the Court, far from holding child labor to be no evil, was willing to concede the point, but went on to emphasize the fact that the evil was connected not with the business of dealing in goods produced by child labor, but in the production stage of those goods—a stage outside the regulatory scope of Congress.

Federal statutes which involve prohibition only in part take into consideration variations in state laws and are responsive to such laws by enacting regulations as supplemental aids to their

29 Here the Court is demonstrating that the automobile is not in itself inherently harmful or noxious, but is merely the instrument by which the evil sought to be abated is accomplished.


30 The Court, in Weber v. Freed, 239 U. S. 325 (1915), held that Congress had the right to prohibit the importation or transportation from one state to another of prize fight films designed to be used for the purpose of public exhibition. The regulation here was sustained not on the ground that a prize fight film is in itself harmful, but rather on the ground of aiding in the enforcement of the laws of those states which believe such films to be demoralizing to the peace and good order of the state. This absolute prohibition was sustained as a valid exercise of the power of Congress to regulate commerce among the states.
enforcement. Such statutes are more material to our consideration than those of absolute prohibition in view of the fact that the proposed child labor act is of that category. In this way it differs essentially from the Keating-Owen Act\footnote{30} which provided for absolute prohibition of the transportation of child labor made goods.

An adequate judgment of the constitutionality of the present bill can best be ascertained by a consideration of the Wilson\footnote{31} and Webb-Kenyon\footnote{32} Acts, respecting former liquor regulation, and the Hawes-Cooper,\footnote{33} and Ashurst-Sumners\footnote{34} Acts, regulating the transportation of prison-made goods. All these acts involve prohibition only to the extent of validating or supplementing action by the states.\footnote{35}

By an analysis of the foregoing statutes, all of which have been upheld by the United States Supreme Court, and by a relation of their provisions to the contemplated child labor act, it is hoped the constitutional validity of the latter may be more readily perceived.

On August 8, 1890, Congress enacted the so-called Wilson Act,\footnote{36} which reads:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or Territory, or remaining therein for use,

\footnote{30} 39 Stat. 675 (1916), supra note 7.

\footnote{35} Other examples of this type of regulation are afforded by the Lacey Act, 31 Stat. 187 (1900), 18 U. S. C. A. §§ 391-395 (1926), subjecting dead bodies of game birds and game animals to the operation of the laws of the state into which they are transported, and in addition, prohibiting the transportation of such birds and animals out of any state where they had been taken or shipped in violation of the laws; the Reed Amendment, 39 Stat. 1069 (1917), 18 U. S. C. A. § 341 (1926), prohibiting carriage by United States mail of any advertisement or solicitation, by letter, postal card, circular, newspaper, pamphlet, or publication, of intoxicating liquors, for transportation into any state the laws of which prohibit such advertisement or solicitation; and the Connally Act of February 22, 1935, 49 Stat. 30 (1935), 15 U. S. C. A. § 715 (Supp. 1936), prohibiting the transportation out of any state of oil produced in violation of the state's laws.

It is markedly significant to note that in no case has the Supreme Court declared such statutes as the above invalid, for the obvious reason that they seek to aid and effectuate valid state regulation instead of coercing or interfering with that control as was the case in the Dagenhart case.

consumption, sale, or storage, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The language of the Wilson Act is almost exactly the language of the Hawes-Cooper Act, and in turn approximately the identical language of section 1 of the proposed bill.

In the case of *In re Rahrer*, the Supreme Court upheld the constitutionality of the Wilson Act. In so doing the Court stated:

"No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."

The Court also pointed out in the opinion that the Wilson Act was not an attempt to delegate the power to regulate commerce, nor to grant a power not possessed by the states, nor to adopt state laws. Congress simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition. It imparted no power to the state not already possessed, but simply allowed transported articles to be subject upon arrival to local law whether still contained in the original package or not. It may be said at this juncture that the original package doctrine is in essence nothing more than a rule of judicial convenience in determining what is and what is not interstate commerce. It is employed by courts in the absence of statutes designating the character of the articles under consideration. But the Wilson Act, and other acts following it, proclaim by statute that the control of Congress over interstate commerce shall be so exercised that after interstate transportation has taken place, goods in a state, whether in the original package or otherwise, shall be immediately subject to all local legislation in the exercise of the police power or for other purposes.

In 1929, Congress passed an act entitled "An Act to divest goods, wares and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain

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38 Set out in full, supra note 3.
39 140 U. S. 545 (1891).
39a Id. at 562.
cases". This Act is known as the Hawes-Cooper Act.\footnote{40} It provided substantially the equivalent of the Wilson Act, differing only in the subject-matter affected. By its provisions all goods, wares, and merchandise manufactured or produced by convict labor, or in any penal institution, and transported into any state and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such state be subject to the laws thereof, to the same extent and in the same manner as though such goods had been produced in such state.

The constitutionality of the Hawes-Cooper Act was upheld in the case of Whitfield v. Ohio,\footnote{41} the Court following the decision in the Rahrer case in its relation to the Wilson Act.

It is deemed advisable at this point specifically to point out that the decisions of the Supreme Court in the Rahrer case and in Whitfield v. Ohio were not based on the character of the product transported. It was not the fact that the goods were harmful or harmless that concerned the Court in these cases. The fact that liquor might be harmful and prison-made goods harmless, or the reverse, was utterly immaterial in the consideration of the acts called into question. All that was involved was the power of Congress to decide when the laws of the state should apply to goods shipped into such state. It decided that the articles manufactured should be subject to state regulation immediately upon arrival, whether in the original package or not. In other words, the Wilson and the Hawes-Cooper Acts simply stated that the characteristic of interstate commerce did not attach to the article by virtue of its still being an original package. The matter of regulation was in the hands of the state immediately upon the arrival of the goods within the state. That assertion of Congress was decided in the Rahrer case to be a competent exercise of its power to say when interstate commerce begins and terminates.

Section 1 of the proposed act embraces just such legislation with respect to goods produced by child labor. It states purely and simply that such goods shall be subject to the laws of the state to which they are consigned immediately upon arrival irrespective of whether they are introduced in the original package. The constitutionality of this section seems apparent in view of the fact that the removal of the impediment to state regulation of goods produced by child labor must be upheld for reasons akin to those which moved the Supreme Court to sustain the validity of the Wilson and Hawes-Cooper Acts.

\footnote{41} 297 U. S. 431 (1936).
A different problem is presented by a consideration of section 2 of this bill.\textsuperscript{42} In that section Congress is prohibiting the interstate transportation of child labor goods into any state where they might be sold or used in violation of the laws of such state. The character of this provision, and its validity, may best be appreciated by a consideration of the Webb-Kenyon and Ashurst-Sumners Acts.

The Webb-Kenyon Act, of March 1, 1913,\textsuperscript{43} prohibits the transportation of intoxicating liquors into states where the same are "intended to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state". The Webb-Kenyon Act was passed in view of a "loophole" that existed in the Wilson Act. That defect consisted in the fact that the "right to receive" for personal use was not affected by the Wilson Act; "such receipt and the possession following from it and the resulting right to use" remained protected by the commerce clause.\textsuperscript{44}

In the effort to prevent such interstate transportation Congress passed the Webb-Kenyon Act. Congress, in that act, asserted the power to prohibit the shipment or interstate transportation of intoxicating liquor into any state where it might be sold or used in violation of the laws of that state. This naturally raised the question as to whether Congress, in exercising the power to regulate, could absolutely prohibit. The act was upheld by the Supreme Court in Clark Distilling Company v. Western Maryland.\textsuperscript{45} In this case the language of the Act was construed to be a regulation of commerce, rather than a prohibition on that commerce. It was further pointed out by the Court that the regulation was not a delegation of power to the states. The purpose of the act was to prevent the immunity characteristic of interstate commerce from being used as a subterfuge for the purpose of transporting liquor into states contrary to their laws, thus, by indirection, setting their laws at naught. The Court further stated:

"As the power to regulate which was manifested in the Wilson Act, and that which was exerted in the Webb-Kenyon Law, are essentially identical, the one being but a larger degree of exercise of the identical power which was brought into play in the other, we are unable to under-

\textsuperscript{42} Set out in full in note 3, supra.
\textsuperscript{44} Clark Distilling Company v. Western Maryland Railroad Company, 242 U. S. 311, 323 (1917).
\textsuperscript{45} 242 U. S. 811 (1917).
stand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity..."  

With respect to the claim of delegated authority the Supreme Court said:

"The argument as to delegation to the States rests upon a mere misconception. It is true that the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibition to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply."  

The language used in Section 1 of the Ashurst-Sumners Act is identical with that employed in the Webb-Kenyon Act, with the exception of the commodity. That section prohibits the transportation of prison-made goods into states where the same are "intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise", in violation of any law of such state.

The recent case, Kentucky Whip and Collar Company v. Illinois Central Railroad Company, sustained the constitutionality of the Ashurst-Sumners Act. It is apparent, from a reading of this case, that although the subject of the prohibited traffic and its effect differ from the Webb-Kenyon Act, the underlying principle is the same, and is therefore controlled by similar considerations. That principle is based upon the fact that the character of prison-made goods is such that the states in the exercise of their police power have an inherent right to legislate to prevent their competition with free labor. Such regulation proceeds upon the view "that free labor, properly compensated, cannot compete successfully with enforced and unpaid or underpaid convict labor of the prison". Where such regulation may be constitutionally exerted by the state, Congress may so interdict interstate commerce as to prevent its use to frustrate the successful prosecution of that state regulation. As Mr. Chief Justice Hughes states in the Kentucky Whip and Collar case:

"The pertinent point is that where the subject of commerce is one as to which the power of the State may constitutionally be exerted by restriction or prohibition in order to prevent harmful consequences, the Congress may, if it sees fit, put forth its power to regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of the State policy."  

45a Id. at 330.
45b Id. at 326.
47 Id. 81 L. ed. 188.
48 Ibid.
A clear distinction exists between the Keating-Owen Act, declared unconstitutional in the *Dagenhart case*, and the proposed legislation under consideration here. The Keating-Owen Act was declared invalid on the ground that the *absolute prohibition* of interstate transportation of products manufactured by child labor constituted an attempt to coerce the manufacture of commodities in accordance with *regulations and standards prescribed by federal statute*, regardless of the laws regulating the labor of children in either the state of origin or destination. In other words, this law prohibited interstate commerce absolutely, *without regard to whether the resultant interstate commerce would be in accord with, or in violation of, the state laws*. Exactly the reverse situation is presented by the proposed legislation. Instead of coercing local manufacture and interfering with state regulation, Congress is proposing a law which forbids an analogous interference with local law by other states through the medium of interstate commerce. This regulation, instead of militating against state rights over local manufacture, actually operates in behalf of state sovereignty.

Section 3 of the proposed act requires child labor goods to be labeled plainly and clearly, "so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the plant, factory, or other establishment where produced, wholly or in part, may be readily ascertained on an inspection of the outside of such package".\(^{49}\)

The constitutionality of an identical provision in the Ashurst-Sumners Act requiring labeling of prison-made goods was sustained by the Court in the *Kentucky Whip and Collar case* as a reasonable and appropriate means of adequately exercising the interstate prohibition.\(^{50}\) Such labeling merely prevents misrepresentation as to the origin of goods, and prevents deceit being practiced on the public in their sale.\(^{51}\) No one has the right to rep-

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\(^{49}\) Cited *supra* note 3.

\(^{50}\) Seven Cases *v.* United States, 239 U. S. 510 (1916); see United States *v.* Freeman, 239 U. S. 117 (1915); Weeks *v.* United States, 245 U. S. 618 (1918).

\(^{51}\) In Federal Trade Commission *v.* Royal Milling Company, 288 U. S. 212, 216 (1933), the Court stated: "If consumers or dealers prefer to purchase a given article because it was made by a particular manufacturer or class of manufacturers, they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good, but having a different origin." Accord: Elgin National Watch Co. *v.* Illinois Watch Case Co., 179 U. S. 665, 674 (1901); Federal Trade Commission *v.* Algoma Lumber Company, 291 U. S. 67, 78 (1934).
resent his goods as being the goods of another. That fundamental principle is a practical force in combating the evils attendant upon unfair competition. The power to require such labeling is merely an exercise, in a lesser degree, of the power to prohibit.\textsuperscript{52}

It may be well to anticipate a possible effort to distinguish the Webb-Kenyon and Ashurst-Sumners Acts from the proposed child labor act on the ground that the regulation of liquor and prison-made goods is not comparable to the regulation of goods produced by child labor. The objection here manifestly proceeds on the assumption that although regulation of traffic in liquor and prison-made goods rests upon a valid police power basis, that of child labor does not. Such a view apparently overlooks a very important feature of the recent prison-made goods decision. The Court in the \textit{Kentucky Whip and Collar} case carefully emphasized the basis upon which the regulation, state and federal, proceeded. That valid basis of regulation consisted in the fact that "free labor, properly compensated, cannot compete successfully with enforced and unpaid or \textit{underpaid} convict labor of the prison".\textsuperscript{53} Is it not an obvious fact that child labor is employed simply because it is \textit{underpaid} in comparison with adult labor? Does this not result in producing an unfair competing basis as between the people of a state whose laws prohibit child labor and one whose laws do not? Must we not conclude, under the authority of the \textit{Kentucky Whip and Collar} case that if, in the view of the state, the sale of goods produced by child labor in competition with the products of adult labor is impairing or defeating state policy, federal regulation, which adapts its own legislation to the end of effectuating the state intention, proceeds upon the same legitimate basis? The Court definitely stated in the prison goods case that "The Congress in exercising the power confided to it by the Constitution is as free as the states to recognize the fundamental interests of free labor".\textsuperscript{54} The fact that the federal power has formulated its own policy of procedure to aid in the effectual enforcement of valid state laws affords no ground for constitutional objection.\textsuperscript{55}

Could we not legitimately go further and view the states as predicking their power to regulate the employment of children

\textsuperscript{52} Clark Distilling Company \textit{v.} Western Maryland Railroad Company, 242 U. S. 311, 331 (1917), cited \textit{supra} note 44.


\textsuperscript{54} \textit{Id.} 81 L. ed. at 189.

\textsuperscript{55} \textit{Ibid.}
not merely on the basis of unfair competition, but on the broader concept of preserving the health and morals of its young children? Is it not undeniable that the decreased health standards, increased illiteracy, and the reduced social standards that attend the employment of children, furnish a powerful incentive for state regulation to check such evils? Is it not equally undeniable that such a mode of regulation would be pursued if Congress would aid such state policy by protecting it from unfair competitive encroachments by other states? This the proposed child labor act seeks to do in accordance with the constitutionally valid precedents upon which it is based.

In the light of the foregoing, the conclusion seems inescapable that the proposed child labor legislation now under consideration is entirely within the constitutional powers of Congress.

E. J. H., Jr.
Proposed Amendments to the Social Security Act *

The Social Security Act 1 was passed in 1935 and signed by President Roosevelt on August 14th of the same year. It is the first federal Act attempting to deal specifically with the broad social problems of unemployment, unemployability and care for aged. The bill itself may be summarized as follows: first, it authorizes grants to the states for three forms of public assistance which provide financial assistance for certain groups: The needy aged, needy dependent children, and the needy blind. Second, it seeks to encourage the development of state systems of unemployment compensation and authorizes grants for their administration. Third, the Act sets up a nationally administered system of old age benefits for persons at present employed. Fourth, it authorizes federal grants for the extension of the facilities of the United States Public Health Service and the Federal Vocational Rehabilitation Service, and for the development of maternal and child-welfare programs, the latter to be administered by the Federal Children’s Bureau. Finally, it levies taxes to augment federal revenues against the expenditures necessitated by the program.

In an omnibus measure of such magnitude, attempting to strike at such a variety of evils, hurriedly passed one year ago, it was evident to all, even the measure’s strongest proponents, that it would, in the near future, require substantial correction or modification more readily and effectively to accomplish its broad aims. Congress itself left the program open to as orderly a development as possible. It is provided in Section 303 a 2 that a state satisfying certain broad criteria is left free to enact any kind of unemployment compensation system it desires. The primary role of the Federal Government is to remove obstacles to such state action. The state laws, which vary widely in many respects, are to be utilized as “experimental workshops” wherein many competing theories concerning ways and means of providing such compensation may be tested. It is with this attitude that Congress has proceeded, and as a result of this plan efforts to perfect the Act itself should logically be offered from time to time as experience shows the advisability and need of such action.

The first of the anticipated recommendations for improvement came on January 29, 1937, in the form of a Joint Resolution 3.

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* For a discussion of the constitutionality of the Act as functioning at present, see Legis. (1936) 24 Georgetown Law Journal 665.
2 Id. at 303 (a).
introduced in the Senate by Senator Vandenburg of Michigan and in the House of Representatives by Representative Reed of New York. The primary objective of the resolution seeks the abandonment of the full reserve system, as provided in Title II of the Act, and the substitution of a pay-as-you-go formula with only a contingent reserve. The proposed resolution reads: "Resolved: that the Social Security Board is directed to report to Congress not later than May 1, 1937, the necessary plans, with its recommendations thereon, to abandon the full reserve system in respect to contributory old-age pensions, and (1) To increase pensions to those retiring within the next ten to twenty years, without, however, increasing pensions for those retiring in later years, and to commence payment of pensions to those retiring in 1939 instead of 1942; and to provide that pay-roll taxes (equally divided between employer and employee) remain at the present level of 2 per centum for at least five years and thereafter until Congress finds an increase necessary to meet requirements and maintain a reasonable contingency reserve, thus avoiding the early and arbitrary increase in these taxes to 6 per centum within twelve years.

"(2) Alternatively to leave benefit payments as now provided by law and to provide that pay-roll taxes (equally divided between employer and employee) shall remain at the present level of 2 per centum for at least ten years and thereafter until Congress finds an increase necessary to meet requirements and maintain a reasonable contingency reserve.

"(3) To provide for the extension of the contributory old-age pension system to large groups, such as domestic servants and farmers, now excluded from the benefits of the Act, and to provide the simplifications necessary to make this possible."  

In Title II of the Act provides for "old-age benefits" financed through the use of a reserve account. Section 401 (a) provides that Congress shall make a yearly appropriation in "an amount sufficient as an annual premium to provide for the payments re-

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7 "It is estimated that approximately 26,000,000 workers are affected by the old-age benefits provisions as the plan goes into effect on January 1, 1937. Within the next 5 or 10 years, as workers not in covered occupations at the present time enter such occupations, wage records may be maintained for as many as 35 or 40 million individuals." Rep. Social Security Board (1937) 21, post note 13.
quired under this title, such amount to be determined on a reserve basis in accordance with accepted actuarial principles and based upon such tables of mortality as the Secretary of the Treasury shall from time to time adopt, and upon an interest rate of 3 per centum per annum compounded annually". Insofar as the money thus accumulated is in excess of funds needed for making current benefit payments, it is to be invested in Government bonds paying 3% interest or more. These bonds can be bought in the open market or can be new issues paying this rate of interest. The ultimate accumulation of this reserve in 1980 will total $47,000,-000,000, which with its accrued yearly interest will be used to pay monthly benefits to participants over 65 years of age, such payments ranging from an eighty-five dollar per month maximum to a ten dollar minimum.

This reserve is, according to those sponsoring the resolution, "a positive menace to free institutions and to sound finance, and ... a perpetual invitation to the maintenance of an extravagant public debt". It is claimed that to continue such a system is to transfer the burden of maintaining the fund from the shoulders of the general tax payer to the shoulders of the lowest income groups of the country by means of a gross income tax on labor; and at the same time to necessitate a needlessly high payroll tax in the immediate years to come and a needless postponement of earlier and more adequate benefit payments to the aged.

It is noted by them that most of the money collected in taxes will not be required immediately for current payments to beneficiaries of the account where payments begin in 1942. By 1980, however, all of the receipts from the collections, plus approximately

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9 Id. at § 1001.

"In addition to other taxes, there should be levied, collected, and paid upon the income of every individual a tax equal to the following percentage of the wages, (as defined in 1011) received by him after December 31, 1936, with respect to employment (as defined in section 1011 of this chapter) after such date.

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum.

(2) With respect to employment during the calendar years 1940, 1941, and 1942, the rate shall be 1\frac{1}{2} per centum.

(3) With respect to employment during the calendar years 1943, 1944, and 1945, the rate shall be 2 per centum.

(4) With respect to employment during the calendar years 1946, 1947, and 1948, the rate shall be 2\frac{1}{2} per centum.


10 Id. at § 402 (a).
$1,406,000,000 in interest, will be required to meet expenditures. Consequently, it is argued, people now in middle-age will, on retirement, receive much smaller benefit payments than those now starting work who are covered by insurance. For example, the average rate of benefit payment in 1942 will be approximately eighteen dollars per month, whereas in 1980 it will be approximately forty-six dollars per month. This disparity, the argument continues, places upon the young people of the present generation an unusual burden to care for their parents when they reach old age, a burden not likely to be imposed upon future generations because by the time these generations become entitled to the benefits of the Act, those retiring will have been insured for all their working years.

The argument, it would seem, begs the whole question. It is not a necessary result of the abolition of the reserve fund that those in the younger generation will be able to avoid the obligation of supporting others now aged or middle-aged. In any systems employed for making benefit payments it is not likely that those who are to receive the future benefits of the Act will be permitted to escape the responsibility of accumulating the necessary account. This unavoidable, but not necessarily oppressive burden (of bearing a small portion of their "parents' payments"), is minimized to a great extent in the reserve system.

In a pay-as-you-go system a tax of a general nature will still be levied upon the taxable group to support these expenditures. The very basis of the Social Security Act is to relate these benefit payments to income. It is inconceivable, then, how under such a program those eligible for participation would be excluded from the purview of any such tax. Indeed, under the present system the taxes are stabilized, frozen as it were, at fixed levels, and conducive to certainty in making returns. If the system proposed were adopted it would be impossible to determine in advance what the rate of tax would be from year to year. It might be higher or lower, depending upon prevalent conditions. Such instability must of itself militate against the efficient planning of any comprehensive system of this nature. If no basis upon which the calculations can be determined is established, not only will the taxes be subjected to the vagaries of economic depressions, and thus probably impose an additional burden upon the participants at a time when such a burden should be lessened, but benefits to be paid would likewise be subjected to the fluctuations of the economic system. As a result, it may well be that the party who has paid in a substantial sum, may, through the operation of economic
laws, receive a much smaller proportionate return than another paying in proportionately much less.

Any old-age-benefit plan based on earnings accumulated after the inauguration of the system is confronted from the start with this problem of the older worker, who has little time to build up the sum to be employed as the basis for his future benefits. The present reserve system, an analogy to the reserve fund system employed in the field of private insurance, establishes a basis for computations and insures a favorable consideration to the older workers of to-day. It also has the effect of affording more adequate levels of benefits for workers in the lower paid classes.

The advocates of the change urge that no analogy between the need of private insurance companies for full reserves and the need of the Government for full reserves exists. The insurance companies, it is true, are privately financed organizations at the mercy of fluctuating revenues. The Government reserve, on the other hand, is supplied by a compulsory and guaranteed flow of revenue through the exertion of the "taxing power". However, the question is not so much one of the need and availability of the Government's fund as it is of the ultimate security of the "old age benefit system". That system must stand or fall by virtue of the fact that it will be operating on its own merits under a system that affords considerations for its unique and peculiar problems, and upon the basis of its proper relation to the public it benefits. The primary fact is this, that if monthly payments are to serve the ends anticipated they must be regular, predictable and safeguarded by public acceptance of responsibility.

The cost of any old age benefit plan is bound to increase year by year for some time, as more and more of the persons covered by it will reach retirement age, and as the basis for monthly benefits become larger aggregates of wages. This problem of increasing costs is intensified in the United States because the age distribution of the population is in a constant state of flux. Students of population estimate that the proportion of old people will double within the next fifty years.11 As a result of these fac-

11 "In 1930 there were 6,500,000 people over 65 years of age in this country, representing 5.4 per cent of the entire population. This percentage has been increasing quite rapidly since the turn of the century and is expected to increase for several decades. It is predicted on the basis of the present population and trends, that by 1940, 6.3 per cent of the population will be 65 years of age; by 1960, 9.3 per cent, and by 1975, 10 per cent. In 25 to 30 years the actual number of old people will have doubled, and this estimate does not take into account the possibility of a decrease in mortality rates, which would further increase the total." Hearings before the Committee on Ways and Means on H. R. 4120, 74 Cong. 1st Sess. (1935) 38.
tors, the cost of the old-age-benefits system will rise very rapidly within the next half century. The future obligations of the Government with respect to these pending increases are envisaged in the present provisions of the Act for building up the old age reserve account—to meet benefit claims maturing in subsequent decades—provisions not wisely displaced unless upon a guaranteed basis. The reserve fund system has proved its worth in the field of private insurance.\textsuperscript{12}

The authors of the resolution are of the opinion, however, that the compulsory taxing system under which the Government revenue is derived guarantees a continuous flow of funds which could be utilized to better advantage to defray these expenses. It would seem from this viewpoint that the purpose of the resolution is to revolutionize the very basis of "old-age benefit payments", or that the proponents of the measure are under a misapprehension of the objectives of such payments. As stated by the Social Security Board\textsuperscript{13} in the first annual report to Congress, there are three major aims toward which the old-age-benefit provisions are directed. Briefly stated they are: (1) the payment of a benefit without a test of need; (2) the budgeting of the cost according to an orderly plan which will effect a wise distribution between present and future payments; and (3) the provision of larger and more suitable incomes in old age for many individuals whose economic situation has been notably insecure in the past.

In order to achieve the first objective—payment of benefit without a means test—it is necessary that coverage under the Act be limited and that a very close link between benefits and earnings be maintained. As to the second objective—effecting a wise distribution between present and future payments—the reserve fund is thought to achieve an adjustment which conforms to the conditions of coverage and future payments. The third general aim is to stabilize and increase the incomes of certain aged individuals. To adjust these benefits with an existing economic order, they were purposely based on the wages earned by the beneficiaries, and have absolutely no relation to the needs of these beneficiaries. It was never intended nor proposed by Congress to provide maintenance for every individual who comes within the scope of the Act's operation. The broad general intent was to assure to every individual who participates in industry for any considerable period of time at least a minimum income in old

\textsuperscript{12} Id. at 102-105.

age. It would seem, therefore, inadvisable at this time to do away with a proved system of operation, arranged to impose a relatively small personal burden on the beneficiary and substitute an already overburdened tax system, needlessly jeopardizing the attainment of ends declared. The present contributory system when in full operation in 1980 will cost the Government approximately $1,400,000,000 per annum. The advisability of raising that revenue yearly without the aid of the 3% interest derived from the ultimate $47,000,000,000 reserve account would seem patently unwarranted. It was this imposing yearly obligation that induced Congress to provide the present reserve fund system. Unaided governmental revenues would ultimately prove inadequate as a practical matter to meet these expenditures. The permanence of the program relating to old-age benefits rests upon the accumulation of this fund. A yearly Government subsidy would eventually prove either grossly inadequate or oppressively burdensome.

The only practical alternative to the current reserve system principle is the pay-as-you-go system proposed as a substitute. This would mean financing the plan from general taxation. The resolution also mentions a "contingent reserve", but what is intended by this is not intimated. It is well then to consider briefly the practicability of financing out of the general taxes the funds which would be required to carry out the stated objectives of the "old-age-benefit" program.

Under the system proposed as an alternative the necessity to limit coverage and to ascertain eligibility, which obtain in the registration and reserve system, would be inappropriate. It would, as a practical matter, be very difficult—if not altogether impossible—to relate the benefits accurately to the amount of wages earned over the years of participation. While most governmental functions are maintained on a pay-as-you-go basis, the practice is necessarily limited to the maintenance and operation of administrative agencies. Operations requiring cash expenditures by way of making benefit payments to particular groups of citizens are financed by individual appropriations and audited on separate accounts. In providing for the benefit payments due under the unconstitutional Agricultural Adjustment Act,\footnote{48 Stat. 31, 7 U. S. C. A. §§ 601-620 (1933).} Congress established an ear-marked treasury deposit from which payments were drawn. Even though this feature of the Act contributed to its unconstitutionality, it is interesting as an indication
of legislative provisions regulating the administrative mainte-
nance of regular accounts on separate audits.

That "there is a marked incompatibility between the old-age-
benefit plan, provided for in Title II 15 of the Social Security Act
as it now exists, and the systems of old-age assistance provided
in Title I 16 of the Act" is urged as an argument for the aboli-
tion of the present reserve system. In 1942, it is pointed out,
an average man and his wife, in an insured occupation, will
receive only an average benefit payment of approximately eight-
een dollars a month, while a man who had been employed in a
noninsured occupation will, with his wife, be able to receive up to
$60 a month for old-age assistance. It should also be noted that
payments under the contributory old-age-benefit plan will not
begin until 1942,17 whereas payments for old-age assistance began
in 1936.18

To seize upon this comparison is to misconstrue the theories
underlying these two different forms of aid, and would seem to
defeat rather than to support the proposal. While it is true that
old-age assistance payments currently are greater than will be
the old-age-benefit payments to commence in 1942, still that is
only because the latter payments proportionately represent those
portions of the earnings of the employee contributed by him in
the form of insurance premiums, and are payable without regard
to his need. They are a matter of right. On the other hand, old-
age assistance proceeds upon an entirely different basis, and
unlike the former payments which are made without the em-
barrassing procedure of a "needs test", the latter payments are
made only to those individuals 65 years of age and in need of
assistance; that is, those only who qualify under a means test.
Once the Act is in complete operation the average benefit pay-
ments will greatly exceed the old-age assistance payment in the
ordinary case. The disparity noted then is only temporary and
unsubstantial.

A not unsubstantial or unimportant provision of the resolution,
however, is that provisions be adopted "to provide for the exten-
sions of the contributory, old-age pension system to large groups,
such as domestic servants and farmers, now excluded from the
benefits of the Act, and to provide the simplifications necessary
to make this possible".

16 Id. at § 301.
17 Id. at § 402(a).
18 Id. at § 301-305.
It has been recognized and regretted by the framers of this legislation that a large portion of the people of this country are currently excluded from the operations of the old-age-benefit provisions because of the administrative problems which would confront their inclusion. Secretary of the Treasury Morgenthau, in testifying before a House Committee hearing on this bill, said:

"The national contributory old-age annuity system, as now proposed, includes every employee in the United States, other than those of governmental agencies or railways, who earns less than $251 a month. This means that every transient or casual laborer is included, that every domestic servant is covered, and that the large and shifting class of agricultural workers is covered. Now, even without the inclusion of these three classes of workers, the task of the Treasury in administering the contributory tax collections would be extremely formidable. If these three classes of workers are to be included, however, the task may well prove insuperable—certainly, at the outset.

"I want to point out here that personally I hope these three classes can be included. I am simply pointing out the administrative difficulty of collecting the tax from those classes."  

Groups such as those engaged in agricultural labor and domestic servants are excluded, and consequently, under the present law, in their old age can receive only old-age assistance as provided in Title I of the Act. This assistance is not given as a right but is given as a privilege after the unsavory procedure of a "needs test". That some provision must be adopted to remedy these omissions is highly desirable. The original intent was that all such people were to be included. Many of these people are anxious to come within the terms of the Act but find it currently impossible. Casual labor "not in the course of the employer's trade or business" presents another immediate and absorbing problem to be solved before the Act will be satisfactory. It has been proposed that the Social Security Board employ its large research staff to develop prompt studies to correct these situations. In these latter proposals the resolution indicates a wholesome and constructive approach to deficiencies in the present law. However no suggestions of corrective measures have as yet been advanced. That some provision will ultimately be made is conceded, as is the necessity of immediate and serious consideration of these omissions.

Social Security legislation is today a vital and increasingly important governmental policy constituting a new approach to

19 Hearings Before the Committee on Ways and Means. on H. R. 4120, 74 Cong. 1st Sess. (1935) 901; cited supra, note 11.
old problems and carrying the non-partisan hopes of the entire country for its ultimate success. The present Social Security Act was drafted to provide a balanced and comprehensive system for supplementing incomes under various conditions in such a way as to increase the security of individuals and to mitigate the extremities of poverty resulting from interruptions in income. The present law, it is admitted, requires substantive corrections satisfactorily to attain these ends. However, it represents the beginning of the solution of the problem. Only by means of further study and continued effort to correct admitted deficiencies will there be an attainment of the objectives sought by the Act.

W. R. C.
A Federal System of Licenses and Charters

Introduction

ONE OF THE most discussed proposals before the 75th Congress is the O'Mahoney Federal Licensing Bill, introduced by Senator Joseph C. O'Mahoney, of Wyoming.

Two principal objectives are sought by the O'Mahoney Bill. First, it would require the Federal Government to assume the obligation delegated by the Constitution to regulate commerce among the states; second, by a system of federal licenses and charters, those businesses engaged in interstate commerce would be required to adhere to practices of fair trade, as outlined by the Anti-Trust Act \(^1\) and the Federal Trade Commission Act \(^2\).

The bill proceeds on the theory that the Constitution delegates the power and obligates the Federal Government to regulate interstate commerce; that the Government has an undeniable right to the reasonable means of carrying into effect its powers and may so use the corporate instrument; that corporations are not, as natural persons, sheltered by the Bill of Rights, but are artificial creatures with only those rights, privileges and immunities given to them by the incorporating authority; and that persons who wish to operate in interstate commerce under a corporate license and charter may be required by the terms of their charters to oblige themselves to those practices of fair trade which experience has shown to be fundamental to the protection and prosperity of employee, stockholder and consumer.

A Summary of the Proposed Bill

The first title establishes a system of licenses for those businesses now engaged in interstate commerce under state charters. Each license to be issued would include provisions prohibiting child labor and discrimination against female employees, and guaranteeing the right, by collective bargaining, to establish maximum hours and minimum wages. Violations of these standards would be unfair trade practices within the meaning of the present anti-trust laws.

The second title imposes upon licensees certain requirements as to corporate structure and practice which are intended to


guarantee financial integrity in the management of interstate corporations.

Title Three provides federal charters for those future corporations wishing to engage in interstate commerce. The requirements of such corporations with respect to labor standards would be the same as those of the licensees under Title One.

The fourth part of the bill is drafted wholly upon the pattern of statutes upheld by the Supreme Court within the last year, the objects of which have been to assist those states, which, by their own laws, have sought to improve their labor standards, by protecting those states from the competition of articles produced in states adhering to lower standards. The bill would extend the same protection to those states with laws against child labor and other undesirable practices that is now extended by the Federal Government, with the approval of the Supreme Court, to states with laws against prison-made goods.*

Soundness of the Proposed Bill in Principle

The declaration of the preamble to the licensing bill, with respect to the power of Congress over commerce among the states, is taken from the decisions of Mr. Chief Justice Marshall and Mr. Chief Justice Hughes.

In the famous case of Gibbons v. Ogden, Mr. Chief Justice Marshall said: "The words are: 'Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.' . . . The subject to which the power is next applied is to commerce among the several States: The word 'among' means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient and is certainly unnecessary."*

Mr. Chief Justice Hughes, who wrote the opinion in the Minnesota Rate case, quoted the opinion last cited, stating: "The general principles governing the exercise of State authority when

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* See infra, Legis.: Regulation of Child Labor Resurrected [Ed.].
3 9 Wheat. 1 (1824).
4 Id. at 187.
5 230 U. S. 352 (1912).
interstate commerce is affected are well established. The power of Congress to regulate commerce among the several States is supreme and plenary. It is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution'. . . . The conviction of its necessity sprang from the disastrous experiences under the Confederation, when the States vied in discriminatory measures against each other. In order to end these evils, the grant in the Constitution conferred upon Congress an authority at all times adequate to secure the freedom on interstate commercial intercourse from State control, and to provide effective regulation of that intercourse as the national interest may demand.'

In Title Two of the Bill, modeled on a Bill introduced by the late Senator John Sharp Williams of Mississippi, are prescribed the underlying conditions upon which licenses are to issue to corporations.

The third title of the bill, authorizing federal corporations for commerce among the state, was taken from the recommendations made by President William Howard Taft in a special message to Congress.

The fourth title, as has been stated, is drafted along the pattern of legislation, approved by the Supreme Court during the last year, in which the federal government may act indirectly in intra-state matters for the protection of states which seek to raise their own labor standards. The preamble of Senator O'Mahoney's Bill is taken from the Constitution of his home state and declares the supreme power of the state over all corporations.

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6 Id. at 354.
7 See, S. 1377, 62d Cong., 1st Sess., 47 CONG. REC. 437 (1911).
8 45 CONG. REC. 378 (1910).
10 "Section 1 . . . The legislature shall provide for the organization of corporations by general law. All laws relating to corporations may be altered, amended or repealed by the legislature at any time when necessary for the public good and general welfare, and all corporations doing business in this state may as to such business be regulated, limited or restrained by law not in conflict with the Constitution of the United States.

"Section 2 . . . All powers and franchises of corporations are derived from the people and are granted by their agent, the government, for the public good and general welfare, and the right and duty of the state to control and regulate them for these purposes is hereby declared. The power, rights and privileges of any and all corporations may be forfeited by willful neglect or abuse thereof. The police power of the state is supreme over all corporations as well as individuals."
Historical Background

The proposal that businesses engaged in interstate commerce do so under federal licenses and charters is not new. The Chairman of the Federal Trade Commission, in giving the historical background of this proposition, stated: 11 "What may be said to be the first government pronouncement of this proposition occurs, we believe, in the report of James R. Garfield, Commissioner of Corporations, for 1904. In this report Commissioner Garfield states that the plan which he proposes is quite similar to the one which was recommended for adoption by the Industrial Commission in its final report." 12

Among the conclusions and suggestions presented by the Garfield Report, transmitted to Congress December 21, 1904, by President Theodore Roosevelt were the following:

"The great reduction of personal responsibility that has followed the corporate form, the divisibility of stock interests, and the separation of the laborer, stockholder and creditor from contact with and the control of the instruments of industry, has left a very large gap to be filled by Government control, and has left more or less unprotected various important interests which must have the supervision and intervention of the State for the following purposes:

"(a) To protect property rights in corporations held by those now unable to protect themselves by reason of lack of information or power.

"(b) To protect those dealing with corporations as employees, creditors, or consumers.

"(c) To protect the public from the abuse of great economic power coupled with little personal responsibility.

"The economic powers of the Government and of public officers are checked by a corresponding publicity and responsibility to the voters, while the economic powers of great corporations, although often governmental in their size and scope, have no such publicity or responsibility.

"(d) To protect the Government itself from the pressure of great commercial and financial powers directed upon it for the attainment of purely private ends." 13

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11 SEN. DOC. No. 92, 70th Cong., 1st Sess. (1934).
12 In his report, the Commissioner of Corporations said: "It is fully appreciated that this recommendation is not new, but has been the subject of most serious and exhaustive consideration by public officials and commissioners, as well as private persons technically well qualified to speak.

13 Id. at 165.
In a letter, entitled "Utility Corporations", addressed to the President of the Senate, the Chairman of the Federal Trade Commission mentions in chronological order a list of 20 bills introduced between November 9, 1903, and February 27, 1914. Among them was the measure, submitted by Senator Clark of Wyoming, known as the Taft-Wickersham Bill.\textsuperscript{14} It incorporated suggestions made to the Congress by President Taft, who accompanied his suggestions with a bill drafted by Attorney General Wickersham. During this period, also, Senator Williams introduced the measure which has been referred to in connection with Title II of the O'Mahoney bill.\textsuperscript{14a}

Eight measures, from August 11, 1918, to June 6, 1920, proposed federal regulation of the interstate operations of corporations, but only the Bill introduced by Senator Brookhart of Iowa, provided for compulsory licensing.\textsuperscript{15}

Three presidents have realized the dangers lying in corporate growth under state supervision. President Theodore Roosevelt, in addressing Congress, December 3, 1907,\textsuperscript{16} reiterated his position, taken two years earlier by quoting from his own speech of December 5, 1905. The President, in quoting, said: "The makers of our National Constitution provided especially that the regulation of interstate commerce should come within the sphere of the General Government. The arguments in favor of their taking this stand were even then overwhelming. But they are far stronger today, in view of the enormous development of great business agencies, usually corporate in form. Experience has shown conclusively that it is useless to try to get any adequate regulation and supervision of these great corporations by State action. Such regulation and supervision can only be effectively exercised by a sovereign whose jurisdiction is coextensive with the field of work of the corporations—that is, by the National Government. I believe that this regulation and supervision can be obtained by the enactment of law by the Congress. . . . Our steady aim should be by legislation, cautiously and carefully undertaken, but resolutely persevered in, to assert the sovereignty of the National Government by affirmative action."

President Wilson, in his message to the 66th Congress, 2nd Session,\textsuperscript{17} December 2, 1919, also repeated the words of an earlier

\textsuperscript{14} S. 6186, 61st Cong., 2d Sess. (1910), 45 CONG. REC. 1516 (1910).
\textsuperscript{14a} Supra note 7, and text thereto.
\textsuperscript{15} S. 2847, 71st Cong., 2d Sess. (1930), 72 CONG. REC. 1093 (1930).
\textsuperscript{16} 42 CONG. REC. 68 (1907).
\textsuperscript{17} 59 CONG. REC. 29 (1919).
address, and pointed out another use to which federal licenses might be put. He said: "We should formulate a law requiring a Federal license of all corporations engaged in interstate commerce and embodying in the license, or in the conditions under which it is to be issued, specific regulations designed to secure competitive selling and prevent unconscionable profits in the method of marketing. Such a law would afford a welcome opportunity to effect other much needed reforms in the business of interstate shipping and in the methods of corporations which are engaged in it; but for the moment I confine my recommendations to the objective immediately in hand, which is to lower the cost of living."

President William Howard Taft, whose suggestions, drafted by Attorney General Wickersham, have been noted in connection with Title III of the O'Mahoney Bill, and with the measure introduced by Senator Clark of Wyoming, stated in his special message to Congress, January 7, 1910: "I withheld from my annual message a discussion of needed legislation under the authority which Congress has to regulate commerce between the states and with foreign countries and said I would bring the subject matter to your attention later in the session. Accordingly, I beg to submit to you certain recommendations as to the amendments to the interstate commerce law and certain considerations arising out of the operations of the anti-trust law suggesting the wisdom of federal incorporation of industrial companies. . . . The Attorney General, at my suggestion, has drafted a federal incorporation bill embodying the views I have attempted to set forth, and it will be at the disposition of the appropriate committees of the Congress." 18

**The Assertion by Congress of its Delegated Right**

Article I, Section 8 of the Constitution provides that "the Congress shall have the power . . . ; To regulate commerce with foreign nations, and among the several States, and with the Indian tribes". The fundamental application of this clause in connection with his bill was expressed by Senator O’Mahoney in a recent address in which he said: 19 "No State since the establishment

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18 45 CONG. REC. 1516 (1910).
19 Delivered over the facilities of the National Broadcasting Company, January 13, 1937.

For the interesting testimony of John T. Flynn, Associate Editor of Collier's, and Dr. Charles A. Beard, eminent historian and economist, see, Hearings before Committee on the Judiciary on S. 10, 75th Cong., 1st Sess. (1937).
of this government has been admitted to the Union until its constitution was approved by Congress. Yet we permit States which cannot set up their own government without the consent of Congress to create corporations which actually dominate, control and regulate the entire commercial and industrial life of the country under charters which have never been submitted to any national authority for public approval. In other words, we allow the States from which the power to regulate interstate commerce has been withdrawn, to create the agencies which now control that entire field.

"Therefore, I propose that instead of permitting the national commerce to continue to be controlled by corporations created by the States, we pass a Federal law which shall clearly define the corporate powers of all interstate corporations."

To those critics who point out that the National Government has done nothing in the exercise of its power, attention is called to the words of Mr. Chief Justice Taft in the case of Larson v. South Dakota, in which he quotes with approval the decision of Mr. Chief Justice Taney in the earlier Charles River Bridge case: "But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience and prosperity of the people. A State ought never to be presumed to surrender this power, because, like the taxing power [or the interstate commerce power] the whole community have an interest in preserving it undiminished. And when a corporation alleges that a State has surrendered for seventy years its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court above quoted, 'that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear.'"

20 278 U. S. 429, 436 (1929).
Incorporation as a Proper Exercise of Power

If doubt exists of the power of the Federal Government to seek, by means of the corporate form, the efficient realization of the ends for which it was conceived, attention should be given to the decision of Mr. Justice Strong in the Legal Tender Cases 22 in which he said: "That would appear, then, to be a most unreasonable construction of the Constitution which denies to the government created by it, the right to employ freely every means, not prohibited, necessary for its preservation, and for the fulfillment of its acknowledged duties. Such a right, we hold, was given by the last clause of the eighth section of the first article. The means or instrumentalities referred to in that clause, and authorized, are not enumerated or defined. In the nature of things enumeration and specification were impossible. But they were left to the discretion of Congress, subject only to the restrictions that they be not prohibited, and be necessary and proper for carrying into execution the enumerated powers given to Congress, and all other powers vested in the government of the United States, or in any department or officer thereof." 23

No greater authority for definition of the power of Congress to choose the means by which it may attain its objectives exists than in the decisions of Mr. Chief Justice Marshall in the case of the United States v. Fisher,24 the far reaching decision in McCulloch v. Maryland,25 and in a case mentioned earlier, Gibbons v. Ogden.26

In the Fisher case,27 testing the constitutionality of a law giving the United States priority in its claims over those of other creditors of a bankrupt, the Chief Justice said: "It [priority] is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the government of the United States, or in any department or officer thereof. In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power.

22 12 Wall. 457 (U. S. 1871).
23 Id. at 533-534.
24 2 Cranch 358 (U. S. 1804).
25 4 Wheat. 316 (U. S. 1819).
26 9 Wheat. 1 (U. S. 1824), supra note 3.
27 2 Cranch 358 (U. S. 1804).
“Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution.” 28

The question of the constitutionality of the incorporation of a national bank and the establishment of one of its branches in Maryland brought forth the following expressions from Mr. Chief Justice Marshall in the McCulloch case: 29 “The government which has a right to do an act, and has imposed on it the duty of performing the act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is expected, take upon themselves the burden of establishing that exception.” 30

Protection of the interests of the people is assured, according to Marshall, against arbitrary or contrary acts of Congress in exercise of its vested powers when, in the case of Gibbons v. Ogden, 31 he stated: “If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power of commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and discretion of Congress, their identity with the people, and the influence their constituents possess at elections, are in this, as in many other instances, as that, for example, of declaring war, the sole restraint on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments.” 32

Natural and Corporate Persons Differentiated

Senator O’Mahoney, in addressing the Cosmos Club in Washington recently, made the following reference: 33 “A review of the decisions which have been rendered in numerous cases affect-

28 Id. at 396.
29 4 Wheat. 316 (U. S. 1819).
30 Id. at 410.
32 Id. at 196.
ing commerce among the states, the field in which all our difficulties of depression and recovery exist, has convinced me that the answer to the question lies in drawing the distinction between the corporate person, through which our modern economic system is handling the trade, commerce, and industry of the people, and the natural person, who has been and is being deprived of natural rights by the modern economic Frankenstein's.

"This was very clearly illustrated in the decision rendered by the present Supreme Court when it invalidated the Guffey Coal Act.\textsuperscript{34} The mistake, however, was primarily made by Congress in confusing these two separate identities. A natural person, a citizen of flesh and blood, precedes all government. He makes the government. He draws the constitutions and he makes the laws. But a corporation has no natural rights. A corporation is a creature of the law. A corporation proceeds from some government. It does not, never has, and never can originate government. That is for the people, and it was to preserve this right in natural persons to govern themselves that the Declaration of Independence was drafted and the Constitution of the United States adopted. . . ."

There was no such confusion in the mind of Mr. Justice Brown when he rendered the decision in the case of \textit{Hale v. Henkel},\textsuperscript{35} wherein an officer of a corporation refused to submit the corporate books and papers pleading immunity under the self-incrimination clause of the Constitution, in an action directed against the corporation represented by him. He said: "Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and to find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused and demand the production of the corporate books and papers for that purpose. The defense

\textsuperscript{34} Carter \textit{v.} Carter Coal Co., 298 U. S. 238 (1936).

\textsuperscript{35} 201 U. S. 43 (1906).
amounts to this: That an officer of a corporation which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with the abuse of such privileges."

The Elimination of Unfair Trade Practices as an Objective

The O'Mahoney Bill proposes to increase the membership of the Federal Trade Commission from five to nine members. He believes that the administration of the legislation properly falls into the hands of the agency created by the Federal Trade Commission Act of 1914 to supersede the Bureau of Corporations established by the act creating the Department of Commerce and Labor, February 4, 1903. 37

Section 5 (f), Title I of the O'Mahoney Bill specifies:

"That dishonest or fraudulent trade practices, or unfair methods of competition which have been so defined in the courts of the United States or established by orders of the Commission made subject to judicial review, may, after notice to the licensee and opportunity for hearing, be prohibited by the Commission."

And in Section 7 it is provided:

"It shall be unlawful and an unfair method of competition within the meaning of the Federal Trade Commission Act, approved September 26, 1914, for any corporation engaged in commerce within the purview of this act to carry on such commerce without conforming to the requirements specified in the licensing conditions stated in Section 5 thereof, where the effect in or upon interstate commerce may be to give to corporations not so conforming a substantial advantage in competition with corporations which do so conform . . . ."

A description of the work of the Federal Trade Commission is contained in the decision of Mr. Chief Justice Hughes in the Schechter case: 38 "The Federal Trade Commission Act [sec. 5], introduced the expression 'unfair methods of competition', which were declared to be unlawful. That was an expression new in

36 Id. at 45.
the law. Debate apparently convinced the sponsors of the legislation that the words 'unfair competition', in the light of their meaning at common law, were too narrow. We have said that the substituted phrase ['fair competition'] has a broader meaning; that it does not admit of precise definition, its scope being left to judicial determination as controversies arise. . . . What are 'unfair methods of competition' are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest. . . . To make this possible Congress set up a special procedure. A commission, a *quasi* judicial body, was created. Provision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the Commission is taken within its statutory authority." 39

*Objectives of Social Justice*

Having thus explained, with the support of authority, the right, duty and power of the Federal Government to exercise its authority over interstate commerce by means of licenses and charters, attention naturally turns to the objectives of social justice to be obtained by the proposed legislation.

Senator O'Mahoney, in a recent speech outlined the objectives as follows: 40 "If you desire to engage in commerce among the States as a corporation, if you desire to receive this special privilege of shedding your personal responsibility for the debts of your business, you must, as a consideration to the people of the United States, agree to accept a charter which will give you no corporate power to do those things which all experience shows are inimical to the public welfare. If you do not care to accept these restrictions you may fall back upon due process of law and your constitutional rights to operate as an individual. Then, wholly within the State in which you are free from the standards, you may, if you dare do it in the face of your neighbors, employ infants, crush labor, impose upon women, rib the consumer, deceive the persons from whom you borrow your money. You may do anything you please that the State law permits, but you must do it in your natural person and as a natural person bear all of the responsibility."

39 Id. at 497.
Objection to the type of legislation proposed is usually founded upon those cases in which a federal law, as the Child Labor Act,\(^4\) attempted to place federal restrictions upon matters which are purely intrastate in character. Mr. Justice Day, in *Hammer v. Dagenhart* \(^4\) ably stated: “The far-reaching effect of upholding the act [the regulation of the hours of children in factories and mines within the states] cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.” \(^4\)

However, the recent decisions of *Whitfield v. Ohio*,\(^4\) and *Kentucky Whip and Collar Company v. Illinois Central Railway Company*,\(^4\) indicate a realization of the inescapable inter-relationship between the interests of the Federal Government and the states in items, the production of which or the use thereof is a purely intrastate matter and the distribution of which is an interstate affair of the national government.

In the *Whitfield case* was tested the constitutionality of the Hawes-Cooper Act, which provided that convict-made goods transported into any state for use, consumption, sale or storage should, upon arrival, be subject to the laws of the state which had sought to protect itself by its own legislative enactment from such goods. The decision in effect admitted the right of the Federal Government to act in an intrastate matter at the terminal destination.

The *Kentucky Whip case* has gone further. In passing upon the constitutionality of the Ashurst-Sumners Act, the Supreme Court sustained the federal statute making it unlawful to transport into any state having its own prohibitory laws, convict-made goods disqualified by state statute. In other words, the protection by the Federal Government, in the exercise of its interstate authority, seems to extend even to the point of origin, before the items are in interstate shipment.

\(^{41}\) 39 Stat. 675 (1917).

\(^{42}\) 247 U. S. 251 (1918).

\(^{43}\) Id. at 276.

\(^{44}\) 297 U. S. 431 (1936).

Conclusion

Freedom from child labor, freedom from discrimination against female employees and freedom in the right of collective bargaining for the ascertainment of maximum hours and minimum wages are the social objectives of the O'Mahoney Bill. And, when Congress asserts its full authority over interstate commerce, an obligation vested in it by the Constitution, it is the belief of the proponents of the bill, and of the author of this paper, that flagrant abuses of the corporate instrument will end, and protection and prosperity will be assured for employee, stockholder and consumer.

H. M. A.
NOTES

STATE SALES AND USE TAXES

A Plan to Protect against Revenue Leakage through Extrastate or Interstate Sales

The sales tax represents nothing new in the field of taxation, but due to the financial difficulties of the states, caused in great part by the depression, many of them have turned to the general sales tax as a source of much needed revenue. With the wisdom of such taxation and the administrative difficulties connected therewith this discussion is not concerned, rather does it concern itself with difficulties experienced by state tax administrators in combating opportunities afforded by the commerce clause \(^1\) for avoidance of such taxation. Needless to say, the taxpayers will, and do, avoid the tax whenever possible, if the result is an actual saving, and the avoidance already achieved is forcing the various states to seek some means of preventing substantial losses of revenue.

The problem would be partially solved if all states had sales taxes, because there would then be no advantage in going outside the state to purchase goods which otherwise would be purchased at home (unless the rate of tax in the neighboring state was appreciably lower). However, a great number of states have no general sales tax, and the merchants in those states are increasing their business at the expense of the merchants in the sales-tax states. Moreover, a general adoption of the tax scheme would still leave interstate sales exempt from the tax, and local merchants would still suffer, although possibly not as much; and the state revenue would continue to suffer in proportion to the loss of local business.

I. Limits Imposed by “Commerce Clause”

(A) Interstate Sales

“. . . the power of Congress [over interstate commerce] . . . is certainly so far exclusive that no state has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the states, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other states, coming or brought within its jurisdiction.” \(^2\) Thus, in general terms, the Supreme Court has expressed the limits upon the states. To be more specific, a state may not tax intrastate transactions which form a part of transactions in interstate commerce; \(^3\) nor may it require as a condition of the right to do interstate business within the state that a corporation prepare, deliver, and file with the Secretary of State a statement of its assets, liabilities, capital stock, etc., for this is a regulation beyond its power. \(^4\) The case deciding this last point involved a Pennsylvania corporation carrying on interstate com-

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\(^1\) U. S. Const., Art. I, § 8.

\(^2\) Brown v. Houston, 114 U. S. 622, 630 (1885), citing many cases. This case involved a property tax on coal in Louisiana, in common with all property within the state, when it had come to rest in that state and was being held for sale there. Not being a discriminatory tax, it was upheld.


\(^4\) International Text Book Co. v. Pigg, 217 U. S. 91 (1910) (correspondence school).
merce with customers in Kansas through a solicitor-agent in Kansas. The
Court said, at p. 109: "If a partnership firm of individuals should undertake
to carry on the business of interstate commerce between Kentucky and other
states, it would not be within the province of the state legislature to exact
conditions on which they should carry on their business, nor to require them
to take out a license therefor." And, in Brennan v. Titusville,5 it was held
that a state may not impose a tax on the privilege of soliciting or selling
goods to persons when this is an interstate transaction, because it is in effect
a regulation of that commerce.

(B) Discrimination Against Imported Goods

Just as effective a deterrent to commerce among the states would be the
power to discriminate against goods because of their extrastate origin. But
it is well settled that such discrimination, no matter what form it may take,
is a violation of the commerce clause. In Ward v. Maryland6 such a statute
was involved. It required all traders resident within the state to take out
licenses and to pay therefor certain sums regulated by a sliding scale of
from $12 to $150 according as their stock in trade might vary from $1000
to $40,000. It also made it a penal offense for any person, not being a
permanent resident in the state, to sell, offer for sale, or expose for sale,
within certain limits in the state, any goods, wares, or merchandise whatever,
other than agricultural products and articles manufactured in Maryland,
either by card, sample, or other specimen, or by written or printed trade-list
or catalogue, whether such person were the maker or manufacturer or not,
without first obtaining a license to do so, for which license (to be renewed
annually) a sum of $300 was to be paid. This statute was held bad as a
discrimination against imported goods, and also as a violation of the
privileges and immunities of non-resident traders. Five years later, in
Welton v. Missouri,7 a Missouri statute which required the payment of a
license tax by persons who dealt in the sale of goods, wares, and merchandise
which were not the growth, produce, or manufacture of the state, by going
from place to place to sell the same in the state, and required no such license
tax from persons selling in a similar way goods which were the growth,
produce, or manufacture of the state, was declared invalid as in conflict with
the power vested in Congress to regulate commerce with foreign nations and
among the several states. A somewhat more clever attempt at discrimination
was invalidated in Walling v. Michigan.8 In 1875, Michigan passed a law
imposing a tax of $300 per year on persons who, not residing or having their
principal place of business within the state, engaged there in the business of
selling or soliciting the sale of liquors to be shipped into the state. No such
tax was imposed on those selling or soliciting the sale of liquors manu-
factured in the state. But, in 1881, a tax of $500 per year was placed on
Michigan manufacturers and dealers. The Court held that this latter statute
did not correct the situation, because a Michigan dealer had to pay his tax

5 153 U. S. 289 (1894).
6 12 Wall. 418 (U. S. 1870).
7 91 U. S. 275 (1875).
8 116 U. S. 446 (1866). See also Webber v. Virginia, 103 U. S. 344 (1881) ; Tiernan v.
Rinker, 102 U. S. 123 (1880) ; and Guy v. Baltimore, 100 U. S. 434 (1879), for dis-
criminatory taxes violating the commerce clause.
only once, while a foreign dealer would have to pay $300 for each drummer or solicitor he sent into the state.

With these cases in mind there can be no doubt as to the fate of any sales tax which attempts such discrimination.

(C) Interstate and Governmental Use

In addition to the limitations discussed above, there are two further limitations. One, which is no longer very important because of recent decisions of the Supreme Court,9 though no doubt there will be instances where it will find application, is that a state may not tax the interstate use of goods. This principle was applied in Helson v. Kentucky.10 A Kentucky statute imposed a tax of 3¢ per gallon on gasoline sold “at wholesale”, which was defined to include purchases for the purposes of resale or use, and also purchases made outside the state for sale or use within the state. It was held invalid as applied to the use of gasoline by a ferry-boat operating on the Ohio River between Illinois and Kentucky, the Court saying: “If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected.”11 The Court also quoted 12 from Minot v. Philadelphia, W. & B. Ry. Co.:13 “It is of national importance that in regard to such subjects there should be but one regulating power, for if one state can directly tax persons and property passing through it, or indirectly, by taxing the use of means of transportation, every other may; thus commercial intercourse between states remote from each other may be destroyed.”

Bingaman v. Golden Eagle Western Lines 14 represents a more recent application of the principle. Section 2, Chapter 176, Laws of 1933 of New Mexico, imposed an excise tax of 5¢ per gallon on the sale or use of all gasoline and motor fuel. Section 3 prohibited any “distributor” from importing, receiving, using, selling or distributing any motor fuel unless such distributor was the holder of an uncancelled annual license issued by the state Comptroller, the fee being $25. Section 1 defined a “distributor” as including a corporation consuming and using in the state any motor fuel purchased in and brought from another state. The state supreme court had construed this to be an excise tax on the use of gasoline in the state and not as a charge for the use of the highways. As applied to the Golden Eagle Western Lines, a bus company, the law was declared invalid, the effect of it being to compel a common carrier engaged exclusively in interstate transportation to procure a license as a “distributor” and to pay an excise tax upon the use of motor fuel purchased in and brought from another state and used only in such transportation.

Well settled as this may be, there is no bar to laying a sales tax upon sales of fuel to interstate carriers, even though that fuel is to be used in interstate transportation. A South Carolina law 15 provided for a license tax on

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10 279 U. S. 245 (1929).
11 Id. at 252.
12 Id. at 251.
13 17 Fed. Cas. No. 9645 at 464 (1870).
14 297 U. S. 628 (1936).
dealers for the privilege of carrying on business of selling gasoline within the state, the amount of the tax to be 6¢ for each gallon “on all gasoline, combinations thereof, or substitute therefor, sold or consigned, used, shipped or distributed for the purposes of sale within the state...” In *Eastern Air Transport, Inc. v. South Carolina Tax Commission*,\(^\text{16}\) this Act was upheld as to the purchase of gasoline by the company for use in interstate commerce as a tax on a purely local transaction, and hence not a burden on interstate commerce such as a tax on the use in interstate commerce.

The other limitation mentioned above is the immunity of state and federal governmental instrumentalities from taxation. Mississippi placed a license tax on dealers in gasoline, the tax to be measured by the number of gallons sold. Some gasoline was sold to the United States Coast Guard Fleet and its Veterans’ Hospital at Gulfport, Mississippi, and, in *Panhandle Oil Co. v. Mississippi ex rel. Knox*,\(^\text{17}\) it was held that though this was on its face a privilege tax, the sale and purchase constituted the transaction by which the tax was measured and on which the burden rested, and hence it was a burden on the United States, the Court saying: “While Mississippi may impose charges upon the petitioner for the privilege of carrying on trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes.”\(^\text{18}\) And, based on the same principle, the sale of a motorcycle to a state agency, such as a municipal corporation, for use in its police service, is exempt from an excise tax imposed by the Federal Government.\(^\text{19}\)

**II. One Remedy—An Act of Congress**

In this state of affairs, can Congress give the states power to tax interstate sales? It has been suggested that this can be done, relying upon the language of the Supreme Court in *In re Rahrer*,\(^\text{20}\) upholding the Wilson Act; \(^\text{21}\) *Clark Distilling Co. v. Western Maryland Ry. Co.\(^\text{,22}\) upholding the Webb-Kenyon Act;\(^\text{23}\) *Whitfield v. Ohio,\(^\text{24}\) upholding the Hawes-Cooper Act;\(^\text{25}\) and *Kentucky Whip & Collar Co. v. Illinois Central Ry. Co.,\(^\text{26}\) upholding the Ashurst-Sumners Act.\(^\text{27}\)

Mr. Perkins, in his article *The Sales Tax and Transactions in Interstate Commerce,\(^\text{28}\) discusses this problem and suggests a system which he thinks covers the field: “(1) a tax on sales within the state; (2) a tax on the

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\(^{16}\) 285 U. S. 147 (1932).
\(^{17}\) 277 U. S. 218 (1928).
\(^{18}\) Id. at 221.
\(^{19}\) Indian Motocycle Co. v. United States, 283 U. S. 570 (1931).
\(^{20}\) 140 U. S. 545 (1891).
\(^{22}\) 242 U. S. 311 (1917).
\(^{27}\) (1934) 12 N. C. L. Rev. 99. See also Layery and Maxson, *State Sales Taxation and the Commerce Clause* (1936) 10 U. of Cin. L. Rev. 351; and Lowndes, *State Taxation of Interstate Sales* (1934) PROCEEDINGS, NATIONAL TAX ASSOCIATION 139.
privilege of soliciting orders within the state, for sales to be made outside
the state, measured by resulting sales; (3) a tax on the use or consumption
of property which is not exempt, but which is neither sold nor for which
orders are solicited within the state (all of the preceding taxes would be at
the same rate); (4) a tax at a higher rate on use or consumption of property
subject to one of the preceding taxes and upon which that tax has not been
paid at a specified time. These taxes are all imposed upon acts done within
the taxing jurisdiction, and they do not discriminate against the property
because of its origin in another state. The assent of Congress to state tax-
atation of sales in interstate commerce and a series of taxes of the nature of
those suggested should lessen the difficulty of administering a consumption
tax, since the merchant would be taxed on intrastate sales, on interstate
commerce sales made in the state when the property is to be used or
consumed in the state; and on the large volume of solicited orders." 29

Subdivision one in Mr. Perkins' article is nothing but the usual sales tax.
Subdivision two would require an act of Congress, and could probably be
collected as a privilege tax. Subdivision three is the ordinary use tax and
is designed to tax the use of property bought outside the state, and presents
the same administrative difficulties as any other use tax. But subdivision
four would probably be unconstitutional as discriminating against goods
bought outside the state, because, though in general terms, its practical
operation would be to penalize those who buy outside the state and do not
pay the use tax, since the collection of the taxes suggested in subdivisions one
and two would present no great difficulties.

To regard some of the suggested federal acts: The North Carolina
Department of Revenue has suggested the bill which follows. "That all
taxes levied by any state upon sales of property or measured by sales of
property may be levied upon or measured by sales of property in inter-
state commerce by the state into which the property is moved for use
or consumption therein, in the same manner and to the same extent that
said taxes are levied upon or measured by sales of property not in inter-
state commerce. Provided: that no state shall discriminate against sales
of property in interstate commerce; nor shall any state discriminate
against the sale of the products of any other state. Provided, further: that
no state shall tax the sale in interstate commerce of property transported
for the purpose of resale by the consignee as a merchant or as a manufac-
turer. Provided, further: that no county, city, or town, or other subdivision
of any state shall levy a tax upon or measure any tax by sales of property
in interstate commerce." 30 At least it can be said that this bill eliminates
the possibility of double taxation of sales.

Senator Thomas of Oklahoma, at the request of the Oklahoma Tax Com-
mission, introduced the following bill in the Senate on January 15, 1932:
"That each of the several states may levy and collect, license, franchise,
gross revenue, registration, or any other forms of taxes upon, or measured
by, any property employed, or business done, within such State, in interstate
commerce in the same manner and to the same extent as such taxes may be
imposed under the constitution and laws of such State upon like property
employed, and business done, in commerce wholly within the State, except
that (a) in no case shall the tax imposed be at a greater rate than is

29 Id. at 118.
30 Id. at 108.
assessed upon like property employed, and business done, in commerce wholly within the State, and (b) nothing contained in this Act shall be construed to authorize taxation of the same property by more than one State."  

Companion bills were introduced in the House, but no action was taken on them. This bill is much broader than the preceding one, which may account for the lack of action. Also, it leaves to construction which state may impose the tax. Evidently the first state to have the opportunity to tax would be the one, and there would probably be much confusion.

Even granting that Congress has the power to divest such interstate transactions of their interstate character for the purposes of state taxation, it is doubtful if such a bill would be passed, at least at the present time. The legislators from non-sales-tax states would object vigorously and could prevent passage. Also, it would give the states a great deal of power over interstate commerce. Further, suppose Congress has to resort to a general sales tax to make ends meet, would there not be a neatly tangled mess of sales and use taxes?

**III. Use Taxes**

Eliminating a federal act as improbable, what are the states going to do about the situation? Disregarding administrative difficulties, the State of Washington has attempted a solution of the problem. The Act in question is Title 4, Chapter 180, Laws of 1935. Section 16 imposes a retail sales tax on sales after May 1, 1935. Section 31 imposes a 2% tax on the privilege of using goods, the rate being the same as the sales tax rate. Section 32 exempts non-residents; all but retail sales; all goods on which a tax of 2% or more has been paid to Washington or any other state; and property purchased in one month amounting to less than $20. Section 33 provides that if the goods have been taxed less than 2% in Washington or another state the difference must be paid.

Naturally, in view of the cases discussed above, actual interstate transactions are exempt, but all other retail sales within the state are taxable. In addition, the incentive for going outside the state to purchase goods is removed, for the use of the goods within the state is taxed at the same rate as the purchase within the state. It might be added that the provisions exempting from the use tax those goods on which a tax of 2% has already been paid in another state shows a disposition on the part of the Washington legislators to play fair, for, assuming the validity of such a use tax, no such exemption need have been given. This statute was considered and upheld in *Vancouver Oil Co. v. Henneford.*  

That case involved a Washington corporation with its principal place of business in Vancouver, Washington, which used trucks and trailers in its business. On May 1, 1935, it purchased a trailer from a manufacturer in Portland, Oregon, the transaction being consummated there, though the trailer was later delivered at Vancouver. Later in the month a gasoline storage tank was similarly purchased. The corporation used these items in its business, and the Tax Commission demanded that the tax be paid. Then the corporation brought this suit to enjoin the enforcement of the use tax. The tax was upheld by the majority (4-3) as an excise tax on the use of the property in intrastate commerce after it had come to rest in the state, relying on decisions of the United States
Supreme Court upholding use taxes imposed on gasoline. The dissent was very vigorous, relying exclusively upon Baldwin v. Seelig, Inc.,33 and cases cited therein. The Baldwin case will be discussed later.

It is proposed to show here that the decision of the court was correct, and that the case relied on by the minority is not in point. This will be done by a consideration of the cases decided by the Supreme Court of the United States upholding excise taxes on gasoline and motor fuel.

In Hart Refineries v. Harmon,34 a state statute imposing a sales tax on gasoline sold within the state, including that imported and then sold, was attacked as discriminatory because gasoline imported and used was not also taxed. The Court upheld the sales tax, saying that there was an obvious and substantial difference between a sales tax and a use tax, and that the sales tax was not a burden upon interstate commerce, not being discriminatory. Previous to this, in Bowman v. Continental Oil Co.,35 the Court had upheld an act which imposed a 2% excise tax upon each gallon of gasoline sold or used within the state, but saying that the tax could not be laid upon sales made in the original package. But in Sonneborn Bros. v. Keeling,36 it was held that a tax upon the sale of oil brought into the state, being non-discriminatory, was valid, whether the sale was made in the original package or not. Hence, to avoid a sales tax upon oil brought into the state, it would have to appear that the sale was made while the oil was still in transit.

Gregg Dyeing Co. v. Query37 involved a South Carolina tax upon sale or use. An act was passed imposing a tax of 6¢ per gallon upon the sale of gasoline within the state, and also upon gasoline used by dealers but not sold. In 1930, another act was passed placing a tax of 6¢ per gallon upon all who imported gasoline into the state and stored it with the intent to use and consume it in the state. This latter act was attacked as a burden upon interstate commerce. The state supreme court took the view that the tax on sales was a burden upon the consumer, and that the Act of 1930 merely made the burden on all consumers within the state uniform. The Supreme Court accepted this view, saying that in order to sustain his case the consumer had to show a substantial discrimination because of the extrastate origin of the gasoline.

Section 1, Chapter 29, Laws of 1929 of New Mexico, imposed this tax: "There is hereby levied and imposed an excise tax of five cents per gallon upon the use of all gasoline and motor fuel used in this state for any purpose; provided that in the collection of such tax a deduction shall be allowed of the amount of the excise tax paid in this State by distributors or dealers upon the sale of the gasoline so used." At that time there was a sales tax of 5¢ per gallon upon gasoline. This Act is in effect a compensating tax designed to tax the use where the sale could not be taxed, and it was upheld by the Supreme Court of New Mexico, and affirmed by the United States Supreme Court.38

Wiloil Corporation v. Pennsylvania39 is a very interesting case. A Pennsylvania law placed a tax of 3¢ per gallon on all liquid fuels used or sold and

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33 294 U. S. 511 (1935).
34 278 U. S. 499 (1929).
35 266 U. S. 642 (1921). It does not appear from the case how the use tax was to be applied.
36 222 U. S. 506 (1923).
37 286 U. S. 472 (1932).
delivered by distributors within the state. The corporation had its place of
business in Pittsburgh and sold liquid fuels at wholesale, and is a distributor
as defined by the law, the distributor being made liable for the tax. A tax
was laid upon the contents of thirteen tank cars sold and delivered by the
corporation, all of which were ordered through its agent in Philadelphia for
delivery to purchasers at Philadelphia and Essington. The purchasers were
not taxable as distributors. These orders were directed to the Crane Hook Co.
of Wilmington, Delaware, and were shipped from there direct to the pur-
chasers in Pennsylvania. By the bills of lading the corporation was the
consignor and the purchasers were the consignees. The Court considered the
aspects of the sale and decided that title did not pass in Wilmington from
the corporation to the purchasers, but that the fuel was sold and delivered
in Pennsylvania, and said: "The precise question is whether the mere fact
that appellant [corporation] caused the fuels to be shipped from Delaware
for delivery in tank cars—deemed original packages (Askren v. Continental
Oil Co., 252 U. S. 444, 449, 64 L. ed. 654, 659, 40 S. Ct. 335)—on purchasers' siding as agreed makes imposition of the tax repugnant to the commerce
clause. There is nothing to indicate legislative purpose to discriminate
against liquid fuels brought into Pennsylvania to be delivered in fulfillment
of sales contracts or there to be used or sold. . . ."40

"Our decisions show that, if goods carried from one State have reached
destination in another where they are held in original packages for sale, the
latter has power without discrimination to tax them as it does other property
within its jurisdiction [citing cases]. And as that rule applies whether the
burden falls directly or indirectly . . . it is not material whether the tax
is upon the sale and delivery or upon the property. . . . As interstate trans-
portation was not required or contemplated, it may be deemed as merely
incidental."41

Monamotor Oil Co. v. Johnson42 involved an Iowa statute which imposed
a tax of $6 per gallon on motor vehicle fuel used in the state. The distributor
was required to pay the tax, but he was also required to pass the tax on to
the consumer; and this tax had to be paid by him on all gasoline imported
into the state, concerning which he was required to submit a monthly report.
However, there was provision for a refund if the gasoline imported was
exported and not used in the state. Also he was required to make a report
on and pay tax on shipments into the state direct to dealers who were his
customers. This statute was upheld as an excuse on the use of motor fuel,
to be collected by making the distributor an agent of the state, the distributor
not bearing any of the tax, except as to that part actually used by him.

Here two seeming inconsistencies on the part of the Supreme Court com-
mand attention. It has held that taxes upon sales to agencies of state and
federal governments are burdens upon the consumer, and hence bad as
burdening governmental instrumentalities.43 On the other hand it has held
that a tax on the sale of fuel to an interstate carrier for use in interstate commerce is not a burden on interstate commerce.44 Also, it has held that

40 Id. at 174.
41 Id. at 175.
42 292 U. S. 86 (1934).
43 Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U. S. 218 (1928); Indian Mo-
tocycle Co. v. United States, 283 U. S. 576 (1931).
44 Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U. S. 147 (1932). Here there was a use tax complementing a sales tax, so that it was necessary to hold
that the burden was on the consumer in each tax so as not to violate the equal protection
clause.
a state need not tax the use of gasoline imported for use when it taxes intrastate sales and the use by dealers of that not sold. It said that there was no discrimination, even though the state might tax both the use and the sale. However, that does not seem to square with the decisions of the Court upholding complementary use taxes, which taxes are applied only to the use of fuel on which no sales tax has been laid. The theory in these latter cases is that the burden of either tax falls on the consumer, and hence taxes are equalized. This helps the state to solve its tax problem, but it would seem logical to hold that a failure to put a use tax on those goods which escape the sales tax is a violation of equal protection, as was contended in the Harmon case, if a sales tax is nothing but a consumer's tax in disguise. For how can a complementary use tax be said merely to equalize the burden of taxation where there has been no discrimination without it? It would seem that that is the question which bothered the minority in the Vancouver Oil Co. case.

Nashville, C. & St. L. Ry. v. Wallace makes it practically impossible for interstate carriers to avoid a tax upon the fuel they use. Section 3, Chapter 58, Tennessee Public Acts (1923), as amended by Chapter 67, Tennessee Public Acts (1925) taxed persons, firms or corporations, dealers or distributors, storing gasoline and distributing the same or allowing it to be withdrawn from storage, whether such withdrawal be for sale or otherwise. The Railway Company purchased large quantities of gasoline outside Tennessee and brought it into the state in tank cars from which it was transferred to storage tanks. It was all withdrawn eventually and used by the company to furnish motive power for its operation in interstate commerce. Concerning this tax the Court said: "Storage of the gasoline and withdrawal of it from storage within the state for use or sale, are, as the state Supreme Court has held, the events which, by the very terms of the statute, call it into action." And the Court continued: "It cannot be doubted that, when the gasoline came to rest in storage, the state was as free to tax it, notwithstanding its prospective use as an instrument of interstate commerce, as it was to tax appellant's right of way, rolling stock or other instruments of interstate commerce which are subject to local property taxes." Hence, only a tax which purports to be upon use in interstate commerce is bad.

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48 Vancouver Oil Co. v. Henneford, 183 Wash. 317, 49 P. (2d) 14 (1935). In order to reach the result which they did, this must have been the nature of their argument: A sales tax is imposed on all retail sales in the state at the rate of 2%. Then a use tax of 2% is laid on the privilege of using goods within the state, but need be paid only by those who have not paid a 2% tax on the goods in this or another state. In practical operation, this means that a use tax is not laid on all users, but only on those who buy goods outside the state. The necessary effect of this is a 2% tax on goods because they are bought outside the state.
49 283 U. S. 249 (1933).
50 Id. at 265.
51 Id. at 267.
52 See Allen, The Aircraft Motor Fuel Tax (1933) 4 AIR L. REV. 239, where the author says that taxes on such storage should be held bad under Nelson v. Kentucky, 279 U. S. 245 (1929), but that the Court has decided that interstate operators should contribute to the governmental expenses of those states through which they operate. See also, Hale, The Taxation of Gasoline Motor Fuel Used in Interstate Operation of Airplanes (1933) 4 J. OF AIR LAW 573; and Lupton, Motor Fuel Taxation (1935) 6 J. OF AIR LAW 566.

Considering the case upon which the minority in the Vancouver Oil Co. case relied so heavily—Baldwin v. Seelig, Inc.56—Seelig, Inc., was engaged in the business of a milk dealer in New York City. It bought milk and cream from a corporation in Vermont, which corporation bought it from Vermont farmers. The milk and cream was transported to New York, and about 90% was sold in the original cans, the other 10% being bottled and sold. Seelig paid less in Vermont than the minimum price set by the New York Milk Control Act57 to be paid to New York farmers. That law also made it unlawful for any milk dealer to sell in New York milk purchased from the producer at a price lower than that required to be paid for milk produced in New York. Seelig, Inc., refused to abide by this law and was refused a license to transact its business. Being threatened with prosecution, this suit was brought to restrain the enforcement of the Act. The Act was held invalid as an attempt on the part of the state of New York to project its police power into the State of Vermont. The Court said: “Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. . . . Imposts or duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of Congress. Constitution, Art. I, § 8, clause 3. . . .58

“If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation. . . .59

“. . . but commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another, in the faith that the augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product. The next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business. Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states.”60

And this is true regardless of whether the milk is sold in the original package or not: “In brief, the test of the original package is not an ultimate principle. . . . What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.”61

53 289 U. S. 249 (1933).
54 3 F. Supp. 995 (E. D. La. 1933), aff’d per curiam, 290 U. S. 596 (1933).
55 57 F. (2d) 877 (M. D. Tenn. 1932), aff’d per curiam, 287 U. S. 565 (1932).
56 294 U. S. 511 (1935).
57 N. Y. Laws 1933, c. 158, reenacted by N. Y. Laws 1934, c. 126.
59 Id. at 522.
60 Id. at 524.
61 Id. at 526, 527.
It must be remembered that the New York Milk Control Act is a police power measure designed to secure an adequate supply of milk by fixing minimum prices to the producers, and it was upheld by a divided Court (5-4).\(^4\) There is nothing to show that this particular milk was unsanitary.

The tax involved in the \textit{Vancouver Oil Co. case} is entirely different. The law does not make it unlawful to use goods in Washington because a tax is not paid in another state. True enough, it is against the law to use in Washington goods bought outside the state on which the use tax is not paid, but a state may tax the use of goods within its boundaries, the property being considered as part of the mass of property within the state. On the other hand, the statute involved in the \textit{Baldwin case}, purporting to be a police power law, lays down certain conditions which must be fulfilled before goods imported into the state may be sold, which conditions, as the Court said, have no substantial relation to the attainment of a legitimate police power purpose. The price paid for the milk in Vermont has nothing whatsoever to do with the safety, health or morals of the people of New York, as long as the milk itself is sanitary and wholesome. And, if the milk were not sanitary or wholesome, its importation could be prohibited.\(^5\) But its importation and sale cannot be prohibited merely on the theory that the price paid in Vermont, being lower than the price required to be paid in New York, makes, or tends to make, it unwholesome. The Court points out, as noted above, the effects of approving such a principle, but those same evil effects cannot flow from permitting a state to tax all consumers at the same rate. At least, the decisions of the Supreme Court have indicated as much, and it is being done every day without noticeably harmful effect.

In cases such as those now under discussion the Court says that it looks to substance, not to form, and hence it will uphold a tax which has the effect of equalizing tax burdens, even though a precisely similar tax is not laid upon all taxpayers. This principle was reiterated in the case of \textit{Colgate v. Harvey},\(^6\) decided, incidentally, after the case of \textit{Baldwin v. Seelig, Inc.}\(^7\) That case involved a Vermont statute imposing a 4% tax on income derived from dividends earned outside the state, without imposing a similar tax upon income derived from dividends earned within the state. However, there was a tax of 2%, measured by \textit{entire net income}, imposed upon every corporation for the privilege of exercising its franchise in the state and doing business therein. Also, all tangible corporate property lying within the state was subjected to a property tax. Concerning this tax, the Court said: "The evident aim of the classification, therefore, is to produce equality, and not inequality; and obviously, that aim will become effective in fact, to a greater or less extent, in the administration of the legislation."

"The theory upon which the tax is laid upon dividends realized from out-of-state business while leaving dividends realized from domestic business untaxed, is that the 2% franchise tax, especially with the property tax added, has the effect of indirectly imposing a tax burden upon the latter measurably equivalent to that imposed directly upon the former. Thus the tendency of the plan is to avoid taxing twice what is, in effect, the same thing. And conceding the power of the state to impose double or even multiple taxation, legislation which is calculated to avoid that undesirable result certainly cannot be condemned as arbitrary. Thus far, the question is settled in favor


\(^{43}\) 296 U. S. 404 (1935). See also \textit{Hinson v. Lott}, 8 Wall. 148 (1868).
of the validity of the tax by prior decisions of this court [citing cases]. True, it well may be assumed that similar franchise and property taxes are imposed upon the outside corporations by other states; but the assumption is immaterial to the issue here involved. It is enough that such taxes are not imposed by the State of Vermont." 63

It would seem, therefore, from this and other cases cited and discussed herein, that the states with general sales taxes which desire to pass compensating taxes similar to the Washington tax may do so without fear that they will be invalidated by the Supreme Court. However, that does not mean that their troubles are over, though they may pass laws which are theoretically "hole proof". For then comes the enormous problem of administering a use tax, or some similar tax. Particular difficulties need not be pointed out; it will be sufficient to call to mind the experience of the states in trying to regulate the importation, sale, and/or use of intoxicating beverages under the late prohibition laws.

John W. Ahern.*

THE TRUST FUND DOCTRINE

Liability of Stockholders on Unpaid Stock Subscriptions

The Doctrine in General

In Sawyer v. Hoag 1 the doctrine was declared to be well established that the capital stock of a corporation 2 constitutes a trust fund for the benefit of its general creditors. 3 The doctrine has been stated in a large number of cases, 4 its theory being that when the line of insolvency is reached or approached, so that the directors can no longer deal with the assets of a corporation in the ordinary course of business, but must deal with them in the contemplation of insolvency and suspension, then the assets become, in the hands of the directors, a trust fund for the creditors of the corporation. The doctrine had its origin in such a brief statement as that "assets of a corporation constitute a trust fund". 5 Its implications, however, are more diverse and numerous than the statement suggests. The collateral principles have been summarized as follows: the assets are held a trust fund to the extent that stockholders may be compelled in equity, at the suit of creditors, to pay in full the amount of their stock; to the extent that creditors generally may follow and subject to the payment of their claims assets wrongfully distributed among, or withdrawn by, the stockholders, or paid or conveyed to third persons without consideration; and to the extent that, when the corporation becomes insolvent, particular creditors cannot be given or obtain a preference, by way of payment or security, over other creditors. 6

We are concerned only with the liability of stockholders to the creditors of an insolvent corporation on unpaid stock subscriptions.

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63 Id. at 420.
* A. B., LL. B., Georgetown University; at present a candidate for J. D. degree, Ibid.; member of the Bar of the District of Columbia; formerly Editor of this Journal.
17 Wall. 610 (U. S. 1873).
2 Especially its unpaid subscriptions.
3 The doctrine had been originated by Mr. Justice Story, who announced it on the occasion of the decision in Wood v. Dummer, 30 Fed. Cas. No. 17, 944 (D. Me. 1824).
15 Fletcher, Cyclopedia Corporations (permanent ed. 1932) §§ 6052, 7283 n. 79.
Wood v. Dummer, supra, note 3.
Fletcher, supra, note 4, at 518.
Unpaid Subscriptions as Trust Fund

Originally, the trust fund doctrine was somewhat limited as to the capital stock or assets involved, but it was extended to include unpaid subscriptions to the capital stock. Unpaid subscriptions or balances due on stock subscriptions, being a part of the assets of a corporation, are considered a trust fund for the benefit of creditors by a majority of the states today. The effect of this extension is that the capital stock of an insolvent corporation is a trust fund for the payment of its debts; that the law implies a promise by the original subscribers of stock who did not pay for it in money or other property to pay for the same when called upon by creditors; and that a contract between themselves and the corporation that the stock shall be treated as fully paid and non-assessable, or otherwise limiting the liability therefor, is void as against the creditors. These are but corollaries of the more general doctrine that the capital stock of a corporation is a trust fund for the satisfaction of its debts. It has been held that this doctrine enables a trustee or receiver to recover the full amount of an unpaid balance. However, this rule will be relaxed when it would work injustice.

The liability imposed under the trust fund doctrine may also be predicated either on a statute or on the doctrine of fraud, the result in both cases, with respect to unpaid subscriptions, being the same, except that the term "trust fund" has been abandoned. This is true of but a few jurisdictions.

The trust fund doctrine has been severely criticized because of the confusion of ideas that has arisen as to its meaning, and the conflicts in its application. That the phrase is not sufficiently precise and accurate becomes

7 Sawyer v. Hoag, supra, note 1.
8 In re Arizona Bank's Estate, 42 Arizona 62, 22 P. (2d) 409 (1933); Wilson v. Lucas, 185 Ark. 185, 47 S. W. (2d) 8 (1932); Cramer v. Burnham, 107 Conn. 216, 140 Atl. 477 (1928); Beach v. Beach Hotel Corp., 117 Conn. 445, 168 Atl. 785 (1933); Philips v. Slocomb, 35 Del. 462, 157 Atl. 695 (1933); John W. Cooner v. Arlington Hotel Corp., 11 Del. Ch. 286, 101 Atl. 879 (1917); Forum v. Symmes, 106 Fla. 510, 145 So. 630 (1932); Pear v. Bartlett, 81 Md. 435, 32 Atl. 322 (1895); Dempster v. Ashton, 125 Neb. 535, 250 N. W. 917 (1933); Windsor Drywring Co. v. Gurley, 197 N. C. 56, 147 S. E. 676 (1929); Amacher v. Western Realty Corp., 148 Ore. 611, 38 P. (2d) 64 (1934); Smith v. McCowan, 60 S. D. 504, 244 N. W. 891 (1932); Fletcher, supra, in the footnotes to §§ 6052 and 7283, as well as in the 1936 Cumulative Supplement; § 7360 has listed also the following states: Alabama, California, Georgia, Illinois, Indiana, Iowa, Louisiana, Michigan, Missouri, North Dakota, New Jersey, New York, Tennessee, Texas, Virginia, Washington.
10 Amacher v. Western Realty Corp., supra, note S.
12 Stevens v. Hopson, supra, note 11.
15 Rainier Lumber Co. v. Hicks, 224 Ala. 138, 138 So. 830 (1932).
16 The court in LaSalle St. Trust and Savings Bank v. Milling Co., 101 Kansas 446, 167 Fac. 1036 (1917), quoted with approval the definition of the trust fund doctrine in Hospes v. Northwestern Manufacturing and Car Co., 48 Minn. 174, 50 N. W. 1117 (1892), reciting: "The capital of a corporation is the basis of its credit. It is a substitute for the liability of the individuals who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid-in capital to the amount which it represents itself as having, and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and, in case the corporation becomes insolvent, the law upon plainest principles of common justice says to the delinquent stockholder: 'Make the representation good by paying for your stock.'"
17 Pomeroy refers to the theory as one based on analogy and metaphor. 3 Pomeroy, Equity Jurisprudence (4th ed., 1918), § 1046.
obvious when we consider the nature of a trust. A trust implies two estates or interests, one legal and the other equitable; one person, as trustee, holding the legal title, while another, as the cestui que trust, has the beneficial interest. On the other hand the capital of a corporation is its property; it holds the legal title and the whole beneficial interest in it. It has an absolute control and power of disposition which is inconsistent with the idea of a trust. It would seem, therefore, that a corporation is a trustee for its creditors only to the same extent as is a natural person. However, the phrase or symbol has been so long in use in the courts of this country that it has taken on a specialized significance. It must not be understood by the use of the phrase "trust fund" that there is a specific lien, or direct trust. The words are used to express the idea that corporate property must be appropriated first to the payment of the debts of the company before there can be any distribution of it among stockholders. This does not mean that the property is so affected with indebtedness of the company that it cannot be sold, transferred or mortgaged to bona fide purchasers for a valuable consideration unless subject to the liability of being appropriated to pay an indebtedness.

The doctrine that unpaid subscriptions to the capital stock of a corporation are a trust fund for creditors has no application until the corporation becomes insolvent. While the obligation thus sought to be enforced rests wholly in contract, there is no privity between the corporate creditor and the stockholder, and the creditor therefore must resort to equity for the enforcement of the obligation. Since the jurisdiction of equity obtains in such cases only upon the return of execution nulla bona, the Statute of Limitations runs from the return date.

The criticism which has been directed at the trust fund doctrine has not by any means reduced it to obsolescence. In many states it has been modified, and in some repudiated. In at least two of the states in which the doctrine received no recognition it has been re-established by the enactment of statutes. In another state the trust fund doctrine is not recognized, although by statute substantially the same results are effected. The view of the Supreme Court of the United States has been that whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the property of the corporation and their conditional liability to its creditors. It is rather a trust in the administration of assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder. There are a number of cases

21 Fear v. Bartlett, supra, note 8. "When a corporation is solvent, the theory that its capital stock is a trust fund upon which there is any lien for the payment of its debts has in fact very little foundation." McDonald v. Williams, 174 U. S. 397, 401 (1899).
23 Atlanta & Walterboro Butter and Cheese Ass'n. v. Smith, 141 Wis. 377, 123 N. W. 106 (1909); Straus v. Corporations (1936) § 178. The extent to which the so-called trust fund doctrine is applied to corporations is explicitly asserted in a series of United States Supreme Court cases, and may be epitomized in the statement of Justice Field in the case of Fogg v. Blair, supra, note 20, wherein he concludes by saying "such a doctrine has no existence".
24 Gallagher v. Asphalt Co. of America, 55 N. J. Eq. 258, 55 Atl. 259 (1903).
that negative the theory of a direct trust in favor of creditors but which at the same time refer to the object of the creditors' claim as a trust fund.26 Other courts admit merely that the assets of a corporation partake of the nature of a trust fund.27 A California court has shown even less indulgence for the term. According to it, debts due a corporation constitute a portion of its assets, and may be reached by creditors. Among these debts are unpaid subscriptions to stock.28 Still another line of cases, the decisions resting on a different ground, namely, fraud, insists that it is only when the unpaid capital becomes an asset of an insolvent concern that it is impressed with a trust in favor of creditors, a thing equally true of individuals. The gist of these decisions is that persons extending credit to the corporation have the right to assume that it has paid up capital to the amount it represents itself as having, and if they give it credit on the faith of that representation, and it is false, it is a fraud upon them, and in case the corporation becomes insolvent the law will require the corporation to make good the representation.29 Rejecting the idea of the presence of any trust, it was stated in the case of Hospes v. Northwestern Manufacturing and Car Co.30 that creditors cannot recover on the ground of a contract when the corporation could not; that their right to recover must rest on the ground that acts of stockholders with reference to the corporation's capital constituted a fraud on their rights. This view has not been generally accepted, however, most of the cases clinging to the trust fund doctrine as applied to unpaid subscriptions and reasoning from the premise of a contractual undertaking rather than of tortious conduct.31

Conclusion

The trust fund doctrine seems very much alive today both in name and meaning. It continues to be a vital organ in the body of the corporation law of numerous states, and it is resorted to not infrequently by the Federal courts. It was said by Judge Kenyon in Stuart v. Larson32 to be merely "applied common honesty". It is supposed by some to possess certain logical consequences which lead to a result incompatible with the rule. Yet, if traced to its source, the doctrine exacts no more than honesty and fairness between a stock subscriber and a corporation. Some of the theories vary, but the rule remains as under the trust fund doctrine; and even the diverse theories that are advanced in support of the rule may all be reconciled by application of the principle of "applied common honesty".33

F. B.

27 Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721 (C. C. A. 2d, 1912); Lawrence v. Greenup, 97 Fed. 906 (C. C. A. 6th, 1899). These cases do not repudiate the meaning of the trust fund doctrine as applied to unpaid subscriptions. They merely seek a more strictly accurate denomination for the process.
30 Supra, note 29.
THE TRANSFER OF STOCK  
At Common Law and under the Uniform Stock Transfer Act

The quality of corporateness, though an abstraction, gives life to many things material. Chief among these is the certificate of stock issued by the corporation, evidencing the contract of membership in it with its resultant advantages. Increased commercial traffic, especially with regard to stock exchanges, has invited regulation.1 To the end of creating uniformity in the transfer of stock, essentially between transferor, transferee and the corporation, the Uniform Stock Transfer Act 2 has been adopted in many states 3 and in one territory.4 Omitting a discussion of remedies for unauthorized dealings and transfers with relation to dividends,5 the more important phases of the topic will be considered.

At Common Law

In the absence of statute certificates of stock have the status of a general contract, so far as delivery and indorsement permit transferability.6 The power to transfer his stock has always been secured to an owner,7 and unless the power is partially prohibited, or restricted or prohibited in some legal manner, as by statute, article, by-law, agreement between the holder and the corporation, or by inclusion in the stock subscription or in the certificate itself, the stock is freely transferable.8 Reasonableness is the strictly construed boundary beyond which a restriction may not go.9

Restrictions which have been held invalid include a denial of the right to transfer,10 requirement that if the transferee be a non-stockholder it is necessary to have the approval of all the stockholders11 or a majority of

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3 Latest compilation (6 Greene, U. L. A. Supp. 1935) includes these states and dates: Alabama (1931), Arkansas (1923), California (1931), Colorado (1927), Connecticut (1917), Idaho (1927), Illinois (1917), Indiana (1923), Louisiana (1910), Maryland (1910), Massachusetts (1910), Michigan (1913), Minnesota (1933), New Jersey (1916), New York (1913), Ohio (1911), Oregon (1935), Pennsylvania (1911), Rhode Island (1912), South Dakota (1921), Tennessee (1925), Utah (1927), Virginia (1924) and Wisconsin (1913).
4 Alaska (1913).
5 See Stevens, Corporations (1936) §§ 127, 128, 133.
6 Johnston v. LaBin, 103 U. S. 800 (1880). In the presence of statute, fundamental general rules of law are applicable. McAllister v. McAllister Coal Co., — N. J. Eq. —, 184 Atl. 716 (1936).
9 Miller v. Farmers' Milling and Elevator Co., 78 Neb. 441, 110 N. W. 995 (1907); Rychwalski v. Milwaukee Candy Co., 205 Wis. 193, 236 N. W. 131 (1931). Here there was a prohibition against transferring to one not a stockholder without previously offering the stock to other stockholders. The court held that the stockholder was within his rights when he sold all his stock to a shareholder even though he did not make a prorated offer of transfer to the others.
11 In re Klaus, 67 Wis. 401, 29 N. W. 582 (1886).
them, or consent of the directors; denial of the right to dispose to a transferee without offering the stock to the corporation at the original price, and denial of the right of a debtor of the corporation to transfer his stock. Prohibitions which have been upheld as reasonable include the requirement of notification to the corporation of the name of the proposed purchaser, number of shares, price, and consent of three-fourths of the stockholders. Courts have also sustained denial of the right to transfer to an outsider without giving other stockholders an option or notice.

Where the common law rule prevails, the corporation has the right to treat the registered holder as owner for all purposes. Though in former years the contract of membership as evidenced by the certificate was a more personal and enduring one (contrast the widespread commercial custom of frequent transfers today) yet, oddly enough, in the absence of statute a corporation had no lien upon its stock. Requirements of recordation of the transfer upon the books of the corporation, as provided for in many charters, are designed for the security of the company and those dealing with the stock without notice. Therefore, as between the parties themselves, the transfer may be valid though no change is made in the books of the corporation. This is logical since title passes by the acts of the parties and not by the registration.

Prior to the Act, essentially on the basis of estoppel, an owner could not recover stock certificates endorsed in blank and transferred to a bona fide purchaser without authority but with the indicia of ownership. Contrary to the general rule, the Maryland courts distinguish the rights of a bona fide purchaser, a bona fide pledgee, and a bona fide purchaser from a pledgee. Where the pledgee has the indicia of ownership but no authority to transact business, the bona fide purchaser is charged with full notice of the rights of the real owner. However, the mere endorsement in blank of a stock certificate, later lost or stolen, does not operate to estop the owner from asserting his title even against a bona fide holder, chiefly for the reason that certificates are looked on as not possessing many of the

17 Sterling Loan and Investment Co. v. Litel, 75 Colo. 34, 223 Pac. 753 (1924). Upon the topic of restrictions generally see Note (1930) 65 A. L. R. 1159.
20 Black v. Zacharie, 3 How. 482 (U. S. 1845); Moores v. Citizens' National Bank of Piqua, 111 U. S. 156 (1884); Helvering v. Miller, 75 F. (2d) 474 (C. C. A. 2d, 1935); In re Estate of Jones, 274 Ill. App. 616 (1934).
21 Hereinafter the Uniform Stock Transfer Act, supra, note 2, will be designated the Act.
attributes of negotiability.\textsuperscript{24} Apothegmatically: the common law looks to estoppel, the Act to negotiability.

Some difficulty has arisen as to the question of the situs of transfers of stock and related transactions.\textsuperscript{25} In an early case,\textsuperscript{26} the Supreme Court stated that the validity of transfers was to be decided by the law of the domicile of the corporation. Later\textsuperscript{27} it was said: "The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicile of a company is and must be in the state that has created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is its real owner." In 1925, in the celebrated case of \textit{Direction Der Disconto-Gesellschaft v. United States Steel Corp.},\textsuperscript{28} an apparently opposite conclusion was reached, the Court holding that the law of the situs of the transfer governed the transaction. The evident magnitude of a discussion of this topic precludes any presentation of its difficulties and ramifications here.\textsuperscript{29}

\textbf{The Uniform Stock Transfer Act}

Some text writers state that the Act clothes stock certificates with negotiability.\textsuperscript{30} However, at least one writer,\textsuperscript{31} using the definition of the Negotiable Instruments Act, denies such effect to the Act, pointing out that a stock certificate is not an unconditional promise to pay a sum certain in money. The Act\textsuperscript{32} evidences the intent to have the certificates represent the share in the most complete manner. Negotiability is furthered with the concomitant loss of a measure of control over the certificate by the corporation and the state where the corporation is domiciled.\textsuperscript{33}

The transfer of shares implies any means by which the ownership of stock is divested by one person and acquired by another.\textsuperscript{34} Section 1, apparently declaring the common law rule as to the mode of transfer, requires the actual delivery of the certificate properly endorsed or delivery of the certificate with a separate document containing a valid assignment or power of


\textsuperscript{25} See 12 L. FLETCHER, CYCLOPEDIA CORPORATIONS (perm. ed. 1932) § 5473.

\textsuperscript{26} Black v. Zacharie, 3 How. 482 (U. S. 1845), cited supra, note 20.

\textsuperscript{27} Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 13 (1900).

\textsuperscript{28} 267 U. S. 22 (1925).

\textsuperscript{29} The subject is well treated in Note (1927) 15 Calif. L. Rev. 145.


\textsuperscript{31} STEVENS, CORPORATIONS (1936) § 130.

\textsuperscript{32} § 1 (Manner of transferring title to certificates and shares) and the Commissioners' Note thereto. Clark v. Western Feeding Co., 10 Cal. App. (2d) 727, 52 P. (2d) 991 (1935).

\textsuperscript{33} Section 1 reads in part: "The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporations issuing the certificate and the certificate itself, provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent."

\textsuperscript{34} Wallach v. Stein, 103 N. J. L. 470, 136 Atl. 209 (1927).
attorney. Doubt existed at common law as to whether an unregistered transferee had title superior to an attaching creditor of the transferor. The Act seems to resolve all doubt in favor of the majority holding in electing the unregistered transferee.

Unless the Act is complied with, only the equitable title is transferred, but the usual remedies are available, and special provision is made for the transferee in the absence of endorsement or delivery. Where there is a contract to sell the stock, title to it does not pass to the vendee, under the Act, when the vendor obtains the requisite amount of the stock, because of the lack of unconditional appropriation to the contract. This is viewed as reasonable. Confidence in stock transfers and dealings in securities generally is to be sought, the benefit being universal. Then too, with such a sanction placed on carelessness, assuming negligence in insuring or safe keeping, the holder will use greater care to protect his certificate, care such as he exerts to preserve cash and bonds. Section 6 does not speak of forgery, even impliedly, and thus it seems that the true owner, as at common law, may recover from the holder, even after delivery to a bona fide purchaser.

In furthering the intention to make the certificate negotiable, effect is given to restrictions only if written upon the certificate. This requirement is the only burden on transfer not present under the common law. The right to a lien must also be expressed on the certificate, the by-laws being otherwise ineffectual. A substantial advance toward identifying the shares

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37 Lacy et al. v. First Trust and Deposit Co., 140 Misc. 877, 262 N. Y. Supp. 213 (Sup. Ct. 1931). The instrument was lost and the purchaser, who had never had possession and who knew that it was lost, was held entitled to require the corporation to issue new certificates.
38 Section 9 provides that delivery of the certificate by the apparent owner, without the required endorsement but with the intention to transfer, shall impose an obligation which may be specifically enforced, to complete the transaction by making the endorsement, which takes effect only when actually made. Boston Safe Deposit and Trust Co. v. Adams, 224 Mass. 442, 113 N. E. 277 (1916). Such was the rule at common law. Similar provisions are found in the Negotiable Instruments Act and The Warehouse Receipts Act.
39 § 10.
40 Agar v. Orda, 144 Misc. 140, 258 N. Y. Supp. 274 (Sup. Ct. 1932), aff'd, 264 N. Y. 248, 190 N. E. 479 (1934). In this case the Uniform Sales Act was held to apply to certificates of stock.
41 Broderick v. Aaron, 152 Misc. 791, 273 N. Y. Supp. 641 (Sup. Ct. 1934). In Johnson v. Johnson, 188 Ark. 992, 68 S. W. (2d) 465 (1934) (the Act was not mentioned) it was said that it would be otherwise, if the parties so intended. This is taken to mean the equitable title, since the Act, § 1, specifically requires actual delivery of the certificate. The court in Stuart v. Sargent, 283 Mass. 536, 186 N. E. 649 (1933) pertinently stated that there is no requirement that an equitable title include a delivery. Strictly, an equitable title would exclude a delivery under the Act.
42 § 5. In the Commissioners' Note, full negotiability is claimed for the certificate.
43 § 15.
of stock with the certificate is made by Section 13, requiring actual seizure of the certificate or the enjoining of its transfer as a prelude to attachment or levy proceedings. It is somewhat similar to the Uniform Sales Act. Under it a sheriff cannot sell stock unless he has possession of the certificates, nor can sequestration proceedings be had. The recordation of transfers of stock upon the books of the corporation is a distinct aid to creditors seeking payment by means of attachment. In the absence of such notation, a creditor must in some manner get possession of the certificates themselves. The remedy of injunction provided seems inadequate since it is not difficult for a debtor-holder to find a bona fide purchaser to whom a transfer can be made. Where the holder resides in another state, the creditor is not aided by a proper registration on the books of the domestic corporation, because the local authorities cannot make the necessary seizure of the certificates outside the state. This situation is complained against, since by the common law generally, levy could be had on the shares in the domiciliary state of the corporation. But cannot the complaint of difficulty of attachment be levelled against personal property in general?

Upon the topic of conflict of laws, where the cause of action is based upon the stock of a company incorporated by a state which has not adopted the Act or similar statute, the Act cannot be applied and the common law must govern. Such was the intention of the framers of the Act.

Conclusion

It is felt that much of the variety of decision can be attributed to the use of the term "transfer" to include pledge, attachment, lien, seizure by the state, the federal government or by foreign nations, as a civil remedy, penalty or war measure, and finally transfer by operation of law and by act of the parties. The Act has gone far toward stabilizing and unifying this important phase of commercial life. The ideal will be attained through the universal adoption of principles and rules applicable alike to commercial transactions, remedial processes of courts, and federal and state tax measures, whether they be estate, income or securities. It is significant that Delaware, the domicil of many corporations, has not seen fit to adopt the Act or similar statute.

J. J. O'C.

latter case the lien was denied even though the corporation law of the state provided for a lien in such instance.

46 "No attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate be actually seized by the officer making the attachment or levy, or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined. Except where a certificate is lost or destroyed such corporation shall not be compelled to issue a new certificate for the stock until the old certificate is surrendered to it."

47 § 39.


51 § 22, especially the definition of "certificate," and the Commissioners' Note.
ATTORNEYS—Wrongful Discharge—Compensation—Recovery on Quantum Meruit.

Plaintiff, an attorney, was employed by the defendant, executrix of a will, to perform certain legal services in connection with the settlement of the estate, for a fee of $5,000. After the plaintiff had performed about five-sixths of the required services, he was discharged by the defendant, without cause. The Surrogate Court awarded the attorney $10,000 as the reasonable value of his services, and, on appeal, this was affirmed. Held, recovery in excess of the contract price was justified on the grounds that: (1) a client has the right, by law, to discharge his attorney, at any time and for any reason, subject to liability for services rendered; (2) this absolute right of discharge at the client's election precludes the assessment of damages against one who exercises it; (3) the premature termination of the relation by the client cancels the contract, and the attorney's recovery for services performed must be in quantum meruit, without regard to the compensation provided in the express agreement; and (4), the facts in this case support the award of $10,000 as the reasonable value of services rendered. Montgomery v. Van Allen, — N. Y. App. Div. — (1936).

Although a recovery in damages for wrongful termination of the contract seems to be inconsistent with the absolute right of discharge given to the client, as brought out in the principal case, the courts usually allow the attorney either to consider the contract of employment as rescinded, and recover, in quantum meruit, the value of services actually performed, Hall v. Gunter & Gunter, 167 Ala. 375, 47 So. 155 (1908); Weil v. Finneran, 70 Ark. 509, 69 S. W. 310 (1902); Parish v. McGowan, 39 App. D. C. 184 (1912); Henry v. Vance, supra; Philbrook v. Mozev, 191 Mass. 33, 77 N. E. 520 (1906); Dempsey v. Dorrance, 15 Mo. App. 429, 132 S. W. 33 (1910); Shevalier v. Doyle, 88 Neb. 560, 180 N. W. 417 (1911); Whitesell v. New Jersey & H. R. Ry. & Ferry Co., 58 N. Y. App. Div. 82, 74 N. Y. Supp. 217 (1st Dept. 1902); Commonwealth v. Terry, 11 Pa. Super. 547 (1899); Myers v. Crockett, 14 Tex. 257 (1855); Price v. Western Loan & Sav. Co., 35 Utah 379, 100 Pac. 677 (1909); or to treat the contract as continuing, although broken by the client, and recover damages for the breach, Brodie et al. v. Watkins and wife, 33 Ark. 545 (1878); Watson v. Columbia Min. Co., 118 Ga. 603, 45 S. E. 460 (1903); Henry v. Vance, supra; Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060 (1889); Shevalier v. Doyle, supra; Badger v. Mayer, 8 Misc. 533, 28 N. Y. Supp. 765 (N. Y. City Ct. 1894); Scheinesohn v. Lemonek, 84 Ohio St. 424, 95 N. E. 913 (1911).

A diversity of opinion exists as to the method by which to measure the compensation allowable to an attorney dismissed without cause. The principal case represents one line of decisions wherein it is held that recovery should be for the reasonable value of the services actually rendered, without regard to contract price. In the case of Shouse, Doolittle & Morelock v. Consolidated Flour Mills Co., 132 Kan. 108, 294 Pac. 657 (1931), the plaintiffs had performed legal services for the defendant before the income tax unit of the Bureau of Internal Revenue, and had been discharged, without cause, before termination of the hearings. They brought an action in quantum meruit, and the court held that where an attorney's services are dispensed with before the conclusion of the litigation, without cause, the client must pay what the services performed are reasonably worth, even though the
contract was for a stipulated fee. And in *Hauenstein v. McAlister*, 172 Okla. 613, 46 P. (2d) 552 (1935), the plaintiff was employed by the defendant to file, for the defendant, a voluntary petition in bankruptcy. After the petition had been filed, and the hearings had started, the defendant obtained $3,500, which he turned over to the plaintiff to pay the debts listed in the petitioner's schedule and to have the petition dismissed. The debts amounted to about $1,500 and the defendant was to retain the balance as his fee for services rendered, and also for services which it was expected he would render in defending the plaintiff against criminal charges for concealment of assets. The charges were never filed, and the plaintiff sued to recover back a portion of the amount retained by the defendant. The holding was that the attorney was entitled to the reasonable value of his services, regardless of the contract price. In other words, the court inferred that should the reasonable value of the attorney's services be found to be more than the compensation agreed upon for complete performance, a recovery would not be restricted to the contract price since the contract price was not to be considered.

In another line of decisions the courts permit recovery by the attorney for the reasonable value of services rendered, but expressly limit that recovery not to exceed the contract price. An attorney was employed to perfect title to a parcel of land, under a contract entitling him to a certain interest in the land for such services. His client, without cause, terminated the contract before the services had been fully performed. It was decided that the attorney could not recover, as the reasonable value of his services, more than the value of the land which would have been the compensation for his services had he been allowed to perfect the title. *Thompson v. Smith*, 248 S. W. 1070 (Tex. Com. App. 1923). In *Goodin v. Hayes*, 28 Ky. Law Rep. 112, 88 S. W. 1101 (1905), it was held that an attorney under contract of employment, who is discharged without cause, is entitled to recover, for the services rendered, the contract price abated by such sum as reasonably represents the unperformed part of the services.

Another group of cases is authority for the proposition that where an attorney is employed at an agreed compensation, and fully performs his agreement until discharged without cause, the measure of damages is the compensation named in the contract. *Webb v. Treseony*, 76 Cal. 621, 18 Pac. 796 (1888); *White v. American Law Book Co.*, 106 Okla. 166, 233 Pac. 426 (1925); *White v. Burch*, 19 S. W. (2d) 404 (Tex. Civ. App. 1929). The court in *McGully v. Gano*, 166 Cal. App. 695, 3 P. (2d) 348 (1931), carries this rule a little further, and says that the attorney is not required to allege or prove the reasonable value of the services he was not permitted to perform, but may recover the full amount called for in the contract. That performance to a substantially complete degree has been rendered sometimes justifies recovery of the full contract price. In *Moyer v. Cantieny*, *supra*, the defendant had employed the plaintiff to obtain a pardon for the defendant's son who was in prison. The agreed fee was $200. Plaintiff's services were directed toward that end, and were proved to have been largely responsible for the obtaining of the pardon. However, he was discharged, without cause, before the pardon was actually issued. The court held that the defendant had unjustifiably broken the contract, and that the measure of recovery for the plaintiff should be the contract price. But cf. *Crye v. O'Neal & Allday*, 135 S. W. 253 (Tex. Civ. App. 1911), where an attorney was employed as counsel for one charged with a criminal offense. The stipulated
fee was $500, and the attorney began to prepare a defense, interviewed wit-
nesses, etc., and obtained a continuance of the case until he was ready to go
to trial. Before trial, however, the client discharged him because he refused
to agree to reduce his fee to $250. The facts did not show substantially com-
plete performance, but the court allowed a recovery in full, as if the con-
tract had been fully performed. The court concluded that full recovery
should be allowed in such cases because, as a general rule, there is no satis-
factory standard by which to measure the damage suffered by the attor-
ney unless reference is had to the amount agreed upon between the parties.
The court had already acted as much, in Moyer v. Cantieny, supra, when it
said that the contract price was not apportionable.

The principal elements in determining the reasonableness of the counsel's
fees are the amount involved, character and extent of services, time em-
ployed, importance of questions, and fidelity and diligence of counsel. Mc-
Clusky v. Kalben, 167 Md. 479, 175 Atl. 449 (1934). Or, as stated in
Cumming v. National Shawmut Bank of Boston, 284 Mass. 563, 188 N. E.
489 (1934), "In determining what constitutes reasonable charges for an
attorney's services, the attorney's ability and reputation, demand for his
services, amount and importance of matter involved, time spent, usual
charge for similar services in the same neighborhood, amount affected by the
controversy, and results secured should be considered, no single factor being
decisive". That case is worthy of note in that it was held that a fee of
$5,300 was not excessive for an attorney's services in the collection of ac-
counts amounting to $160,000, where he had collected approximately $60,000
and reduced the rest to judgment, even though the attorney on cross exami-
nation testified that he spent only twelve or fifteen hours on the matter
altogether.

It should be kept in mind, in connection with the principles discussed above,
that before the relation of attorney and client is created the attorney may
bargain for his services with a prospective client and deal with him at arm's
length. Boldt v. Baker, 18 Ohio App. 125 (1920). The effect of this is to
make the resultant contract as binding upon the client as if it had been made
between him and a tradesman. It does not vest in the client the right to dis-
charge the attorney at his election. A premature discharge, without cause,
subjects the client to liability for damages, as in the case of a breach of an

A. F. O.

CONSTITUTIONAL LAW—Criminal Syndicalism—Constitutionality of
State Statute.

Appellant, a member of the Communist Party, was convicted of violat-
(1930) §§ 14-3, 110 to 14-3, 112, as amended by chapter 459, p. 868, §§ 1-3,
Oregon Laws 1933. The indictment charged that he assisted in the conduct
of a meeting which was under the auspices of the Communist Party, an
organization advocating criminal syndicalism. The statute, so far as mate-
rial, made it a felony for any person "to preside at or conduct or assist in
conducting any assemblage of persons . . . which teaches or advocates the
doctrine of criminal syndicalism or sabotage". Ore. Code Ann., supra,
§ 14-3, 112. Conviction was affirmed by the Supreme Court of Oregon. The
actual conduct at the meeting in question was held to be immaterial, in that
the indictment referred to the advocacy of criminal syndicalism and sabotage by the Communist Party. On appeal to the United States Supreme Court, held, that the statute is unconstitutional, as construed to apply to one who assists at a meeting regardless of whether the doctrine of criminal syndicalism is taught or advocated at the time, under the due process clause of the Fourteenth Amendment. De Jonge v. Oregon, — U. S. —, 81 L. ed. 189 (1937).

Freedom of speech and press, together with the right of peaceable assembly, are fundamental rights guaranteed by the First Amendment to the Federal Constitution, and have been held to fall within the due process clause of the Fourteenth Amendment. Gitlow v. New York, 268 U. S. 652 (1925). The law is well settled that these rights and immunities are not novel principles, inflexible in their application, but, on the contrary, are historical in their nature and subject to well recognized exceptions arising from the exigencies of each particular case. Robertson v. Baldwin, 165 U. S. 275 (1896).

It is within the power of Congress to limit the exercise of these fundamental rights when the free exercise thereof, under existing conditions and circumstances, would create a clear and present danger of a resulting evil that Congress has a right to prevent. Accordingly the constitutionality of espionage and sedition acts has been upheld. Schenck v. United States, 249 U. S. 47 (1919); Frohwerk v. United States, 249 U. S. 204 (1919); Debs v. United States, 249 U. S. 211 (1919); Abrams v. United States, 250 U. S. 616 (1919); O'Connell v. United States, 253 U. S. 142 (1920). It should be noted, however, that the provisions of such acts are made applicable only "when the United States shall be at war". 40 STAT. 219 (1917); 50 U. S. C. § 33 (1934). In Abrams v. United States, supra, Justice Holmes, with whom concurred Justice Brandeis, dissented upon the ground that the act charged had no appreciable tendency to create an immediate danger. The dissent was apparently based upon the conclusion reached by the majority of the court in their application of the law to the facts, and not upon opposition to an extension of the doctrine of clear and present danger. Schenck v. United States, supra. States may pass similar statutes in cooperation with the Federal Government and in the exercise of police power to preserve the peace of the State. Gilbert v. Minnesota, 254 U. S. 325 (1920); but cf. ex parte Meckel, 87 Tex. Crim. Rep., 120, 220 S. W. 81 (1919). In the exercise of its police power a state may punish those who abuse the exercise of constitutional rights by utterances antagonistic to public welfare, tending to corrupt public morals, to incite to crime, or to disturb the public peace. It is upon this ground that criminal syndicalism statutes have been held constitutional. Gitlow v. New York, supra; Whitney v. California, 274 U. S. 357 (1927).

The Supreme Court has taken different stands regarding the conclusiveness of legislative discretion in the enactment of such statutes. In upholding the constitutionality of the Espionage Act of June 15, 1917, in Schenck v. United States, supra, the court said that a clear and present danger must exist. The stringency of this rule was seemingly relaxed in Gitlow v. New York, supra, at 69. "It [the State] cannot reasonably be required to defer the adoption of measures for its own peace and safety . . . but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency." Justice Holmes and Justice Brandeis dissented vigorously, stating the doctrine of the Schenck case as the test to be applied, and championing the right of free speech so far as to say, id. at 673: "If in the long
run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.” The principle adopted by the majority in the Gitlow case seems best supported by logic and precedent. State legislation, enacted in the exercise of police power, is valid if the means are appropriate for the accomplishment of a legitimate object. Determinations made by the state, through its legislative body, are given great weight and a statute is presumed valid when passed in the exercise of police power. *Mugler v. Kansas*, 123 U. S. 623 (1887). The State is primarily the judge of regulations required in the interest of public safety and welfare. *Gitlow v. New York*, supra, at 668.

Syndicalism and sabotage statutes, being an exercise of state police power, must be dealt with accordingly in determining their validity. Any vagueness or uncertainty of definition is repugnant to the due process clause of the Fourteenth Amendment. *International Harvester Co. v. Kentucky*, 234 U. S. 216 (1914). Objection is repeatedly taken upon this ground. *Burns v. United States*, 274 U. S. 328 (1927); *State v. Dingman*, 37 Idaho 253, 219 Pac. 760 (1923); *People v. Ruthenberg*, 229 Mich. 315, 201 N. W. 358 (1924), *writ of error dismissed*, 273 U. S. 782 (1927). In *Fiske v. Kansas*, 274 U. S. 380 (1927), the Kansas Criminal Syndicalism Act was held to constitute an arbitrary and unreasonable exercise of the police power of the state. The statute was held unconstitutional as applied to one who secured members in a union advocating organization of workers and abolition of the wage system. This decision is in line with the weight of authority and the instant case. Any statute which is construed by the courts to include within its provisions peaceful and orderly opposition to government by legal means must be held a violation of constitutional rights as applied to a prosecution for such acts. *Stromberg v. California*, 283 U. S. 359 (1931). Such cases are clearly distinguishable from contrary holdings where the penalties are confined to those who advocate a resort to violent and unlawful methods as a means of changing industrial and political conditions. *Whitney v. California*, supra; *Gitlow v. New York*, supra.

It should be noted that in the principal case the question of clear and present danger was not discussed. Had the statute been construed to apply to one who assisted at a meeting at which criminal syndicalism and sabotage as defined by the statute were actually advocated, and evidence to the effect had supported the charge, there is no doubt that the statute would have been held constitutional.

J. O'D.

CONSTITUTIONAL LAW—Delegation by Congress to President of Power in International Affairs.

A joint resolution of Congress, 48 *Stat.* 811 (1934), declared that if the President should find that the prohibition of the sale of arms to belligerents in the Chaco might contribute to the reestablishment of peace, then it should be unlawful to export arms to the participants. The President, pursuant to this authority, proclaimed, 48 *Stat.* 1744, (1934), that such a situation existed, thus putting into effect the prohibitory and penalizing provisions of the resolution. Defendant was indicted for violation of this act, but its demurrer on the ground that the resolution constituted an unwarranted delegation of legislative power to the President was sustained by the District Court. *Held,*
in international affairs, Congress may delegate to the President power to
determine the occurrence of a contingency to which a given law expressing
the will of Congress shall be applicable. United States v. Curtiss-Wright

In the internal affairs of the nation, Congress may authorize the execu-
tive to determine facts upon which the express will of the legislature is to
take effect, Wisconsin v. Illinois, 278 U. S. 367 (1929); United States v.
Chemical Foundation, 227 U. S. 1 (1926); or to exercise quasi-legislative
regulatory functions provided there be a fixed standard or intelligible prin-
ciple to which the person authorized is directed to conform, Hampton v.
United States, 276 U. S. 394 (1928); United States v. Grimaud, 220 U. S. 506
(1911); United States v. Atchison, T. & S. F. R. Co., 234 U. S. 476 (1913),
and many other cases. But Congress may not abdicate its essential legisla-
tive functions. Panama Refining Co. v. Ryan, 293 U. S. 552 (1935); Schech-

In extra-national affairs, Congress has from time to time from a very
early period authorized the President to determine and proclaim contin-
gencies that would put embargoes into operation. 1 Stat. 372 (1794); 1 Stat.
444 (1795); 2 Stat. 351 (1806). Similar enactments have continued in
unbroken line down to the present day, almost invariably without question
as to their validity. Contemporaneous construction of the Constitution since
acted on with such uniformity in a matter of much public interest and impor-
tance, is entitled to great weight, in determining whether such a law is
repugnant to the Constitution. Cooley v. The Board of Wardens, 12 How.
299 (U. S. 1851), Burrow-Giles Lithographic Co. v. Sarony, 11 U. S. 53
(1884), The Laura, 114 U. S. 411 (1885). See Valentine v. United States
ex rel Neidecker, 299 U. S. 5 (1936), discussed in (1937) 25 GEORGETOWN
LAW JOURNAL 756.

This delegation of authority to the President to find facts that put an
embargo into effect was challenged in The Aurora, 7 Cranch 378 (U. S.
1813), but the court there said: "We can see no sufficient reason why the
legislature should not exercise its discretion in reviving the act, either
expressly or conditionally, as their judgment should direct." Where an Act
of Congress, 26 Stat. 567 (1890), authorized the President "for such time as
he deemed just" to suspend the provisions of the law allowing free import
of certain goods in respect to such countries as impose duties on goods of
the United States, which he "may deem to be reciprocally unequal and
unjust", the court said: "It does not, in any real sense, invest the Presi-
dent with power of legislation." Field v. Clark, 143 U. S. 649 (1895). That
such delegation of power as may have occurred in the instant case has long
been recognized as legitimate is attested by the fact that in Chavez v. United
States, 228 U. S. 525 (1913) an almost identical joint resolution and presi-
dential proclamation, 37 Stat. 630 (1912), was attacked, but no question
was raised as to the validity of the delegation.

Although it would seem that the delegation here is well within that sanc-
tioned by the Constitution, long recognized and here made definite, the Court
went further and said that in foreign relations, the federal government is
not limited by the express grant of powers of the Constitution. Further-
more, the President has "plenary and exclusive power" "as the sole organ
of the federal government in the field of international relations—a power
which does not require as a basis for its exercise an act of Congress, but
which, of course, like every other governmental power, must be exercised in
subordination to the applicable provisions of the Constitution". It is diffi-
cult to say whether this case may be considered authority for complete delegation of power in foreign affairs to the President, if the Senate so desires, or whether the constitutional requirement that treaties be made by and with the advice and consent of the Senate is an insurmountable bar to such delegation. On the face of it the case is a long step toward executive autonomy in the field of foreign relations.

R. O'D.


Petitioner, a manufacturer of goods made with convict labor, brought suit to require the defendant railroad company to transport packages of his merchandise. The goods were not properly labeled, and thus violated the Ashurst-Sumners Act, 49 Stat. 494, 49 U. S. C. A. §§ 61-64 (Supp. 1936), which prohibited interstate transportation of convict-made goods without label indicating names and locations of penal institutions where manufactured, and which further precluded transportation into states for use contrary to local law. Held, the act was a legitimate exercise of congressional power to regulate interstate commerce, and not unconstitutional as violative of due process or as usurpation of state police powers. Kentucky Whip & Collar Co., v. Illinois Central Railroad Co., — U. S. —, 57 Sup. Ct. 277 (1937).

Movement of articles in interstate commerce has frequently encountered state restrictions. In this respect, intoxicating liquor was one of the first commodities to receive attention. However, due to the fact that it was generally recognized as a legitimate article of commerce, prevention of its interstate transportation was somewhat difficult. Interference with interstate commerce constituted a major stumbling block. In Bowman v. Chicago & Northwestern Ry. Co., 125 U. S. 46 (1888), the power of a state to prohibit interstate importation of liquor for use therein was denied, Matthews, J. declaring that a state could not regulate commerce between its people and those of other states, however desirable such regulation might be, without the consent of Congress. In Leisy v. Hardin, 135 U. S. 100 (1890), "original package" sales of liquor imported into one state from another were held to be free of state regulation, thus overruling the decision in the License Cases, 5 How. 504 (U. S. 1847), to that extent.

Nevertheless, Congress, by the power granted to it to regulate interstate commerce, U. S. Const. Art. 1 § 8, has aided the states by means of federal legislation, forbidding transportation into a state of articles which the state has constitutionally forbidden in its internal commerce. The effect of this cooperation, in numerous instances, has been to make state regulations workable and enforceable.

In 1890, Congress passed the Wilson Act, 26 Stat. 313 (1890), 27 U. S. C. A. § 121 (Supp. 1936), which provided that certain articles, intoxicating liquors in particular, should lose their interstate character as soon as they came within the confines of the state of their destination, that is actual delivery to the consignee. Its validity was upheld in the famous case of In re Rahrer, 140 U. S. 545 (1891), in which it was pointed out that Congress had merely removed an impediment to the enforcement of state laws in respect to imported packages in their original condition, and that no new power had been imparted to the states. Subsequently, the Webb-Kenyon Act removed the protection of interstate commerce from all receipt and possession of

Another article of commerce, which has also been subjected to state regulation from time to time, has been that of convict-made goods. Several states have provided that all goods made by convict labor in other states should be conspicuously branded "convict made" before their importation is allowed. A brief survey of a number of these state enactments may be found in Legisl. (1931) 44 HARY. L. REV. 846. Also, the Federal Government, following closely the precedents as to intoxicating liquors, has not remained inactive in regard to this matter. The Hawes-Cooper Act provided that on the "arrival or delivery" of convict goods in a state they should be subject to its laws in the same manner as if they had been produced there (to take effect in 1934). 45 STAT. 1084 (1929), 49 U. S. C. A. § 60 (Supp. 1936). In addition, the importation of convict-made products has been denied the right of entry at United States ports, 46 STAT. 689 (1930), 19 U. S. C. A. § 1307 (Supp. 1936), and the sale to the public in competition with private enterprises of goods made by convicts imprisoned under federal law has been forbidden. 46 STAT. 391 (1930), 18 U. S. C. A. § 744 c (Supp. 1936).

The validity of the Hawes-Cooper Act, supra, was brought into question in Whitfield v. Ohio, 297 U. S. 431 (1936); see (1936) 24 GEORGETOWN LAW JOURNAL 1013, and held constitutional. Sutherland, J., in rendering the opinion of the court, relied on the decision of In re Rahrer, supra, and pointed out the economic reason behind this particular type of legislation. "All such legislation, state and federal, proceeds upon the view that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison. A state basing its legislation upon that conception has the right and power, so far as the federal constitution is concerned, by nondiscriminating legislation, to preserve its policy from impairment or defeat by any means appropriate to that end and not inconsistent with that instrument." See, however, State v. Whitfield, 216 Wis. 577, 257 N. W. 601 (1934), in which the Hawes-Cooper Act, supra, was held valid, but the state law invalid, because of its discriminating features.

In Baldwin v. Seelig, 294 U. S. 511 (1935), The New York Milk Control Act (N. Y. Laws of 1933, c. 158; Laws of 1934 c. 126), which forbade the sale of imported milk in that state, unless its producers had been paid the standard New York prices, was held invalid. Mr. Sholley, in an interesting article, "The Negative Implications of The Commerce Clause" (1936) 3 U. OF CHI. L. REV. 556, comments on the fact that this case received no mention in Whitfield v. Ohio, supra. He is of the belief that the actual holdings of the two cases may be reconciled, but not on the reasoning contained in the opinions, and that the "inconsistency in the opinions results from different constructions of the Constitution itself—specifically, of the commerce clause as a limitation on state power". He points out that a free nation-wide market for the milk industry is of greater importance than the securing of like protection to prison-made goods. A worthwhile discussion might easily arise as to what the result in the Baldwin case, supra, would have been if there had existed a Federal statute prohibiting transportation of milk into a state in violation of its laws. Apparently, the regulation, which the New York statute attempted to impose, was not a valid exercise of the state police power as regards milk in interstate commerce.
In the instant case, petitioner, in reliance upon the decision of *Hammer v. Dagenhart*, 247 U. S. 251 (1918), argued that Congress had no authority to prohibit the movement in interstate commerce of goods harmless in themselves. In that case, a federal statute, 39 Stat. 675 (1916), which prohibited the transportation in interstate commerce of goods made at a factory in which, within thirty days prior to their removal therefrom, children under 14 years of age had been employed, etc., was held, in a 5 to 4 decision, to be unconstitutional. In effect, the statute closed the channels of interstate commerce to all the goods of any manufacturer who violated its terms, whether or not particular goods shipped were in fact produced by child labor. No specific pronouncement was made in the statute that the employment of child labor constituted unfair competition. In addition, the decision in no way forbade cooperative action by the Federal and State Governments, for the question was not there involved. See Legis. (1936) 5 Geo. Wash. L. Rev. 100.

Hughes, C. J., in the principal case, states that the ruling in *Hammer v. Dagenhart*, supra, in no way contravened or limited the principle of previous decisions, but that the act there under consideration had as its aim the placing of local production under federal control. He also recognizes the economic effect of allowing convict-made goods to compete with the output of free labor and concedes that "Congress in exercising the power confided to it by the Constitution is as free as the states to recognize the fundamental interests of free labor".

B. G. McK., Jr.

CONSTITUTIONAL LAW—Search and Seizure.

Revenue officers, in possession of information that a still was being operated in one of two houses on a farm, visited the vicinity on May 25, where, from the boundary of the premises, they could detect the odor of fermenting mash. On May 28 they again went to the premises and walked up close to a large two-story house whence the odor was issuing. There was a light downstairs and they saw Mrs. Vleck sitting at a table in the living room reading. Then on the night of May 30 they smelled the mash from close up to the house. Subsequently, on the morning of June 3, these officers drove to the farm and came up the driveway going in the place. They drove into the yard and smelled the odor of fermenting mash. One of the officers, Davis, arrested Mrs. Vleck on the back porch of the house as she came out the kitchen door. The charge was having fermented mash. Before Davis finished taking notes about Mrs. Vleck, and while standing near the open kitchen door, he saw Joe Vleck enter the kitchen from the basement and placed him under arrest, the premises being searched as incident thereto. On the arrest of Joe Vleck, Mrs. Vleck was released. Held, as the arrest of Mrs. Vleck was unlawful, there was no basis for the search, and evidence seized in the search would be suppressed in a prosecution for unlawfully operating a distillery in a dwelling house. *United States v. Vleck*, 17 F. Supp. 110 (D. C. Neb. 1936).

In determining whether the Fourth Amendment has been violated by an unreasonable search and seizure, no general rule can be laid down, but each case must necessarily be determined by its particular facts and circumstances. *Lambert v. United States*, 282 Fed. 413 (C. C. A. 9th, 1922). While this oft-quoted decision denies that a general rule exists, the cases evidence the operation of two theories, thus accounting for the diversity of opinion as to the constitutionality of an entry of premises by officers without warrant on the basis of their detection of the odor of fermenting mash. Under the
first theory entries so made are constitutional, and decisions abiding by this theory are premised on the doctrine of the leading case of McBride v. United States, 284 Fed. 416 (C. C. A. 5th, 1922), where it was held that if an officer is apprised by any of his senses that a crime is being committed, it is being committed in his presence so as to justify an arrest without a warrant. 

Rocchia v. United States, 78 F. (2d) 966 (C. C. A. 9th, 1935) (entry of warehouse); Gerk v. United States, 33 F. (2d) 485 (C. C. A. 8th, 1929) (forced entry of padlocked shack); Benton v. United States, 28 F. (2d) 685 (C. C. A. 4th, 1928) (officers remained without premises until they heard sounds of liquor being poured). The application of this theory displays a tendency of the courts to circumvent constitutional guaranties in order that a known and established criminal may be punished for his crime. Apparently, the tendency is at odds with the statement of Justice McReynolds in Taylor v. United States, 286 U. S. 1, 6 (1931) that “Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guaranties against unreasonable search”.

The second theory finds expression in the opinion of Justice Sutherland, in the case of Byars v. United States, 273 U. S. 28, 32 (1927): “The court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be liberally construed, and ‘it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.’ Boyd v. United States, 116 U. S. 616, 635 (1886); Gouled v. United States, 255 U. S. 298, 304 (1921).” In United States v. Hirsch, 57 F. (2d) 555 (W. D. N. Y. 1932), it was held that the odor of distilling mash near a closed brewery, together with smoke from the chimney and the sound of machinery from within, were insufficient to justify a forced entry and a search and seizure on the theory of a crime committed in the officer’s presence. Taylor v. United States, supra.

But the decision in the instant case may be rested on other grounds. The arrest and subsequent release of Mrs. Vleck is indicative of a mere pretext for the concomitant search and seizure. Since the arrest was unlawful, the accompanying search and seizure were unlawful. Agnello v. United States, 269 U. S. 20 (1925); De Pater v. United States, 34 F. (2d) 275 (C. C. A. 4th, 1929); Henderson v. United States, 12 F. (2d) 528 (C. C. A. 4th, 1926). In addition, previous federal adjudications have shown a meticulous regard for a liberal construction of the Fourth and Fifth Amendments where a private dwelling has been entered without warrant on suspicion engendered solely by the odors of illicit products emanating therefrom. Papani v. United States, 84 F. (2d) 160 (C. C. A. 9th, 1936); Leubbert v. United States, 74 F. (2d) 387 (C. C. A. 8th, 1934); Ramiele v. United States, 34 F. (2d) 877 (C. C. A. 8th, 1929). Contra: Donahue v. United States, 56 F. (2d) 94 (C. C. A. 9th, 1932) (with a vigorous dissent).

C. F. B.

CONSTITUTIONAL LAW—State Fair Trade Acts.

Appellee was a dealer selling to wholesale distributors for resale in Chicago various brands of liquor and alcoholic beverages of standard quality. Appellant was a retailer of liquor and had pursued a practice of “cutting”
the prevailing retail price of brands of liquor of standard quality which had acquired widespread attention and public favor. Appellee sought relief under the provisions of the Fair Trade Act; ILL. REV. STAT. (1935) c. 140 § 8 et seq. The purpose of the act is to protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand or name. The appellant contended that the Fair Trade Act violated the equal protection of the laws provision of the Fourteenth Amendment to the Federal Constitution and the due process clauses of the Federal and State Constitutions. A decree was entered for the appellee permanently enjoining the appellant from carrying on such practices. Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 363 Ill. 610, 2 N. E. (2d) 940 (1936). The constitutional validity of the statute was still questioned and thus was appealed to the United States Supreme Court for final determination. Held, the Illinois Fair Trade Act is not wanting in due process and the classification resorted to does not violate the equal protection clause. Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U. S. —, 81 L. ed. 130 (1936).

In the opinion the emphasis was placed on the fact that the Fair Trade Act was directed to the protection of the property of the producer of goods identified by trade mark, trade name or his name, namely, the good will of the producer. This property has long been recognized as a valuable asset. McLean v. Fleming, 96 U. S. 245 (1877); Hanover Star Milling Co. v. Metcalf, 240 U. S. 403 (1915). The essence of "good will" is the fact that it resides with the producer of an identified commodity. It cannot be disposed of in gross or apart from the business with which it is connected. Therefore, as long as the commodity is linked to its source, as by trade mark or the like, it retains and carries with it a portion of the good which cannot belong to the purchaser of the goods and which may be subjected to restriction in order to protect the property of the producer. However, the purchaser may remove the element which links it to its source and then dispose of it in any way he sees fit.

The transactions were intrastate and so did not bring down the often repeated condemnation of the federal courts where a question of similar acts in interstate commerce was involved. It is the well marked policy of the federal courts to prevent new monopolies and to restrict legitimate monopolies as far as possible. Federal anti-trust laws, 26 STAT. 209 (1890), 15 U. S. C. A. § 1 (1927) and the Federal Trade Commission Act, 26 STAT. 209 (1890), 15 U. S. C. A. § 2 (1927) have been added to the strong common law aversion to monopoly and the whole formed into a very strict federal policy. Even the statutory monopolies of patent and copyright have been cut down so that sale of the articles produced under protection of the monopoly has been held to destroy control of the patentee or copyright owner. Bauer et Cie. v. O'Donnell, 229 U. S. 1 (1912); Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502 (1917); Boston Store v. American Graphophone Co., 246 U. S. 8 (1918); Carbice Corp. v. American Patents Development Corporation, 283 U. S. 27 (1931); International Business Machines Corporation v. United States, 298 U. S. 131 (1936) (restriction of patent monopoly); and Bobbs-Merrill Co. v. Straus, 210 U. S. 339, (1908) (restriction of copyright monopoly).

The leading case of Dr. Miles Medical Co. v. Park and Sons Co., 220 U. S. 373 (1911), involved interstate commerce of a trade-marked commodity prepared under a secret formula and a series of price fixing contracts with retailers. This arrangement was condemned as an illegal restraint of trade
in that it attempted to abolish competition among retailers. It was plain that under the Sherman Act, 26 STAT. 209 (1890), 15 U. S. C. A. §§ 1-7 (1927), an agreement among retailers would be bad and so the Court held that the arrangement carried out by the Medical Company was bad because it accomplished the same thing indirectly. Predominating in these federal cases is the thought that a manufacturer or dealer is presumed to get his benefit from the price at which he sells and that what his vendee does with the article thereafter is none of his concern. Such a view is inconsistent with the recognition of a property right in good will which this Court has uniformly recognized. Hanover Star Milling Co. v. Metcalf, supra.

In addition to the cases arising under the anti-trust laws proper there is a large body of cases which have come up under the Federal Trade Commission Act, supra, notable among these being Federal Trade Commission v. Beech-Nut Packing Company, 257 U. S. 441 (1921). Here the Packing Company was "suggesting" resale prices to wholesalers and retailers to whom it sold. A system of inspection and informing was established and as a result data was compiled to provide lists of buyers in good or bad standing, based on the strictness with which they regarded the "suggestions" of the Company. Those who failed to give due weight to the "suggestions" could obtain no more goods from the Company. The Court sustained the authority of the Federal Trade Commission to stop this system on the theory that it was the same as a series of written contracts and operated to restrain trade.

Following the intimation of the Court in the Dr. Miles Medical Co. case, supra, and some of the other cases, bills were introduced into Congress along the line of the Illinois Fair Trade Act. Hearings were had and testimony taken but the bills never eventuated into laws.

During the fight of the federal courts to protect the public's interest in free bargaining a very substantial portion of the public, through the legislatures of the states, renounced their interest where good will was in question, and as a consequence Fair Trade Acts exist in California, Illinois, Iowa, Maryland, New Jersey, New York, Oregon, Pennsylvania, Washington, and Wisconsin. As early as 1916 New Jersey had a law permitting the fixing of resale prices by affixing notices to the articles. The courts of that state upheld the constitutionality of the law in the case of Ingersoll & Bro. v. Hahne & Co., 88 N. J. Eq. 222, 101 Atl. 1030 (1917); aff'd 89 N. J. Eq. 332, 108 Atl. 128 (1918). California passed the Banham Act in 1931 permitting the owner of the good will to protect his property by contract and later amended the Act in 1933 to include the same provision as Section 2 of the Illinois Fair Trade Act. In two cases decided concurrently with the Old Dearborn case, supra, the United States Supreme Court held the California Act constitutional for the same reasons. The Pep Boys, Manny, Moe and Jack of California, appellants v. Pyroil Sales Company, Inc., No. 55; and Clarence G. Kunsman, Appellant v. Max Factor & Co., and Sales Builders, Inc., No. 79, — U. S. —, 81 L. ed. 138 (1936).

The New York Fair Trade Act, Laws of 1935, Ch. 976, has been twice held unconstitutional by the state courts. In Coty Inc. v. Hearn's Department Store, Inc., 284 N. Y. Supp. 909 (Sup. Ct. 1955), the Supreme Court of New York held the section identical with § 2 of the Illinois Fair Trade Act bad as a legislative fixing of the price of commodities not affected with a public interest and furthermore as an illegal delegation of power to the producer or vendee to fix the price. The second case was Doubleday, Doran & Co., Inc. v. R. H. Macy & Co., Inc., 269 N. Y. 272, 199 N. E. 409 (1936). Here the New York Court of Appeals likewise held the Act bad. However,
in the latter case, the price fixing contract was only a colorable contract made between the publisher and its sales agent, a subsidiary corporation. This decision was disposed of on this ground when it was raised in the California Supreme Court in a case on the identical California Fair Trade Act of 1933. *Max Factor & Co., and Sales Builders, Inc. v. Clarence G. Kunsman*, 5 Cal. (2d) 446, 55 P. (2d) 177 (1936); *aff'd* by the United States Supreme Court, *supra*.

The idea of protecting good will by permitting resale price fixing has been opposed on three principal grounds, the first two of which appear in the federal rule, namely, the aversion of the law to restraints of trade and the common law principle that the sale of a chattel is not to be accompanied by a restriction of the subsequent disposition of the article. The other important consideration is the economic question of the value of price fixing in protecting good will, whether unrestricted active competition in a commodity is not more beneficial to a producer than the restraint of competition. The *Old Dearborn case*, *supra*, and the others decided with it show the United States Supreme Court content to let a state determine within its sphere the economic question and relax the rule against restraints. No tendency is seen, however, toward relaxation of the rule in cases involving interstate commerce, as this rule is drawn largely from federal policy as evidenced by legislation. The question of conditioning the resale of a chattel is disposed of by finding that the condition is applied to the good will of the maker in the hands of the retailer by reason of the identifying link between the goods and its source. *Old Dearborn Distributing Co. v. Seagram-Distillers Corp*, 299 U. S. — (1936).

R. J. M.

CORPORATIONS—Subsidiaries—Liability of Parent Corporation.

Suit was brought against the parent corporation by a certificate holder on her own behalf and on behalf of others seeking payment of taxes and rents on which the subsidiary company, a reality corporation, had defaulted. The subsidiary corporation was organized as a reality company by the parent corporation engaged in the mercantile business. The parent company owned all of the stock of the subsidiary, the officers and directors of the parent corporation being likewise the officers and directors of the subsidiary. *Held*, the parent corporation was not liable for the defaulted obligations of the subsidiary company, irrespective of the fact that the subsidiary was controlled by the parent through stock ownership and that the officers and directors were the same for both the corporations, in absence of showing that the subsidiary was formed for the purpose of perpetrating fraud and that domination by the parent over the subsidiary was exercised in such a manner as to defraud holders of the leasehold certificates. *North v. The Higbee Company*, 131 Ohio St. 507, 3 N. E. (2d) 391 (1936).

Although the cases involving the liability of the parent for the contractual obligations of the subsidiary are becoming increasingly hard to reconcile, the broad and comprehensive rule may be suggested that where one corporation acquires sufficient stock of another to control it, the corporate entity of the two organizations will be respected and recognized where such acquisition is resorted to for the purpose of participating in the business and affairs of the owned corporations in the normal and usual manner in which the ordinary stockholder shares in the management of a corporation in which he is interested.

In *Gledhill v. Fisher*, 272 Mich. 353, 262 N. W. 371 (1935), the parent company was being sued for the instalments of the purchase money on a land contract which its subsidiary had executed. The court in denying the liability of the parent for the acts of the subsidiary pointed out that before the corporate entity could be properly disregarded and the parent corporation held liable for the acts of its subsidiary, it must be shown not only that undue domination and control was exercised by the parent corporation over the subsidiary but also that such control was exercised in such a manner as to deprive and wrong the complainant, and that unjust loss or injury will be suffered by the complaining party unless the parent be held liable. In accord are: *Martin v. The Development Co. of America*, 240 Fed. 42 (C. C. A. 9th, 1917); *Majestic Co. v. Orpheum Circuit*, supra; *Bank of Macon v. Macon Co.*, 97 Ga. 1, 25 S. E. 326 (1895).

The courts have generally recognized that the organization of a corporation for the avowed purpose of avoiding personal responsibility does not in itself constitute fraud justifying the disregard of the corporate entity. *Gledhill v. Fisher*, supra, (1935); *Elenkrieg v. Siebrecht*, 238 N. Y. 254, 144 N. E. 519 (1924). Wormser in “Disregard of the Corporate Fiction” (1929), at page 18, states: “It follows that no fraud is committed in incorporating for the precise purpose of avoiding and escaping personal responsibility. Indeed that is why most people incorporate, and those dealing with corporations know, or at least are presumed to know, the law in this regard.”

However, where the parent corporation acquires ownership of the stock of the subsidiary with the definite intention and purpose of so dominating the subsidiary that it becomes a mere instrumentality, “dummy”, or department of the holding company, the courts will not permit the parent to escape liability for the contractual obligations of the “child” or “alter ego”, and will deal with the parent as if the “dummy” or substitute did not exist. *Platt v. Bradner*, 131 Wash. 573, 230 Pac. 633 (1924); *Chicago, Milwaukee and St. Paul Railroad v. Minneapolis Civic and Commerce Association*, 247 U. S. 490 (1918); *Attorney General (People ex rel. Potter) v. Michigan Bell Telephone Co.*, 246 Mich. 198, 224 N. W. 433 (1929); *Old Ben Coal Co. v. Universal Coal Co.*, 248 Mich. 486, 227 N. W. 794 (1929); *Dillard and Coffin Co. v. Richmond Cotton Oil Co.*, 140 Tenn. 290, 204 S. W. 758 (1918); *Spokane Merchants Association v. Clere Clothing Co.*, 84 Wash. 616, 147 Pac. 414 (1915).

Some courts construe the relation between the parent and the subsidiary to be that of principal and agent, and finding that such a relation does in fact exist, hold the parent liable for the acts of the subsidiary. *Kimberly*
Coal Co. v. Douglas, 45 F. (2d) 25 (C. C. A. 6th, 1930); Platt v. Bradner, 131 Wash. 573, 230 Pac. 633 (1924). One of the most important factors in predicking liability is the fact that the subsidiary’s capital is wholly disproportionate to the amount of business that it conducts. Such inadequacy of capital affords strong proof that the subsidiary is a mere instrumentality or “dummy” of the parent corporation. Stark Electric Railroad v. McGinty Contracting Co., 238 Fed. 657 (C. C. A. 6th, 1917); Luckenbach Steamship Co. v. W. R. Grace and Co., 267 Fed. 676 (C. C. A. 4th, 1920).

It will be seen that the legal principles applied by the majority are well settled and reasonable enough in themselves, considered abstractly. But the case is unconsciously informative as to the difficulty in which the courts find themselves when they attempt to apply the principles to a state of facts. The dissenting opinion states facts of evident importance which were disregarded by the majority. The subsidiary corporation had leased from a securities company, which later sold and assigned the lease to a trust company as trustee. The subsidiary then leased to the parent corporation for a ten year term. The trust company issued a prospectus in 1925, when it was disposing of certificates of the subsidiary. This prospectus was couched in terms designed to create the impression that the parent corporation’s name and credit were behind the leasehold certificates, and that rentals for the building remained fixed until the year 2007.

While the majority opinion had been unable to find any inequitable features here, the dissenters could conclude that there was a plain showing of concealment, wrong, and fraud; that the subsidiary was a mere device resorted to for the sole purpose of enabling the parent corporation to evade a liability represented to be its own. As was pointed out, the parent did everything possible to make the obligation to pay rent its own, except to take the longer lease in its own name, holding itself out as being behind the long term lease as principal and absolutely dominating the subsidiary through its responsibility and credit.

Where the parent corporation does not exercise control over the subsidiary in a manner which is normal and usual with the stockholders, but rather creates the subsidiary corporation as a mere instrumentality, agent, or dummy, so-called, the corporate entity will be disregarded to produce the equitable result. See Latty, Subsidiaries and Affiliated Corporations (1936) 191. Probably the justices of the majority in the principal case would not quarrel with this as an abstract proposition, but their particular factual approach precluded its application here. Upon the full explanation of the facts as set forth in the dissenting opinion it must be recognized that the minority had a sounder legal basis for its decision than did the majority.

F. E. H.

COURTS—Recognition of State Practice by Federal Courts.

Where suit is begun in a federal district court by notice of motion for judgment, signed only by the plaintiff, held, that procedure by which suit shall be begun is a question of the practice of the state and, adhering to the Conformity Act, Rev. Stat. § 914 (1873), 28 U. S. C. A. § 724 (1926), must be followed by a federal court provided such method gives reasonable notice and affords fair opportunity to be heard before issues are decided. Chisholm et al. v. Gilmer,— U. S. —, 57 Sup. Ct. 65 (1936).
Paragraph 724 of the Conformity Act, supra, provides: "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such district courts are held, any rule of court to the contrary notwithstanding."

Petitioners, shareholders in a national bank, have been charged by the Comptroller of the Currency with an assessment in the amount of the par value of their shares. To enforce that assessment, respondent, receiver of the bank, gave notice of motion that he would apply for judgment at a given time. In conformity with the statutes of Virginia (cited infra), the notice incorporated a statement of the facts making up the claim, was signed by the receiver, and served on the petitioners. Petitioners argued the "process" was unavailing to bring them into court, but the objection was overruled and judgment on the merits went in favor of the receiver. Upon appeal the judgment was affirmed, 81 F. (2d) 120 (C. C. A. 4th, 1936). The Supreme Court of the United States granted certiorari "limited to the question of the jurisdiction of the District Court". 298 U. S. 648 (1936).

In affirming the decisions of the lower courts Mr. Justice Cardozo sketched briefly the history of the Virginia remedy by notice of motion. In 1732 it was limited to claims for public moneys payable by sheriffs. Acts of May, 1732, c. 10, § 8, 4 Va. Stat. 352. In 1849 it was made applicable to claims on contracts generally, (Va. Code, 1849, c. 167, § 5). Torts and statutory penalties were included by 1912. Virginia Acts, 1912, §§ 15, 641. Today § 6046 of the Virginia Code, as amended by Acts, Virginia, 1928, c. 121, reads "Any person entitled to maintain an action at law, may, in lieu of such action at law, proceed by motion." Mr. Justice Cardozo remarks that the history of the development has been traced with precision by students of procedure. See Burks, PLEADING AND PRACTICE IN ACTIONS AT COMMON LAW (1913) 164; Millar, Three American Ventures in Summary Civil Procedure (1928) 38 Yale L. J. 193; Clark and Samenow, The Summary Judgment (1929) 38 Yale L. J. 423; Report of the College of Law of West Virginia to the Bar Association (1929) 36 W. Va. L. Q. 5, 70.

As early as 1904 the remedy by motion was accepted by the Bar in Virginia, and recognized by the federal courts, according to an opinion in Leas and McVitty v. Merriman 132 Fed. 510 (C .C. W. D. Va. 1904). In January 1935, the Circuit Court of Appeals for the Fourth Circuit, with supervisory powers over courts in the same area, made a study of the growth of the use of the remedy by motion. Their study disclosed the fact that the remedy had almost superseded the common law forms of action and was followed in the majority of common law actions begun in federal courts.

Meeting the objection that this procedure was at odds with the Constitution of the United States, Mr. Justice Cardozo remarked that the Constitution does not attempt to make a choice between one method and another, provided only that the method employed "gives reasonable notice, and affords fair opportunity to be heard before the issues are decided ", citing Iowa Central Ry. Co. v. Iowa, 160 U. S. 389 (1896).

Petitioners relied extensively on REV. STAT. § 911 (1875), 28 U. S. C. A. § 721 (1935), which provides: "All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the
Supreme Court shall bear teste of the Chief Justice of the United States, or when that office is vacant, of the associate justice next in precedence, and those issuing from a district court shall bear teste of the judge, or, when that office is vacant, of the clerk thereof.”

The Justice’s reply to this was brief, “We do not essay a definition of the word ‘process’ in every context. It may take on varying shades of meaning in varying surroundings. For present purposes it is enough to say that a notice of motion, if process at all, is not process issuing from a court, and assuredly is not a writ. Only writs or processes so issuing are governed by the statute.”

This expression finds precedent in the view expressed by Judge (later Mr. Justice) Sanford in the District Court of Tennessee, “In any proceeding which may properly be instituted and proceeded with upon mere notice to the parties in interest, without process from the court itself the requirements of section 911 have no application”. In re Condemnation Suits by United States, 234 Fed. 443, 445 (E. D. Tenn. 1916).

The petitioners in their arguments relied quite heavily upon earlier decisions of the District and Circuit Courts for New York, wherein the requirements of § 911, supra, were held to be applicable to the New York form of summons. The reply of the court to this contention was very decisive: “In so far as these decisions and others following them (United States v. Mitchell, 223 Fed. 805 [E. D. N. Y. 1915]) extend the rule of the statute to notices or forms of process not issuing from a court, they do not have our approval.”

J. A. H.

EQUITY—Federal Jurisdiction—Amount in Controversy.

Complainant, a New York corporation, brought a bill in a United States District Court in Washington to enjoin defendant, a Washington corporation, from releasing, by radio broadcast to the public, news gathered by it for the benefit of its members, which are approximately twelve hundred daily newspapers. The acts complained of were the announcements of news bulletins three times daily. It was alleged that by such acts several members of complainant’s organization would be irreparably damaged in that the radio reports were reaching subscribers of the newspapers before the daily issue of the papers. The complaint alleged damage in excess of $3,000, the requisite amount prescribed by the Judicial Code, 36 Stat. 1091 (1911), 28 U. S. C. A. § 41(1) (1927). Prior to the return day of the order to show cause why a temporary injunction should not issue, defendant filed a motion to dismiss, one of the grounds therefor being that the matter in controversy did not exceed $3,000. Held, the formal allegation of the amount in controversy is not sufficient to sustain jurisdiction if the bill shows other facts which raise a doubt as to the sufficiency of the amount, and the bill should be dismissed. KVOS, Inc. v. Associated Press, — U. S. —, 81 L. ed. 143 (1936).

The complaint in the instant case, as has been seen, alleged that the amount in controversy exceeded $3,000; and it sufficiently appeared that the parties were of diverse citizenship so as to entitle complainant to sue in a federal court. However, an averment of the fact that the amount involved exceeds $3,000 is not conclusive upon the court. The rule is that it must appear by distinct averment, or otherwise from the proofs, that the requisite amount is involved. Pinel v. Pinel, 240 U. S. 594 (1916). That the allegation is
unnecessary if the fact is shown otherwise is brought out in *Lee Line Steamers v. Robinson*, 232 Fed. 417 (C. C. A. 6th, 1916). The substance of the rule is, therefore, that the jurisdictional facts must appear in some manner, so that an allegation in the complaint of such facts will be of no avail if the accompanying allegations or proof fail to support it. *Lion Bonding and Surety Co. v. Karatz*, 262 U. S. 77 (1923); *First Nat. Bank v. Louisiana Highway Commission*, 264 U. S. 308 (1924).

The question then is, what determines the amount in controversy? May the court disregard the allegation of the complaining party that there is an amount in excess of $3,000 involved? The cases show that the jurisdictional amount is to be determined by the value of the right to be protected or the extent of the injury to be prevented. *Glenwood Light & Water Co. v. Mutual Light Heat & Power Co.*, 239 U. S. 121 (1915); *Bureau of National Literature v. Sels*, 211 Fed. 379 (W. D. Wash. 1914); *General Petroleum Corporation v. Beanblossom*, 47 F. (2d) 826 (C. C. A. 9th, 1931). The case of a bill to enjoin continued trespasses on land may present the question of the value of the right to be protected, but where the trespasses are not sporadic and would possibly impair the utility of land worth $50,000, the statutory amount is involved. *Swan Island Club v. Ansell*, 51 F. (2d) 337 (C. C. A. 4th, 1931). A case in the nature of the principal case presents only this question, because the Court decided that a property right was involved in the case of news piracy when it granted an injunction in the case of *International News Service v. Associated Press*, 248 U. S. 215 (1918). It did not declare news to be property but it considered the complainant as having a civil right in gathering and distributing news, which is a property right. In that case the question of the jurisdictional amount was not raised at all, and the Court did not bring it up.

Since that case arose on facts almost identical with those of the principal case, it was pressed upon the Court by the respondent. Mr. Justice Roberts distinguishes the cases by saying that in the *International News Service* case the question was not raised; it was there if counsel or the Court cared to raise it. In the case at hand, the defendant seasonably moved to dismiss for want of jurisdiction, thus putting the matter into the case. But it is also pointed out by Mr. Justice Roberts that the Court may raise the point *sua sponte*. The rule is that if the cause is not at all one for equitable cognizance the defendant may raise the objection at any stage of the proceedings; *Allen v. Pullman Palace Car Co.*, 139 U. S. 658 (1891); but if the cause does not show an entire lack of equitable jurisdiction the parties will be left to the jurisdiction by their failure to raise the matter. *Acord v. Western Pocahontas Corp.*, 156 Fed. 989 (C. C. S. D. W. Va. 1907), *cert. denied*, 215 U. S. 607 (1910). Where it clearly appears, however, that under the Judicial Code the amount involved does not exceed $3,000, a federal court may not hear the merits, because it would have no jurisdiction over the subject matter and the parties may not waive the amount. *Holt v. Indiana Mfg. Co.*, 176 U. S. 68 (1900). This would make it appear that the Court should have dismissed the *International News Service* case, unless it felt that lack of the necessary amount was not clearly shown. See *Read, Fears & Miller v. Miller*, 2 F. (2d) 280 (D. C. E. D. Pa. 1924), *aff'd*, 5 F. (2d) 1018 (C. C. A. 3d, 1925). But the cases may be distinguishable on their facts; in the case under discussion only three newspapers with membership in complainant were alleged to suffer, while in the previous case the news piracy was widespread.

E. J. Q., Jr.
EQUITY—Jurisdiction—Cancellation.

Suit was brought by the insurer to cancel two life insurance policies on the ground of concealment of material facts and fraudulent misrepresentations made by the insured in the procurement of the policies. The policies contained clauses which provided that they would become incontestable one year after the date of issue, if the insured then were living, otherwise, after two years from the date of issue. The policies were issued in February, 1932. The insured died in May, 1932, and the suits were filed in September, 1932, approximately one year and a half before the contest period was to expire. The beneficiaries moved to dismiss, alleging that the bills were without equity and that the insurer had an adequate remedy at law. On October 11, 1932, the beneficiaries filed actions at law for recovery on the policies, and the insurer filed supplemental bills, therein seeking to restrain the prosecution of the actions at law until the equity suits were finally determined. On August 29, 1933, the parties stipulated that the suits in equity should be tried before the actions at law. The District Court approved the stipulations, and the cases were tried on the merits on January 3, 1934. In December, 1934, the Court filed findings of fact and conclusions of law, finding that the policies had been procured by fraud and should be canceled. The Circuit Court reversed on the ground that the District Court should have dismissed the equity suits, regardless of the stipulations, since the actions at law furnished an adequate remedy for the insurer. 85 F. (2d) 791 (C. C. A. 10th, 1936). Held, there was equity jurisdiction and, if having been so stipulated, the insurer was entitled to have the issues tried on the merits in the equity court. Reversed and remanded to the Circuit Court for consideration of the merits. American Life Insurance Company v. Stewart, 299 U. S. —, 81 L. ed. 306 (1937).

As to the statutory limitation upon equity jurisdiction, it was said in Boyce's Executors v. Grundy, 3 Pet. 210 (U. S. 1830): “This court has been often called upon to consider the sixteenth section of the judiciary act of 1789, and as often, either expressly or by course of its decisions, has held that it is merely declaratory, making no alteration in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity.”

In Insurance Company v. Bailey, 13 Wall. 616 (U. S. 1871), a case similar to the principal case, but involving insurance contracts which did not become incontestable by their terms after the expiration of a period of time, the Court said: “Courts of equity unquestionably have jurisdiction of fraud, misrepresentation, and fraudulent suppression of material facts in matters of contract, but where the cause of action is 'a purely legal demand', and nothing appears to show that the defense at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in a Federal court, as it is clear that the case, under such circumstances, is controlled by the sixteenth section of the Judiciary Act.” In Cable v. United States Life Insurance Company, 191 U. S. 288 (1903), Insurance Company v. Bailey, supra, was held to be controlling.

In Enelow v. New York Life Insurance Company, 293 U. S. 379 (1935), it was sought to stay proceedings in an action at law by invoking section 274b of the Judicial Code. The court held this to be substantially a prayer to enjoin the action at law pending a final determination of the issue in equity.
It was further held that a bill in equity to enjoin the action at law could not be sustained where the equitable remedy was available as a defense to the action at law. Although distinguishable from the instant case in that no incontestable clauses were involved, \textit{Di Giovanni v. Camden Fire Insurance Association}, 296 U. S. 64 (1935), relies in part upon \textit{Enelow v. New York Life Insurance Company}, supra: "This Court has recently pointed out that equity will not compel the cancellation and surrender of an insurance policy procured by fraud where the loss has occurred and a suit at law to recover the amount of the loss is pending or threatened. ... While equity may afford relief \textit{quia timet} by way of cancellation of a document if there is a danger that the defense to an action at law upon it may be lost or prejudiced, no such danger is apparent where, as respondent's bill affirmatively shows, the loss has occurred and suits at law on the policies are imminent, and there is no showing that the defenses cannot be set up and litigated as readily in a suit at law as in equity." In \textit{Enelow v. New York Life Insurance Company}, supra, the court said: "The instant case is not one in which there is resort to equity for cancellation of the policy during the life of the insured and no opportunity exists to contest liability at law. Nor is it a case where, although death may have occurred, action has not been brought to recover upon the policy, and equitable relief is sought to protect the insurer against loss of its defense by the expiration of the period after which the policy by its terms is to become incontestable." The main case falls within this class for which the court suggests that relief in equity may be had. It would also seem to fall within the class for which the court, in \textit{Di Giovanni v. Camden Fire Insurance Association}, supra, held that the remedy at law was adequate. In the insurer's supplemental bills (in the instant case) the fact of the pending law suits was set forth. The court, in \textit{Di Giovanni v. Camden Fire Insurance Association}, supra, construing \textit{Enelow v. New York Life Insurance Company}, supra, in speaking of equitable relief \textit{quia timet} by cancellation of a document if there existed a danger that the defense to an action at law upon it might be lost or prejudiced, said that "no such danger is apparent where, as respondent's bill affirmatively shows, the loss has occurred and suits at law upon the policies are imminent, and there is no showing that the defenses cannot be set up and litigated as readily in a suit at law as in equity". In the main case the suits at law were actually filed, not merely imminent. The principal case does not dignify \textit{Di Giovanni v. Camden Fire Insurance Association}, supra, by so much as a citation, although the case was strongly relied upon below.

"Contest", as applied to insurance contracts, is generally held to mean a present contest in court, and not merely a notice of repudiation. 

As to whether the contest barrier would stand though an action at law, brought within the period, has been dismissed or discontinued later, the court said: “... we are not required to determine, for a slight variance in the facts, as, e. g., in the rule prevailing in the jurisdiction where the final suit is brought, may have a bearing on the conclusion. At least in such warnings there are possibilities of danger which a cautious insurer would not put aside as visionary.” In the cases in which the lower courts have allowed equitable relief no actions had been brought at law for recovery on the policies at the times the bills in equity were filed. The court said of actions brought after the filing of bills in equity: “There is indeed, a possibility that the bringing of actions at law might have been used by the respondents to their advantage if they had not chosen by a stipulation to throw the possibility away.” This suggests that the case might have been decided differently had the respondents stood on their motion to dismiss. It is not to be expected that the insurer may in every case rush into equity and deprive the beneficiary of a jury trial. The court said in the instant case: “If request had been made by the respondents to suspend the suits in equity till the other cases were disposed of, the District Court could have considered whether justice would not be done by pursuing such a course, the remedy in equity being exceptional and the outcome of necessity.” This suggests the English practice adopted in Hoare v. Brembridge, L. R. 8 Ch. App. 22 (1872).

In spite of the court's statement, “We granted certiorari to settle an important question, and one likely to recur, as to the scope of equitable remedies”, the case may resolve itself into one of minor signifiance. It may mean no more than a re-affirmation of the well established principle that the trial equity court, having control of its own docket, may, in the exercise of discretion, take to itself jurisdiction, or sua sponte deny itself jurisdiction in a case where the legal remedy is adequate, yet the defendant fails to take advantage of this point in his pleadings. And so long as the exercise of discretion is not clearly without sensible foundation, it should not be overturned by the appellate court. Yet the solicitude of the court to preserve for the defendant the right of jury trial in every case possible, and the importance hitherto attached by the court to the warning against a careless exercise of federal equity jurisdiction contained in the Judicial Code, are,
apparently for the first time in a case of seeming importance, here ignored. What this may mean to the future expansion of federal equity jurisdiction (especially in view of the forthcoming formulation of revamped federal pleading and practice) remains to be seen.

N. C.

INSURANCE—Recovery of Double Indemnity for Death by Accidental Means.

Life insurance policy of deceased had a clause providing for the payment of double indemnity "upon receipt of due proof that the death of the insured resulted directly and independently of all other causes, from bodily injury effected solely through external, violent, and accidental means". The policy provided that the double indemnity should not be payable if death resulted, among other things, from "any bacterial infection other than that occurring in consequence of accidental and external bodily injury". The insured intentionally extracted a hair from his nose, and septicaemia resulted, from which he died. On a suit by his representatives for the double indemnity, Held, that the death from septicaemia caused by pulling hair from his nose was the result of bodily injury effected through "accidental means" within the meaning of the clause, and recovery should be affirmed for the plaintiff. New York Life Ins. Co. v. Kassly, — F. (2d) — (1937).

A distinction must be drawn between accidental injury or death, and injury or death by accidental means; that is between "accident" and "accidental means". A distinction between accidental death and death resulting from accidental means is that in the former, death is accidental if the result is an accident, whether due to accidental means or not, whereas in the latter, regardless of whether the means by which death is produced be voluntarily employed, the result is due to accidental means if in the act preceding the injury something unforeseen, unusual, and unexpected occurs which produces the result. Maryland Cas. Co. v. Spitz, 246 Fed. 817 (C. C. A. 3rd, 1917); Smith v. Federal L. Ins. Co. 8 F. (2d) 1022 (C. C. A. 5th, 1925); Smith v. Travelers Ins. Co., 219 Mass. 147, 106 N. E. 607 (1914); Appel v. Aetna Life Ins. Co., 180 N. Y. 514, 72 N. E. 1139 (1904); Pledger v. Business Men's Acc. Ass'n of Texas, 197 S. W. 889 (Tex. Civ. App. 1917).

So where the insured's policy covers only injury or death due to accidental means, recovery has been denied where the acts done were the acts intended even though the resulting injury was undesigned and unexpected. New Amsterdam Casualty Co. v. Johnson, 99 Ohio St. 155, 110 N. E. 475 (1914) (Injury suffered from dilation of heart following a cold bath); Lehman v. Great Western Acc. Ass'n., 155 Iowa 737, 133 N. W. 752 (1911) (appendix burst while bowling); Wayne v. Traveler's Ins. Co., 220 Ill. App. 498 (1921) (death from approved medical injection of morphine); Clarkson v. Union Mut. Co., 201 Iowa 1249, 207 N. W. 132 (1926) (sprained back from lifting log): Husbands v. Travelers Acc. Ass'n. 194 Ind. 586, 133 N. E. 130 (1923) (hemorrhage from shaking down ashes in a furnace).

But the courts are eager to seize upon any slip or mistake which occurs in the series of events leading up to the injury, and thus be able to call the death one caused by accidental means. In the leading case of United States Mutual Acc. Ass'n v. Barry, 131 U. S. 100 (1880) the insured intentionally jumped to the ground from a platform about four feet high. The Supreme Court held that the injury should be regarded as an accident. For, decided
the court, while the insured intended to leap, he did not intend to leap so as to suffer the injury which caused his death.

So runs the weight of authority. In National Life & Acc. Ins. Co. v. Singleton, 193 Ala. 84, 69 So. 80 (1915), the insured cut himself while shaving and the resulting infection caused an injury which the Court held was due to accidental means. For, said the Court, while he intended to use the razor on his face, he did not intend to use it in such a manner as to cut the skin. Likewise in Preferred Acc. Ins. Co. v. Patterson, 213 Fed. 595 (C. C. A. 3d 1914), the insured was cranking his automobile and his foot slipped in the sand, causing him to fall in such a manner as to injure himself. The Court, seizing on the slip, held this to be within "accidental means", even though the plaintiff had intended to crank the automobile. In Carswell v. Railway Mail Ass'n, 8 F. (2d) 612 (C. C. A. 5th, 1925) the cranking proceeded in the manner intended. When it resulted in the fatal rupture of a blood vessel from over-exertion, the Court held it to be the unintended result of an intended act, and therefore not effected by accidental means. Some evidence to support the oft-repeated statement that the federal courts will interpret the policy and its provisions more strictly than will the state courts is found in Home Benefit Ass'n v. Smith, 16 S. W. (2d) 357 (Tex. Civ. App. 1929) where under almost the same facts as appeared in the Carswell case, supra, the Court held the death to be by accidental means.

The underlying reason usually supplied for the Courts' alacrity to give recovery is that insurance companies, experts in their business, deal with the average business man on their own terms, and the business man must buy the policy from the company or not be insured. Therefore the term "accident" should be construed strongly against the company. So, given a bona fide loss, and a bona fide policy, the Court will usually try to give recovery.

J. E. B.

INTERNATIONAL LAW—Extradition—Interpretation of Treaties.

Three citizens of the United States were taken into custody by the New York City police commissioner upon warrants issued on complaint of the local French consul. They were charged with having committed in France crimes extraditable under the existing treaty between the United States and France. 37 Stat. 1526 (1909). Suing out writs of habeas corpus, they claimed exemption under Article 5 of the Treaty, which reads: "Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention". 37 Stat. 1530 (1909). Held, that the Treaty gave the United States neither mandatory authority nor discretionary power to surrender its citizens. Valentine v. United States ex rel Neidecker, 299 U. S. 5 (1936).

Extradition, being the responsibility of the executive power of the state, arises only infrequently as a judicial question. United States v. Rauscher, 119 U. S. 407 (1886). Hence, to determine the national policy and interpretation of extradition treaties resort must be had to the opinions of those entrusted with their execution. While it insisted that courts must be careful to enforce the obligations imposed by treaties, the Court stated in Sullivan v. Kidd, 254 U. S. 433, 442 (1920), that "... the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight".
In the principal case the Court, admitting the paucity of judicial opinion and the intrinsic nature of the extradition treaty, looked carefully at the historical background of this and similar treaties. It found that the United States habitually had refused to except its citizens from the operation of the treaties (and throughout its opinion it relied upon the leading text authority in the field, Moore, Extradition [1891]), Moore, op. cit. supra, 159, and that it was only upon the insistence of foreign governments and the necessity for reciprocity that the United States finally agreed so to except her citizens. 1 Moore, op. cit. supra, 163. Once having agreed that her citizens should be excepted, her Court divided all extradition treaties into two classes, "those which expressly exempt citizens and those which do not." Charlton v. Kelly, 229 U. S. 447, 467 (1912).

In effect counsel for the appellant, and the dissenting justice in the Court of Appeals in the principal case (United States ex rel Neidecker v. Valentine, 81 F. [2d] 32, [C. C. A. 2nd, 1936]), was asking the Court to disregard the classification in Charlton v. Kelly, supra, and create an additional class which would embrace those which (purportedly) formally exempted citizens but without so stating actually made this exception effective vel non in the exercise of the executive discretion. However, passing the constitutional issue in regard to delegation of power presented by this contention, and insisting that both France and the United States must have had under consideration the nature of existing treaties, and had carefully chosen the language most expressive of their intent, the Court held that the existence of the opinions of several of the secretaries of state (see Ex parte McCabe, 43 Fed. 363, 378, 379 [W. D. Tex. 1891]), and the opinion of the Texas District Court (Ex parte McCabe, supra), were conclusive evidence of the intent of the parties. Since it is a fundamentally sound principle of construction that the provisions of a treaty (which "is to be regarded . . . as equivalent to an act of the legislature", Foster v. Neilson, 2 Pet. 253, 314 [U. S. 1829]; United States v. Arredondo, 6 Pet. 689 [U. S. 1832]; In re Parrott, 1 Fed. 481 [1880]), are to be construed liberally so as to effectuate the intent of the parties, 1 Kent, Commentaries, 174, quoted with approval in Tucker v. Alexandroff, 183 U. S. 424, 437 (1902); Geoffroy v. Riggs, 133 U. S. 258, 271 (1889); Asakura v. Seattle, 265 U. S. 332 (1923), the procedure of the Court here in determining the intent of the parties seems to be absolutely valid. To the contention that the result is unfair there is of course only one answer. "We are to find out the intention of the parties by just rules of interpretation applied to the subject matter, and having found that, our duty is to follow it as far as it goes, and to stop where that stops, whatever may be the imperfections or difficulties which it leaves behind." The Amiable Isabella, 6 Wheat, 1, 71 (U. S. 1821).

As pointed out by the Court in the principal case, though the contra opinions of foreign jurisdictions (notably In re Galway, [1896] 1 Q. B. D. 220) are of academic interest, they do not aid the Court in the determination of the intent of these particular parties, and hence may not be considered.

Finally, though it seems that the president may be delegated almost limitless discretionary power in international affairs, United States v. Curtiss Wright Export Corp., — U. S. —, 57 Sup. Ct. 216 (1936), (discussed (1937) 25 Georgetown Law Journal 738), he must in the first instance derive that power from some source. The only possible places of derivation are the Constitution (Art. II, § 2) or an act of Congress. Though Article II, Section 2 of the Constitution includes the power to negotiate treaties, it does not give the president power to act beyond the grant of the words of the
treaty or the legislation passed for the execution of that treaty or treaties in general. United States v. Rauscher, supra. So when Congress ratifies a treaty negotiated by the President, all the parties must be assumed to know the meaning of the words used. Hence it is that, unless it is expressly delegated to him, the President may not voluntarily extradite citizens of the United States. "It necessarily follows that as the legal authority does not exist save as it is given by Act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power." Valentine v. United States ex rel Neidecker, supra, 9.

The case seems to be soundly decided, and crowns with judicial authority numerous opinions of qualified statesmen and text writers. See Moore, op. cit. supra, 3-55, 164-167; IV Moore, Int. Law Dig., 301-303 (1906).

J. N. S. Jr.

MUNICIPAL CORPORATIONS—Liability on Ultra Vires Contracts.

Defendant town contracted with the Chesapeake and Ohio Railway Company that in consideration of the town's vacating for the benefit of the latter certain of its streets and alleys, the railway company would contribute twenty five thousand dollars towards the construction of a highway. The town entered into an agreement with the plaintiff for the surfacing of the highway which extended from within its corporate limits to a point outside its boundaries. The payment was to be made out of the balance left from the twenty five thousand dollars after payment of original construction costs. The surplus was, by a properly adopted ordinance, converted into a fund known as the "special street and road improvement fund". The town applied for and received from the Federal Emergency Administration of Public Works a grant of thirty percent of construction costs to supplement the fund. On completion of the work the municipality paid for that part which was within its boundaries, but refused payment for the work performed without its boundaries. The plaintiff brings a petition to recover on its contract. Held, the town was liable though the contract was ultra vires, on the ground that to refuse would be a confession of the impotency of the law to avert the city's wrongful conversion of a fund not derived from taxation but intrusted by others to its control and custody for a definite purpose. Womack-Rayburn Company v. Town of Worthington et al, 262 Ky. 710, 91 S. W. (2d) 13 (1936).

Acts ultra vires of a municipal corporation may be classified into those done with an entire absence of power so to act and those which, though the power exists, yet because of some irregularity in its execution, are void.

Municipal corporations are the creatures of the legislature. They have such powers to contract, and only such powers, as the legislature grants to them. Johnson County Savings Bank v. City of Creston, 212 Iowa 929, 231 N. W. 705 (1930). In Bartlett v. City of Lowell, 201 Mass. 151, 87 N. E. 195 (1909), where the superintendent of streets undertook to make a contract with the plaintiff for graveling of the streets, in violation of a provision of the law requiring purchase of such material to be made after public advertisement, the court affirmed a judgment denying the plaintiff a right to recover for materials furnished and said: "The plaintiff's contention is that the defendant city having had the benefit of the plaintiff's gravel should pay the reasonable value of it. But we are of the opinion that that is not so. If the court would adopt that result it would be putting the seal of the law upon a plain evasion of the law."
It is settled beyond controversy that the agents, officers, or even city council, or other governing body of a municipal corporation, cannot bind the corporation by a contract which is beyond the scope of its powers or entirely foreign to the purposes of the corporation. Winchester v. Redmond, 93 Va. 711, 25 S. E. 1001 (1896). All persons dealing with a municipal corporation are charged with notice of its limitations upon its power. Reams v. Cooley, 171 Cal. 510, 152 Pac. 293 (1915). Those limitations may not be exceeded, defeated, evaded, or nullified under guise of implying a contract, People v. Gleason, 121 N. Y. 631, 25 N. E. 4 (1890), nor may the acceptance of benefits thereunder be made a basis of liability by estoppel. Eaton v. Shiawassee County, 213 Fed. 588 (C. C. A. 6th, 1914); Van Buren Light and Power Company v. Inhabitants of Van Buren, 118 Me. 458, 109 Atl. 3 (1920). The ruling in Vito v. Simsbury, 87 Conn. 261, 87 Atl. 722 (1917), was to the effect that municipal corporations cannot be made liable on implied contracts which would be ultra vires if express or into which, except in a particular manner, entry is forbidden by statute.

There are however, authorities supporting an exception to the rule denying the liability of a municipality or other political subdivision upon implied contracts for any benefit received, if the benefits enrich the corporation. Thompson v. Elton, 109 Wis. 589, 85 N. E. 425 (1901) held that where the chairman and clerk of a town, representing that they had authority so to act, received a loan for the town which was turned over to the town treasurer and utilized for legitimate purposes, there was an implication of law that the money would be returned, irrespective of any claim of ultra vires. The court declared it to be the settled law in that state that the doctrine of ultra vires cannot be invoked by a public corporation in the absence of some prohibiting law to protect itself from liability to refund money which it had received and of which it had the legitimate benefit.

The purpose of avoiding liability on ultra vires acts or contracts of a municipal corporation is to insure protection of the tax-payer, who in the last analysis must bear the burden. Such a doctrine is consistent with principles of equity, good conscience and fair dealing. Great Atlantic and Pacific Tea Company v. City of Lexington, 256 Ky. 595, 76 S. W. (2d) 894 (1934). The peculiar circumstances of the present case however, make inapplicable the doctrine so laid down. The town's custody and control of the fund was acquired, not by or through its ownership, but as a trust for a definite purpose—the surfacing of a specified road. To allow it to retain the fund as owner would be at once to countenance its unjust enrichment and allow it to repudiate its obligation to the defendant, as well as its contracts with the railway company and the Federal Emergency Relief Administration of Public Works.

In Chapman v. County of Douglas, 107 U. S. 348 (1882), the Supreme Court quoted with approval from Pimental v. City of San Francisco, 21 Cal. 351 (1863) this principle: "The city is not exempted from the common obligation to do justice which binds individuals. Such obligations rest upon all persons, whether natural or artificial. If the city obtains the money of another by mistake or without authority of law, it is her duty to refund it, from this general obligation. If she obtains other property which does not belong to her, it is her duty to restore it, or, if used, to render an equivalent therefor, from the like obligation." Aldrich v. Chemical National Bank, 176 U. S. 618 (1899); Fernald v. Town of Gilman, 123 Fed. 797 (D. Iowa 1903); Tennessee Ice Company v. Raine, 107 Tenn. 151, 64 S. W. 29 (1901).

Robert H. Hunt died June 11, 1935, leaving real estate and bank deposits in both Massachusetts and California, besides considerable personal property, most of which was in the custody of the complainant, a domiciliary of Massachusetts, whom the testator had, in his will, designated executor. The will was admitted to probate in Massachusetts on June 26, 1935, and ancillary proceedings were instituted in California July 29, 1935. It was alleged that the complainant was under obligation to pay any and all estate, inheritance and succession taxes to the officials of Massachusetts and California; that the officials of each state were asserting the right to assess and collect succession and inheritance taxes upon the transfer of intangibles upon the theory that the decedent, at the time of his death, was domiciled in the respective states and that there was involved in this controversy over $100,000, which sum the complainant had in its custody. It was further alleged that the threatened collection of both the California and Massachusetts taxes which were based upon an inconsistent claim of domicile would deprive the estate of property without due process of law, and would deny it equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States. By virtue of the Federal Interpleader Act of 1936, 49 STAT. 1096, 28 U. S. C. A. § 41 (26) (1936) the complainant caused process to issue from the United States District Court for Massachusetts against the taxing authorities of Massachusetts and California and secured a temporary restraining order against each from taking any further proceeding to assess, determine or collect the inheritance taxes due from the estate.

The complainant’s bill contained five prayers: first, that the respondents plead their adverse claims to the money and property in the possession of the complainant or to the benefits arising by virtue of the complainant’s obligation to pay the inheritance taxes; second, that the court determine the domicile of the decedent at the time of his death and the persons entitled to said money, property or benefits; third, that the court determine the sum owed to any of the respondents; fourth, that the court permanently enjoin respondents of the nondomiciliary state from taking any action to determine or collect taxes based upon domicile except as determined by the court; fifth, that complainant be discharged of all further obligation to the respondents upon compliance by it with such decree as the court may make in the case. The respondents set up the defense that the court was without jurisdiction due to the inhibition of the Eleventh Amendment. After preliminary findings that the suit could not be considered one against the state inasmuch as the said suit was not brought specifically to enforce an obligation of the state or to control the discretion of executive or administrative officers or to administer funds actually in the public treasury, and that it was not necessary to make the state a party in order to carry into effect the appropriate decree, Held, the Massachusetts executor was entitled by the Federal Interpleader Act of 1936 to interplead the taxing authorities of Massachusetts and California to have the testator’s domicile determined in order that double taxation might be avoided. The court refused, however, to determine the exact amount of tax due. Worcester County Trust Co. v. Long, 14 F. Supp. 754 (D. Mass. 1936).

Although it is well settled that intangibles have only one situs for the purpose of inheritance or succession taxes, and that situs is the domicile of the decedent at the time of his death, First National Bank of Boston, Ex’r v.
Maine, 284 U. S. 312 (1932); Farmers' Loan and Trust Co., Ex'r. v. Minnesota, 280 U. S. 204 (1930); City Bank Farmers' Trust Co., Ex'r. v. Schnader, 291 U. S. 24 (1934); and equally as well settled that a person can have at one time only one domicil, however many places of residence he may maintain, Tax Collector of Lowell v. Hanchett, 240 Mass. 557, 134 N. E. 355 (1922); Commonwealth v. Bogigian, 265 Mass. 531, 164 N. E. 472 (1929), the difficulties encountered before the passage of the Federal Interpleader Act of 1936 in guarding against multiple exaction of taxes as a result of more than one state claiming to be the domicil of the testator, are well illustrated in the famous Dorrance Tax Controversy.

John T. Dorrance died testate September 21, 1930 while a resident of New Jersey. On October 2, 1930 his will was admitted to probate by the Orphan's Court of Burlington County, New Jersey, and letters testamentary were issued by authority of which the executors administered the estate from that time under jurisdiction of the Court. The petition for probate cited Dorrance as domiciled in New Jersey at the time of his death. The executors on April 6, 1931 filed with the Inheritance Tax Bureau of New Jersey their return as a basis for the assessment of the tax. The estate consisted almost wholly of intangibles located in New Jersey. The Tax Commission finding upon evidence that Dorrance was at the time of his death domiciled in New Jersey, on October 17, 1931 assessed a tax in the amount of $12,247,333.52, in accordance with the New Jersey Transfer Inheritance Tax Act of April 20, 1909, c. 228, as amended.

Upon request of the executors, on December 12, 1931, the assessment so made was opened, enabling them to submit additional information concerning decedent's domicil. This evidence consisted of a judgment of the Supreme Court of Pennsylvania rendered September 26, 1932, In re Dorrance's Estate, 309 Pa. 151, 163 Atl. 303 (1932), holding Dorrance to have been domiciled in Pennsylvania. This state claimed that he was domiciled there at the time of his death and commenced proceedings to subject his estate, including the intangible property to the Pennsylvania inheritance tax. The executors claimed Dorrance was, or must be deemed to have been domiciled in Pennsylvania in view of the judgment and other evidence. Nevertheless on October 10, 1932 the New Jersey Tax Commission again assessed upon the estate the tax of $12,247,333.52. The executors appealed to the Prerogative Court, which by final decree entered May 11, 1934 affirmed the assessment. In re Dorrance, 115 N. J. Eq. 268, 170 Atl. 601 (1934); 116 N. J. Eq. 204, 172 Atl. 503 (Prerog. Ct. 1934). The case then went by writ of certiorari to the New Jersey Supreme Court which by memorandum on February 8, 1935 affirmed the decree of the Prerogative Court and dismissed the writ. Dorrance v. Martin, 13 N. J. Misc. 168, 176 Atl. 902 (Sup. Ct. 1935).

A final judgment was rendered in March 1933 by the Pennsylvania Supreme Court against the executors, which adjudged that Dorrance's domicil at the time of his death was in Pennsylvania and therefore that state was allowed to impose an inheritance tax upon the intangible property as well as upon the real estate and tangible personal property located within the state. Dorrance's Estate, 309 Pa. 151, 163 Atl. 303 (1932). It is important to note that no question under the Federal Constitution was presented in the Pennsylvania Court and for this reason certiorari was denied by the United States Supreme Court, 287 U. S. 660 (1932); 288 U. S. 617 (1933). In satisfaction of the judgment the executors paid to Pennsylvania $14,394,698.88 and $104,278.03 as interest thereon; and they also gave a bond in the
sum of $4,000,000 to pay additional amounts, if upon final determination of the federal estate tax they should appear to be due.

On April 1, 1935 suit was instituted under § 266 of the Judicial Code, 28 U. S. C. A. § 380, (1928) to enjoin collection of the inheritance tax assessed by New Jersey. The plaintiffs insisted that the Pennsylvania judgment was in rem and bound the New Jersey State Tax Commission and other officials although they were not parties to that litigation, and that the New Jersey courts and administrative authorities in refusing to give effect to the Pennsylvania judgment holding that Dorrance was domiciled in the latter state, violated the full faith and credit clause of the Federal Constitution; and that if they construed the New Jersey Transfer Inheritance Tax Act as applying to intangible property the situs of which was outside New Jersey they violated the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. If the Pennsylvania judgment was not in rem, the plaintiffs contended, the federal court was free to ascertain the facts as to domicil and reach its conclusion independently of the prior decisions of the courts of the two states; and that the evidence introduced below established that Dorrance's domicil was in Pennsylvania.

The United States Supreme Court upheld the United States District Court in its conclusion that § 265 of the Judicial Code applied and that therefore the federal courts lacked jurisdiction to grant the injunction since at the time of the institution of these suits in the federal court the proceedings in New Jersey had passed into the judicial stage. *Hill v. Martin*, 296 U. S. 393 (1935).

Dorrance could not have been domiciled in both Pennsylvania and New Jersey at the time of his death and justice seemed to require that his estate should have paid only one tax. Yet the record disclosed that both states claimed to be the domiciliary state, both levied inheritance taxes on intangibles, both collected. Obviously one state proceeded in violation of the Fourteenth Amendment, but which state it was could not be determined because of lack of an appropriate legal remedy.

Clearly, when the officials of more than one state claim the decedent to be domiciled at the time of his death within the geographical boundaries of their respective state, some method is necessary by which this single issue can be settled in one litigation. The best method that suggests itself is interpleader.

Prior to 1936, federal interpleader would probably have been impossible in inheritance tax disputes between states, since the United States courts had no personal jurisdiction outside the state in which they sat and no power to compel the appearance of the extra-territorial taxing authorities. Interpleader being a proceeding in *personam*, such personal service is required. *New York Life Ins. Co. v. Dunlevy*, 241 U. S. 518 (1916). This objection to federal jurisdiction was removed by the Federal Interpleader Act of 1936, 49 STAT. 1096, which enables a United States District Court in either state to grant interpleader or an action in the nature of interpleader against both sets of tax officials. For a detailed discussion of the changes wrought by the Act, see Chafee, *The Federal Interpleader Act of 1936* (1936) 45 YALE L. J. 963.

The district court by virtue of the federal statute has nationwide powers of service of process and thus can compel the tax officials in the other state to become parties to the interpleader suit, and the statute permits federal injunctions against future or pending tax suits in the state courts of the two states concerned.
As established by the principal case, had the Federal Interpleader Act of 1936 been in effect at the time of Dorrance's death, immediately the controversy as to the state of domicil arose, the executors would have had the right to go into the United States District Court and interplead the tax authorities of New Jersey and Pennsylvania to prevent double taxation of transfers of intangibles by having decedent's domicil determined. Also the executors would have been relieved of the lengthy and costly litigation in the state courts by obtaining a federal injunction against future or pending tax suits in the courts of the two states concerned.

J. H. D.

TAXATION—The Jurisdiction to Tax Intangible Personal Property.

The complainant was one of four partners, all residents of Massachusetts, who conducted a stock brokerage firm in Boston. Among the firm assets was a membership in the New York Stock Exchange, the ownership of which was divided equally among the four partners, although it was held in complainant's name. In 1929 the membership of the Stock Exchange was increased, and each member thereupon became entitled to a "right" to one-fourth of a new membership. This right the complainant sold for $108,000 and the Tax Commission assessed a tax upon the profit of the sale, calculated at the difference between original cost plus dues paid in, and the proceeds of the sale, as income derived from property within the State of New York. The tax was paid under protest, and relief sought on the ground that the State tax "contravened the Fourteenth Amendment of the Federal Constitution as an extraterritorial tax." The complainant argued that since he and his copartners were domiciliaries of Massachusetts where they transacted business, and since their transactions on the Exchange were conducted through other members who had offices in New York, the firm membership in the Exchange could not be said to have acquired a "business situs" in New York, but like other intangible property was properly taxable only at the domicile of the owner, Massachusetts. Held: New York had jurisdiction to tax the profit of this transaction because the membership was by its very nature localized and given a "business situs" at the New York Stock Exchange. New York ex rel Whitney v. Graves, 57 Sup. Ct. 237, 81 L. ed. 195 (1937).

That an incorporeal right in a seat on a stock exchange is a species of intangible personal property is well settled. Page v. Edmunds, 187 U. S. 596 (1903); Sparhawk v. Yerkes, 142 U. S. 1 (1891); Hyde v. Woods, 94 U. S. 528 (1876).

Under the law as it stood in the early nineteen-twenties taxation of the same intangible property was possible in four separate jurisdictions, each sustaining its tax under a subsisting decision of the United States Supreme Court. Farmer's Loan and Trust Co. v. Minnesota, 280 U. S. 204 (1930). One state might have fixed the situs of the property for taxation at the domicile of the creditor, State Tax on Foreign-Held Bonds, 15 Wall. 300 (U. S. 1872); a second at the domicile of the debtor, Blackstone v. Miller, 188 U. S. 189 (1903); a third at the "business situs" of the property, New Orleans v. Stempel, 175 U. S. 309 (1899); while a fourth jurisdiction might have taxed where the evidences of indebtedness were actually held, Wheeler v. Sohmer, 233 U. S. 434 (1914).

By 1929 the Supreme Court was able to find in the Fourteenth Amendment of the Federal Constitution an inhibition on the principle of multiple taxation
of intangibles, something Mr. Justice Holmes could not do twenty-six years before, when he said in the case of Blackstone v. Miller, supra, at 204: "But these inconsistencies [multiple taxation upon divergent theories] infringe no rule of constitutional law".

In a case involving taxation by Virginia, the residence of the cestuis que trust of a fund the legal title to which was held in Maryland, the Court invalidated the Virginia tax, saying "Ordinarily this Court recognizes that the fiction mobilia sequuntur personam may be applied in order to determine the situs of intangible personal property for taxation. But 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. . . . The adoption of a contrary rule would involve possibilities of an extremely serious character by permitting double taxation, both unjust and oppressive." Safe Deposit and Trust Co. v. Virginia, 280 U. S. 83 (1929).

The case of Farmers’ Loan and Trust Co. v. Minnesota, supra, in 1930 faced the situation squarely for the first time. After adverting to the possibility, mentioned above, of taxation of the same intangible property in four jurisdictions, the Court boldly stated the rule that intangibles were taxable at the domicile of their owner, and were entitled to immunity from taxation at more than one place, under the Fourteenth Amendment. The Court expressly overruled the case of Blackstone v. Miller, and in the later case of Baldwin v. Missouri, 281 U. S. 586 (1930) afforded the same fate to Wheeler v. Sohmer, supra.

Thus the Supreme Court, after 57 years of conflicting decisions, readopted the rule it had stated so long before in the State Tax on Foreign-Held Bonds case, supra.

However, the exception to the rule of mobilia sequuntur personam which permitted the acquisition of a “business situs” other than the domicile of the owner of intangible personal property for taxation remained, having become more firmly rooted in the law with the passing of the years. New Orleans v. Stempel, supra; Bristol v. Washington County, 177 U. S. 133 (1900); Board of Assessors v. Comptoir National D’Escompte, 191 U. S. 388 (1903); Metropolitan Life Insurance Co. v. New Orleans, 205 U. S. 395 (1907); Liverpool and L. & G. Insurance Co. v. Assessors, 221 U. S. 346 (1911); Safe Deposit and Trust Co. v. Virginia, supra; Farmers’ Loan & Trust Co. v. Minnesota, supra; Baldwin v. Missouri, supra; Beidler v. South Carolina Tax Commission, 282 U. S. 1 (1930); Virginia v. Imperial Coal Sales Co., 293 U. S. 15 (1934); First National Bank v. Maine, 284 U. S. 312 (1932).

The latest and most important pronouncement of the Court upon this point is found in the case of Wheeling Steel Corp. v. Fox, et al., 298 U. S. 193 (1936). In this case, a Delaware corporation maintained its principal office in West Virginia, although most of its manufacturing plants were in Ohio. West Virginia assessed a tax on the intangible property of the corporation, consisting of bank deposits and accounts receivable held chiefly outside West Virginia. The Court sustained this as a property tax, saying that it was in West Virginia that the corporation had its “commercial domicile”, there it kept its books and records and held meetings, there its “management functioned”, hence its intangible property was there subject to taxation, and “in the absence of a showing that such intangibles had been localized elsewhere, was taxable in no other jurisdiction”. (Italics supplied.) The
decision in this case is thought to extend the rule long applied to tangible personality (New York Central R. R. v. Miller, 202 U. S. 584 [1906]) to the field of intangibles, and when it can be shown that intangible property has been localized in one jurisdiction, to protect it from taxation elsewhere.

Turning to the principal case, it appears that only twice before in the history of the Supreme Court has the question of the jurisdiction to tax the property right inhering in a seat on a stock exchange been presented. In Rogers v. Hennepin County, 240 U. S. 184 (1916) the Court held that a membership in the Minneapolis Chamber of Commerce, in reality a grain pit, owned by a non-resident of Minnesota, was properly taxable in Minnesota, since it was in that State that the rights and privileges arising from the membership were actually exercised.

Subsequently, in Citizens National Bank v. Durr, 257 U. S. 99 (1921), a tax was levied on a membership in the New York Stock Exchange, owned by a resident of Ohio who had transacted no business on the New York Exchange personally. This membership was held to be properly taxable at the domicile of the owner, and the Court expressly refrained from stating its opinion as to the jurisdiction of New York to tax the membership privileges exercisable there.

It would thus seem at first glance, in the light of the decision in the Durr case, that the principal case is an expression of opinion by the Supreme Court that double taxation of the property in a stock exchange membership is still sanctioned.

However, this conclusion may be modified by a more careful consideration of the Court’s language in the instant case. “What the Court said [in the Durr case] with respect to double taxation must be read in the light of Farmers’ Loan and Trust Co., v. Minnesota, supra, and later cases upon that point. See Wheeling Steel Corp. v. Fox, supra.” This language, coupled with that of Wheeling Steel Corp. v. Fox, supra, quoted above, constitutes at least a strong intimation that the Durr case would not be sustained by the present court if the membership on the exchange could be shown to have acquired a “business situs” elsewhere than in the taxing state, and that, if the question is squarely presented, Citizens National Bank v. Durr must join Blackstone v. Miller and Wheeler v. Sohmer on Justice Holmes’ Index Expurgatorius (Baldwin v. Missouri, supra, at 596) of cases which no longer exemplify the law. Such a view accords with the decision of the Indiana court in the case of Miami Coal Co. v. Fox, 203 Ind. 99, 176 N. E. 11 (1931), where it was held that the state of corporate domicile, which was Indiana, had no jurisdiction to tax debts owed the corporation by its customers, because it was established that the debts had acquired a taxable situs under the business situs doctrine in Illinois. See Brown, Multiple Taxation by the States (1935) 48 Harv. L. Rev. 407. However, the author of the article just cited states that “the numerical majority is probably committed to the contrary views, and permits the taxation by the state of domicile even though credits are taxed in another state under the business situs theory”. Brown, op. cit. supra, at 425. At the conclusion of the article the author hazards the conjecture that the Court, continuing its avowed policy of outlawing multiple taxation of property among the states, will discard the business situs doctrine and allow taxation of credits only at the owner’s domicile. Referring specifically to the Rogers and Durr cases, he suggests that the court is prepared to make a choice between the two, and expresses the opinion that the Durr case stands the better chance of survival. This is consistent with his prophecy that the business situs doctrine is on the way out. Unfortunately, the article was
written before the decision of the Court in the *Wheeling Steel Corporation* case, and the decision in the principal case. Taking these decisions together it would seem that Professor Brown’s guess has missed the mark, and that if the Court is about to make a choice between competing jurisdictions (if, indeed, the choice has not already been made), the state of business situs will be awarded the palm.

P. J. F., Jr.

**TAXATION—The Taxation of Governmental Instrumentalities.**

Richard Reed Rogers, the general counsel for the Panama Railroad Company, in making his State income tax return for the years 1927, 1928 and 1929, reported the receipt of salary from the corporation during those years, but upon the claim that the salary was exempt, paid no tax. The State Tax Commission having sustained the tax, it was paid under protest, and the exaction was upheld in the State courts. An appeal was taken to the Supreme Court of the United States. *Held*, the operations of the Panama Railroad Company, the capital stock of which the United States is the sole owner, are so connected with the Panama Canal as to confer upon the railroad company the immunity of a federal instrumentality from state taxation, and that where a corporation is immune from such taxation as an instrumentality of the federal government, fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune. *New York ex rel Rogers v. Graves*, — U. S. —, 57 Sup. Ct. 269 (1937).

The following decision, also dealing with the taxation of a governmental instrumentality, was handed down at the same term of the court.

The Revenue Act of 1926, 44 Stat. 88 (1926), 26 U. S. C. A. § 700 (1934) lays a tax of 18 cents per pound upon all tobacco and snuff manufactured in or imported into the United States, and provides that said tax is to be paid by the manufacturer or importer upon removal from the place of manufacture, or upon sale prior to such removal. In test suits in the court of Claims the petitioner sought to establish the right to recover the value of Internal Revenue stamps affixed by Liggett and Myers Tobacco Company to boxes containing tobacco which it had manufactured and sold to the Commonwealth of Massachusetts for free distribution to patients in Boston State Hospital. The institution is maintained by the Commonwealth and the petitioner contended that it is a governmental instrumentality immune from Federal taxation. The Court of Claims of the United States denied the claim to recover the value of the internal revenue stamps. The Supreme Court affirmed the decision of the Court of Claims. *Held*, A federal tax upon the manufacture of all tobacco is not a direct burden on the State, when the state purchases tobacco for use in a state hospital. The effect of the tax being indirect and incidental, it was not prohibited under the immunity from taxation granted to governmental instrumentalities. *Liggett & Myers Tobacco Co. v. U. S.*, — U. S. —, 57 Sup. Ct. 259 (1937).

The decisions in the cases set out above mark no new development in the law in the field of taxation of governmental instrumentalities. The court in deciding the case of *New York ex rel Rogers v. Graves*, supra, pointed to *Wilson v. Shaw*, 204 U. S. 24 (1906) as establishing the fact that the Panama Canal is a true governmental instrumentality, because its construction and maintenance is well within the constitutional power of congress to provide for the national defense and to regulate commerce. The court then went on
to state that the railroad, which is an auxiliary designed and used primarily in aid of the management and operation of the canal, is a part of the canal system and is therefore a governmental instrumentality. Having established the railroad in this category it found that the salary of the General Counsel was immune from state taxation. In support of this conclusion it cited McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819) and Dobbins v. Erie County, 16 Pet. 455 (U. S. 1842).

In the case of Liggett & Myers Tobacco Company v. United States, supra, Justice McReynolds, in delivering the opinion for the court, did not pass upon the status of the Boston State Hospital as a governmental instrumentality. He found that the federal tax on tobacco and snuff was a tax on the manufacture and that the effect on the purchaser was indirect and imposed no burden. He concluded that the tax was permissible within the doctrine approved by Cornell v. Coyne, 192 U. S. 418 (1904).

The case of Liggett & Myers Tobacco Company v. United States, supra, may profitably be compared with the case of Panhandle Oil Company v. Mississippi, 277 U. S. 218 (1928). The court in the Panhandle Oil case exempted sales of gasoline made to the Coast Guard fleet and Veterans' Hospital from a general State gasoline tax, holding that as federal instrumentalities they were immune from this State taxation. In the Liggett & Myers case the sale of tobacco to the Boston State Hospital was declared not to be immune from the federal tax on tobacco.

The gasoline tax imposed by Mississippi was found to be a sales tax, and as such was held to be a direct burden on a federal instrumentality and therefore bad. The tax upon tobacco was held to be a tax on the manufacture and therefore only an indirect burden on the state hospital and well within the power of Congress. These decisions raise the question of the difference in the effect upon the purchaser of a sales tax and a tax on the manufacture. It is one that is open to argument on both sides. See the comment of Justice Stone in Indian Motorcycle Company v. United States, 283 U. S. 570, 582 (1931). Continuing the comparison, neither the tax on the sale of gasoline nor the tax on the manufacture of tobacco is discriminatory against the Governmental agency as such. Mr. Justice Butler in the Panhandle Oil case reasoned as follows: "The United States is empowered by the Constitution to maintain and operate the fleet and hospital. Art. 1, § 8. That authorization and laws enacted pursuant thereto are supreme (art. VI); and, in case of conflict, they control state enactments. The states may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of federal functions."

Mr. Justice McReynolds in his decision in the Liggett & Myers case did not pass on the question as to whether or not the status of the Boston State hospital was that of a governmental instrumentality immune from taxation. The lower court had found, however, that the operation of this hospital by the Commonwealth was not the performance of an essential governmental function. It based its conclusion that there was a lack of immunity from federal taxation on the following test. The operation to be of strict governmental character must embody some kind of control of persons or things which can be exercised only by sovereign power.

While the test stated is undoubtedly correct, the cases more frequently turn upon limitation on the theory of the immunity of state instrumentalities. Such a limitation was adopted by the court in South Carolina v. United

It is insisted that the state cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constituted a departure from the usual governmental functions, and to which, by reason of their nature, the federal taxing power would normally extend. The fact that a state has the power to undertake these enterprises, and that they are undertaken for what the state conceives to be public benefit, does not establish immunity.

This limitation upon the independence of state government is in line with the doctrine of supremacy enunciated in McCulloch v. Maryland, supra, and is a notification of the theory of parity on which the decision of Collector v. Day, 11 Wall. 113 (U. S. 1871) rested.

For an exhaustive discussion on this subject, see Boudin, Taxation of Governmental Instrumentalities, (1934) 22 Georgetown Law Journal 1, 254.

J. F. W.
BOOK REVIEWS


For some thirty years it has been the generally accepted dogma of legal pedagogy that the law is to be learned from the study of decided cases alone. While it has been conceded that the student requires some assistance from an instructor in the way of guidance and the coördination of case-matter, the use of a text-book for like assistance has been considered to be detrimental or even demoralising. The present generation of law teachers will, therefore, be somewhat startled, if not shocked, to find that a professor in so conservative a school as the University of Minnesota puts forth a volume of cases on such a subject as Equity along with a text-book manifestly intended for concurrent use and as an adjunct to the case-book.

To the older members of the profession, who can remember when the case method itself was an innovation, Professor McClintock's combination of cases and text will not appear so dubious. Those of that class who have had experience at the bar have always entertained misgivings, more or less positively expressed, as to the sufficiency of casebooks alone to equip students for the exigencies of practice. And those whose recollections reach back for some forty years remember that even Professor Langdell himself, in at least two instances, supplemented his collection of cases with what he called summaries, which were condensed but quite enlightening treatises upon the subjects expounded in his casebooks. So our eminent contemporary, Professor Williston, whose Cases on Contracts and Cases on Sales more nearly than most compilations approach completeness, has not found it superfluous to enlarge upon those subjects in treatises which, while perhaps not intended for the use of students, at least evince a persuasion that no substantial branch of the law can be adequately presented within the compass of a case-book. A growing opinion to the same effect is disclosed in most (or all) recent collections of cases, in which the reported decisions are followed by more or less elaborate notes which are really text-matter, rather thinly disguised and not very systematically or coherently arranged.

Professor McClintock's combination is, therefore, not altogether a radical departure from established standards, but rather

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a reversion to the conservative conception of an elder generation. It will commend itself especially to those instructors whose notions of pure pedagogy have been vitiated by the hard realities of earning a living at the bar. Every practitioner knows, or soon learns, that a knowledge of legal principles will not help him much in court unless embodied and concretised in decisions which exemplify the application of abstract doctrine to actual conditions. So he finds, on the other hand, that the citation of reports is likely to lead him into trouble unless fortified by acquaintance with a body of general doctrine which may control the ruling had in a particular instance, and with which the particular instance must conform. It seems, then, that the student should be taught to coördinate the two modes of learning, to acquaint himself with decided cases establishing specific points of the law, and at the same time to acquire the larger outlook which will enable him to fit the individual case into the comprehensive scheme of legal institutions. Professor McClintock's purpose appears to have been to provide in his treatise a background of Equity Jurisprudence against which his cases are to be read, to the end that the cases may be better understood and the abstract doctrines made more realistic. The underlying theory seems sound in principle; and an experience of some thirty years in endeavoring practically to apply it in the class-room has afforded to the present reviewer an increasing persuasion of its efficacy.

How far and how thoroughly the author has accomplished the purpose thus imputed to him, can be ascertained only by examination of his two volumes. The textbook gives an impression of meagerness. It is written much in the manner of Eaton on Equity, the older Hornbook, which it seems intended to supersede, and it is of about the same volume. Now, the Eaton work, while an excellent résumé of the subject, was much too condensed for the use of the student. If the instructor knew his Equity, he could understand Mr. Eaton's rather baldly stated propositions; but the learner had difficulty in apprehending, and greater difficulty in remembering, the multiplicity of principles propounded. The same criticism occurs upon a cursory inspection of the present book. The author has undertaken to restate the body of Equity Jurisprudence in 364 pages. Obviously so limited a compass affords scant room for the development of any doctrine, and none at all for exfoliation, or to indicate the practical application of principles. Thus, the subject of Marshalling is allowed

1 Eaton, Handbook of Equity (2d ed. 1923).
only a single short page, which necessitates a degree of compression making the statement virtually incomprehensible to one who does not know, before he begins to read, a good deal more than is stated. The important and complicated topic, Priorities of Equities, finds no place, even as a title in the index; and the only approach to mention of it is in half a page on the maxim that where the equities are equal, the law prevails.

Anyone who has attempted to teach Equity will realise that the dogmatic statement of equitable principles will make little impression upon a class of beginners; and that is true even when the instruction is reinforced by cases which apply and elaborate the doctrine. A treatise on the subject, intended for the use of students, need not run to the volume and particularity of such works as those of Story and Pomeroy; but it is safe to say that an irreducible minimum of 600 pages is requisite to set forth even the beggarly elements of the law, and 750 to 900 pages will answer that purpose much more satisfactorily. Of course, the Hornbook Series cannot well afford so large an allowance of space; but the books of Dean Clark on Code Pleading and of Professor Clephane on Equity Pleading show that, even under Hornbook limitations, some subjects may be quite adequately developed. Whether so large a branch of the law as Equity Jurisprudence can be usefully treated with like limitations, is of course another question. At any rate, it seems that Professor McClintock’s attempt at compression has impaired the usefulness of his treatise.

The case-book is not subject to criticism on the score of exiguity. While not so voluminous as some collections of like purpose, it contains 1263 pages, which is probably as much reading matter as a class can digest in 90 or 100 hours, and considerably more than can be profitably covered in a less extensive course. The scope of the work discloses that Professor McClintock is not satisfied to teach the subject as it has been, until recently at least, the fashion to treat it. For many years Equity, as conventionally understood in the leading law schools, consisted substantially of Specific Performance and Injunctions against Torts. Other heads of Equity, such as Conversion, Priorities, Laches and the

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2 P. 198.
3 P. 37
4 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (1835).
5 POMEROY, A TREATISE ON EQUITY JURISPRUDENCE (1881).
6 CLARK, HANDBOOK OF THE LAW OF CODE PLEADING (1928).
7 CLEPHANE, HANDBOOK OF THE LAW OF EQUITY PLEADING AND PRACTICE (1926).
like, if not altogether ignored, were noticed only as they incidentally affected the development of the supposedly major constituents of the subject; and even such essential and fundamental elements of Equity Jurisprudence as Fraud, Accident and Mistake, were either presented in the same incidental manner, or relegated to a place distinctly subordinate to what was assumed to be the substance of equitable doctrine.

The present work allows only 236 pages to Specific Performance, which is developed quite as fully as its proportionate importance fairly requires. The restriction of that topic leaves well over 1000 pages for the treatment of other matters, of which the student is likely to stand in need when he enters practice. By such allocation of space Professor McClintock succeeds in outlining a course in Equity which is well rounded out and much better balanced than the older and more generally accepted case-books make possible. The cases cover pretty nearly all the heads of the subject which it is necessary or practicable to develop in the time available for study; though some of the matters are touched upon rather more lightly than might be desired and certain quite important and practically useful matters are not suggested at all. The selection of decisions includes most of those familiar to instructors and a considerable number of additional cases, which seem to have been chosen principally for their recency of date. It is not damning with faint praise to say that the case-book is a meritorious accomplishment and a serviceable instrument of instruction in Equity.

Charles A. Keigwin.*


Professor Brown's Treatise on the Law of Personal Property, "designed primarily for student use," offers first an introductory chapter dealing with the nature, subject matter and classification of law; with certain important concepts such as rights, privileges, powers, interests in rem and personam, property and ownership; and with the classification of property. Next presented are the creation and transfer of interests in personal property by original acquisition, finding, adverse possession, judg-

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1 P. vi.

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8 Pp. 78-314.
ment, accession, confusion, gift and sale. These topics are followed by a treatment of bailments, common law liens, pledges, fixtures and emblements.

Since the subject matter selected rather closely parallels the contents of several of the leading case books on personal property now in use, Professor Brown's book undoubtedly will, as its author apparently hoped, be of special interest to a large number of teachers and students of this branch of the law. The book should, however, in view of the fact that many of its topics have long needed fresh textbook treatment, attract the attention of the bench and bar generally. Too many of the existing texts treating of common law liens, pledges, gifts and fixtures have little utility, either because they amount to little more than running digests of the cases, or because they are too old to reflect modern developments. Much of what valuable material is available concerning the acquisition of interests by finding, adverse possession, judgment, accession and confusion, is more or less buried in various law reviews, and has long been in need of correlation and condensation. In producing a book which makes use of this scattered material and which casts further light on these interesting and important topics, Professor Brown has performed a service valuable to the legal profession as a whole.

In conformity with his declaration of purpose, the author does much more than to state and illustrate the rules of law in the field of personal property. In every chapter of his treatise, he keeps in the reader's view the important policies which lie back of the rules, and evaluates the rules critically in the light of these policies. Thus Professor Brown, in marked contrast with some of the earlier writers on personal property, has in his chapter on original acquisition, pointed out how the rules relative to the acquisition and loss of property interests in wild animals have been shaped with an eye to the protection of the social interests in the maintenance of the public peace and in the economic

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2 "In the selection of material for the present treatise, the author has been guided largely by the courses in the law of personal property in many of the leading law schools of the country; by the excellent case books of Gray, Warren, Bigelow, and Fraser; and by his own experience as a teacher and practitioner."—P. v.

3 "The purpose of the present work is to be critical; not merely to present the bare rules of the law, but also to consider the fundamental principles and policies which lie back of them."—P. v.

4 See, for example, DARLINGTON ON PERSONAL PROPERTY (1891); 29-32 SCHOULER ON PERSONAL PROPERTY (5th ed. 1918); 48-50 WILLIAMS ON PERSONAL PROPERTY (18th ed. 1926) 166-9

5 C. II.
reward of the diligent. His excellent Special Note on Possession,\(^6\) despite its regrettable brevity, contains not merely a summary of the most current definitions of and opinions as to possession, but also an accurate and illuminating explanation of the significance in the common law of the concept of possession, and of the attitude taken toward that concept by the courts when using it to achieve their desired ends. In his discussion of the contests between finders of chattels and owners of the \textit{loqui in quo},\(^7\) his demonstration that the public premises—private premises and lost—misplaced criteria currently applied in these cases are products of defective legal logic, is effectively climaxed by an exposition of the practical difficulties incident to the employment of these criteria, and by a timely reminder that the conflicting claims of aspirant custodians should be resolved in a way most apt to protect the more important interest of the true owner of the lost chattel. By pointing out that a decision as to whether a common law lienor loses his lien by claiming one for too great a sum can best be arrived at by adherence to the just policy against the requirement of vain acts, Professor Brown clearly exhibits the futility of the fine distinctions attempted in some of the opinions in this field.\(^8\) His chapter on gifts of chattels,\(^9\) the general trend of which seems to have been shaped at least in part by Professor Mechem's excellent article,\(^10\) so lucidly explains the relation between the decisions as to delivery and the policies underlying the requirement of delivery, that it should be possible for his practitioner-readers, without resort to other works on the subject, not only effectively to formulate the theories on which to found their gift cases, but successfully to predict the outcome of a large majority of them. The chapter on fixtures,\(^11\) which Professor Brown says is "chiefly the product of the work of Professor Jacob H. Beuscher",\(^12\) and which incorporates some of the valuable suggestions made by Professor Bingham,\(^13\) achieves in its field the purposes so successfully accomplished by the chapter on gifts of chattels in that territory. Readers of the treatise will,

\(^6\) Pp. 18-21.
\(^7\) § 12.
\(^8\) § 124.
\(^9\) C. VII.
\(^11\) C. XVI.
\(^12\) Pp. vi-vii.
of course, discover for themselves many more helpful and suggestive examples of the author's critical evaluation and interpretation of the cases than it has been practicable here to enumerate; and it is highly probable moreover that they will find much more to approve than to disapprove.

It is conceivable, however, that issue will be taken with some of Professor Brown's conclusions. For example, he predicts that if one wrongfully in possession of a chattel is allowed to recover its full value from a defendant who has destroyed it, that defendant will also be held liable to the true owner of the chattel for its full value.\(^\text{14}\) This prediction seems to be inspired by the author's belief, but to support which he cites no authority,\(^\text{15}\) that the protection of the defendant, who has been sued by a bailee, from a second recovery by the bailor rest on an implied agency in the bailee to proceed against the wrongdoer.\(^\text{16}\) There may be those who will decline to accept this prediction of Professor Brown's, and possibly for the following reasons: (a) the courts, having purported to found the rules that the bailee can recover the full value and that his recovery bars the bailor, on the principle that possession as such merits protection, rather than on an agency theory,\(^\text{17}\) would find it easy to extend these rules to cases where goods are damaged by a second wrongdoer while unlawfully possessed by the first wrongdoer, despite the lack of any justification for the use of an agency theory in these latter cases; (b) while not all courts would agree that the wrongful possessor should be allowed full recovery,\(^\text{18}\) those courts which accord it to him would, in all probability, as a matter of elementary justice, hold that the second wrongdoer should not have to pay twice for his unlawful act.\(^\text{19}\) In short, it would be far easier to support the position that the first wrongdoer should recover only for the invasion of his possession by the second wrongdoer than to defend the

\(^\text{14}\) Pp. 354-5, n. 70.

\(^\text{15}\) Although Professor E. H. Warren, in his recent article entitled, Qualifying as Plaintiff in an Action for a Conversion (1936) 49 Harv. L. Rev. 1084 at 1095-1100, suggests that the decision in The Winkfield, [1902] P. D. 42, is sound only if predicated upon the bailor's implied assent to suit by the bailee, he does not intimate that the court rested its decision on any such basis; and doubts whether many courts would refuse full recovery because such assent was lacking.

\(^\text{16}\) P. 354.

\(^\text{17}\) The Winkfield, [1902] P. D. 42.

\(^\text{18}\) Compare Barwick v. Barwick, 33 N. C. 80 (1850) with Anderson v. Gouldberg, 51 Minn. 294, 53 N. W. 636 (1892).

\(^\text{19}\) See the dictum in Illinois & St. Louis R. & Coal Co. v. Cobb, 94 Ill. 55 (1879).
conclusion that a full recovery should be granted the true owner, in addition to a full recovery by the first wrongdoer.

The author's election to insist that those on whom possession of a chattel is thrust without their assent are nevertheless bailees, may strike some of his readers as unhappy in view of the growing tendency to place such possessors in a separate class denominated "involuntary bailees". Would it not be simpler, and more in accord with conceptions currently prevailing, to accept this classification and to formulate appropriate rules for each class, than to contend that non-assenting as well as assenting possessors are bailees, only to be compelled to recognize, as does the author, that lack of the possessor's assent diminishes the duty owed by him to the owner of the chattel?

It seems rather unlikely that Professor Brown's preference for the doctrine of Patton v. Union Pacific Ry. over that of Fitch v. Newberry will meet with unanimous approval. The Patton Case holds that a railroad to whom a shipper delivers goods for shipment to a point beyond its own line has apparent authority to choose a connecting carrier; and that therefore a connecting carrier has a lien on the goods for its carriage charges, even though the delivery of the goods to it by the first carrier was in violation of the shipper's instructions. Under this rule the shipper must pay the freight to the connecting carrier which possesses his goods, although he may have paid it in advance to the connecting carrier of his choice; and must look to the initial carrier for his damages. Under Fitch v. Newberry, which denies a lien to an unauthorized connecting carrier, the burden of suing the first carrier is cast upon the connecting line. In view of the effective operation of the railroads' long established organization for the settlement without litigation of interline freight disputes, and of the obvious handicaps under which the smaller shippers labor when engaged in a legal contest with a railroad, it seems

21 Since Professor Williston's definition of a bailment "as the rightful possession of goods by one who is not the owner" does not require assent on the part of the possessor, Professor Brown approves it (p. 227). It is interesting to note, however, that while this definition survives unchanged in 4 Williston, Contracts, (rev. ed. 1936), § 1032, the new § 1038A of the revised edition, treating of involuntary bailments, concludes with the sentence: "It is clear, however, that where an article is hidden in some way or its presence is unknown to the bailee, there is no bailment".
22 P. 237 and sec. 91.
23 Pp. 491-3.
24 29 Fed. 590 (1896).
evident that the rule which pits the carriers against each other is functionally preferable. Moreover, it is difficult to comprehend how the connecting carrier can be heard to allege apparent authority in the first carrier to deliver to an unauthorized line without having shown that it had taken the pains to examine the accompanying waybills for the purpose of ascertaining the shipper's instructions in regard to carriage beyond the line of the initial carrier.

While the treatment of the topics selected by Professor Brown is for a single volume work remarkably thorough, there appear to be a few omissions which, though perhaps relatively unimportant, are regrettable. Thus, while his penetrating critical comment on the law of common law liens is of great value, there is in his discussion of the denial of a common law lien to agisters no reference to Yearsley v. Gray, which accords such a lien. Neither his section dealing with the essentials of the specific common law lien nor his section treating of agreements inconsistent with a lien, makes any mention of Hillsburg v. Harrison, which correctly permitted a tailor to retain possession of an unfinished garment, though the attempt of the owner of the cloth to retake it occurred before the tailor could have maintained an action for the value of his labor; that is, before the debt was due. Nor do his sections on loss of liens call attention to the fact that a bailee may lose his common law lien on the bailed chattel by a failure to perform his contract, even though he may be entitled to some payment for the benefits he has conferred on the chattel in partial fulfillment of his contract.

To this list of far from serious omissions might be added the lack of any explanation as to how a pledgee can be allowed, in apparent contravention of the general principles of contract, to escape some of his obligations to the pledgor by a transfer of the debt and pawn; the author's failure to note that before Pennsylvania had come to the point of repudiating its apparently firmly established rule that a stockbroker pledgee who had con-

26 Cc. XIII and XIV.
27 P. 468.
28 140 Pa. 238 (1891).
29 § 108.
30 § 110.
31 2 Colo. App. 298, 30 P. 355 (1892).
32 §§ 121-7.
34 The transferability of the pledgee's interest in the pawn is affirmed at pp. 579-80.
verted the pawn could not maintain an action of the debt, 35 Michigan had adopted it; 36 the omission from his chapter on acquisition of title by adverse possession 37 and from his discussion of the interests of a wrongful possessor 38 of a statement as to the transferability of the title of the dispossessed owner of a chattel; his failure to point out that when a court defeats a claim of gift by applying the rule that delivery of a key to a container is not sufficient if actual delivery of the chattel itself is practicable, 39 the loser by the decision is usually not a natural object of the alleged donor's bounty, 40 whereas, if the court upholds the claim of gift by reference to the occasional sufficiency of constructive delivery, the fortunate litigant will normally turn out to be someone closely connected with the alleged donor by ties of blood or marriage; 41 and his omission in his discussion of the fixtures section of the Uniform Condition Sales Act 42 of a warning that the conditional seller of a chattel to be annexed to land, but which will be severable without material injury, must, if he wishes to be certain of protection against subsequent bona fide purchasers, file his conditional sale contract not only as a fixture contract but also as a chattel contract. 43

Despite the fact that certain of Professor Brown's readers may disagree with some of his conclusions and may regret certain of his omissions, it seems safe to prophesy that the majority of those who use the book will pronounce it good. Of typographical errors there seem to be none. The great majority of the cited cases support the propositions to which they are cited. The valuable suggestions made in the available important law review articles pertinent to the topics selected for treatment have been

37 C. IV.
39 Professor Brown's discussion of constructive delivery by means of a key is found in § 42.
40 As for example in Hatch v. Atkinson, 56 Me. 324, 96 Am. Dec. 464 (1868); Knight v. Tripp, 121 Cal. 674, 54 P. 267 (1898); Newman v. Bost, 122 N. C. 524, 29 S. E. 848 (1898).
42 Discussion of the effect of § 7 of the Un. Cond. Sales Act can be found in § 155.
given proper prominence. While certain of the chapters, such as those dealing with original acquisition, gifts of chattels, common law liens and fixtures stand out above the rest, all of the chapters bear the mark of careful, critical and able scholarship. The book will be of great value to all who are interested in the law of personal property.

WILLIAM H. FARNHAM.*


One Andrew Fletcher (a patriot in the view of Scotland and a politician in that of England), who, we understand from English sources, had driven "a hard bargain" with the English in the proposed union of England and Scotland, once wrote to the Marquis of Montrose that he knew "a very wise man" who believed that "if a man were permitted to make all the ballads, he need not care who should make the laws of a nation". And wellnigh a century later Scotland gave to the world through Robert Burns the ballads not only for Scotland but for the world at large.

On the birth of Burns in 1759, his country lay, on the morrow of Culloden, prostrate and bleeding at the feet of the Duke of Cumberland. And during the course of the poet's all too short life of thirty-seven partly wasted years, Scotland was suffering from what we of today may call an "inferiority complex". It was the time when David Hume (later to be one of the glories of Scotland) inscribed in a note-book "Scotticisms to be avoided"; and when William Robertson (later Principal of Edinburgh University) endeavored to indite his admirable contributions to history in the somewhat inflated and artificial English of Edward Gibbon.

From Burns' "Is There for Honest Poverty" we lift two stanzas:

Is there for honest poverty
That hings his head, an' a' that?
The coward slave, we pass him by—
We dare be poor for a' that!
For a' that, an' a' that,
Our toils obscure, an' a' that,
The rank is but the guinea's stamp,
The man's the gowd for a' that.

Is it any wonder that the birthday of Burns, the twenty-fifth of January, is the holiday of the Scotsman—not merely the Scots-

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man by birth but of Scots wherever congregated throughout the world?

In the days of Burns, communications were not as they are today, when the human voice, by the miracle of radio, is heard throughout the world. Indeed, but yesterday a newspaper of Washington took down the text of a message broadcast from London, and that very afternoon the paper was selling on the streets within half an hour, to be meticulously accurate, twenty-eight minutes after the completion of the broadcast. Time and distance are in truth being annihilated. We are almost a union!

But let us turn to the second stanza of the ballad-maker of Scotland:

Then let us pray that come it may
(As come it will for a' that)
That Sense and Worth o'er the earth
    Shall bear the gree an' a' that!
For a' that, an' a' that,
    It's comin yet for a' that,
That man to man the world o'er
    Shall brithers be for a' that.

And when this happens—as it surely must—then indeed we shall have a union of peoples which the poet of Scotland and of the world has prophesied.

The sovereign of the United Kingdom brought to the throne in 1707 by Fletcher of Saltoun and his fellow statesmen was of the Stuart line, and today a British sovereign is on the throne because of a drop of Scotch blood which runs through his veins. But until lately the Scots had not progressed very well under the common sovereign. However, George VI has had the good fortune—if we may say so in passing—to marry a Scotch "lassie", and therefore it goes without saying that the Scots will look upon the present King's successor (half of Scotch ancestry, with a wee drop o' Stuart for good measure) as rehabilitating the one-time Kingdom of Scotland.

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Having supplied the ballads which Fletcher had in mind for his country, Scotland is now in a position to look after the laws.

Some years ago the legal lights to the south formed The Selden Society in honor of John Selden, a distinguished scholar who spent a considerable portion of his time in the Tower of London because of the liberal views which, with other patriots, he had advocated. These views today, however, are firmly embedded in the English Constitution.
 Appropriately the legal lights to the north have followed the example of their brethren to the south by forming a society of much the same kind, bearing the name of the first Viscount Stair, one James Dalrymple (1619-1695), President of the Court of Session (the Supreme Court of Scotland). Now Lord Stair had been privileged to accompany William III, then Prince of Orange, to England from Holland, in which country his lordship had spent several years of exile because of his political opinions. On leaving Holland the distinguished exile is reported "to have taken off his wig, and, pointing to his bare head, said: 'Though I be now in the seventieth year of my age, I am willing to venture that my own and my children's fortunes in such an undertaking'". Fortunately he kept the head which he was thus willing to risk in a constitutional and victorious cause; but though he enjoyed the favor of William, it is unfortunately true that the patriot had better luck with posterity than in the checkered days of captivity in his native land—and even in the later days of his restoration to the presidency of the Court of Session.

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The Stair Society was instituted in 1934 "to encourage the study and advance the knowledge of the history of Scots Law", and its Annual Report for 1935 informs us that "membership is now 682, consisting of 630 individuals and 52 institutions", among which we are pleased to mention the Georgetown Law School.

The purpose which the founders and members of the society had in mind has, mirabile dictu, been realized in the first years of its existence. Its President, the Right Honorable Lord Macmillan, Lord of Appeal in Ordinary, assures us in the Introduction to the first of its volumes, on The Sources and Literature of Scots Law: "The inaugural volume which the Stair Society now presents to its members contains the first comprehensive survey of the sources of Scots Law which has ever been essayed." ¹ However, "it does not", Lord Macmillan cautions us, "profess to be either exhaustive or final, for much of the ground which it covers has hitherto been little explored, and some of it is almost virgin territory".²

Although the Society is meant primarily for Scotsmen, it is not limited to them or the land of their birth, Lord Macmillan saying: "The special value of the present compilation is that for the first time it furnishes the happily increasing number of

¹ P. ix.
² P. ix.
those at home and abroad who are interested in the history of Scots Law with a reasonably complete guide, well documented and equipped with useful bibliographies, to assist them in the prosecution of their studies.”

This may be said to be the practical purpose, but the Society wisely looks to the future as well as to the past and present; for it represents, to quote again his lordship, “an important step towards the ascertainment of the materials which exist for the historian who will some day write the history of the Law of Scotland.” Of course, “no one single-handed”—unless he were a Methuselah—could hope to begin and carry such an elaborate undertaking to conclusion, and Methuselah, we are reasonably informed, has not had a successor. There was some fear, his lordship adds, that there was not available “sufficient material to justify its creation”, and without mentioning names he states as the reason, “the vicissitudes which have robbed Scotland of so many of her national archives”; but he felt justified in advising prospective readers that “no one who reads these forty monographs on the sources of Scots Law will entertain that fear.”

Of course a review of this kind is more in the nature of an announcement than an analysis. Of the introductory volume, his lordship very properly says that “each reader, according to his predilections, will find here signposts pleasantly suggestive of attractive by-ways which he may be stimulated to explore”. And he adds as a further inducement to readers, which a Scotsman may invoke but the invocation of which would be ungracious on the part of a foreigner, even if he be of the blood (as is the writer): “The national zest for controversy will likewise discover plenty of smouldering embers to fan into flame.” His lordship also indulges in the hope that “some readers may be inspired to acquire the requisite skill in deciphering ancient documents, so as to enable them to offer their services to the Society as editors, for ‘suthlie thar is mekile ripe corn, bot few werkmen’ (Scots New Testament, Mark x, 37).”

We would like to quote the entire Introduction of Lord Macmillan, not merely as showing the purpose of the volume and its successors but for his lordship’s delightful style. Dr. Johnson

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3 P. ix.
4 P. ix.
5 P. x.
6 P. x.
7 P. x.
8 Pp. x-xi.
was not given to over-praise, especially of Scotland, but even he admitted that "much may be made of a Scotchman if he be caught young", and Sydney Smith was of the opinion—from experience, perhaps, as he had lived in Edinburgh for some time—that "it requires a surgical operation to get a joke into a Scotch understanding". But Lord Macmillan exemplifies both these miracles, as clearly appears from a further borrowing from his lordship: "An eminent German jurist warns us that 'whoever would be a philosopher of the law must first breathe the dust of legal archives'.\(^9\) It is not an atmosphere which everyone enjoys, but those who in future venture to enter it in Scotland will find that this volume has done much to clear the air for them. When Lord Kames", he continues, "in 1758 first published his \textit{Historical Law Tracts, . . .} David Hume, who, it will be remembered, did not believe in miracles, said of it that 'a man might as well think of making a fine sauce by a mixture of wormwood and aloes as an agreeable composition by joining metaphysics and Scotch law. However, the book, I believe, has merit; though few people will take the pains of diving into it'.\(^10\) "But", Lord Macmillan adds, "the miracle happened. The \textit{Historical Law Tracts} attained a remarkable popularity and passed successively through four editions, certain of the chapters even receiving the tribute of being translated into French, such was the interest which the book aroused. \textit{Adsit omen.}\(^11\)

But we would be unjustified in the space which we have already occupied if we did not call attention to some of the articles themselves which we have read with great interest (and we may say in passing that our reading has not been here and there but continuous).


\(^9\) P. xi.
\(^10\) P. xi.
\(^11\) P. xii.
Among the native sources the reader will doubtless read and reread Mr. A. C. Black's excellent and interesting section on The Institutional Writers, 1600-1826, especially on the first Lord Stair's *Institutions of the Law of Scotland* (1681, 1693, 1759, 1826), the standard edition being that of John S. More (two stout volumes, 1832). Mr. Black says of the author and the *Institutions*: "During Stair's tenure of office as a judge he methodically wrote out the decisions of the court. 'I have omitted no material decisions of the Lords that I found, especially where they were contrary and seemed inconsistent, that judges might not be overruled by adducing some decisions where others about the same time were opposite.' Thus equipped as a student, a man of affairs and a lawyer, Stair set himself to write an Institute of the Law of Scotland. The first edition was published at Edinburgh in 1681 before he fled to Holland. It had probably been in manuscript for some time. The second edition was prepared by Stair himself and published in 1693."  

To quote another penetrating observation by Lord Stair: "No man can be a knowing lawyer in any nation who hath not well pondered and digested in his mind the common law of the world, from whence the interpretation, extension, and limitations of all statutes and customs must be brought."  

Mr. Black, from whose article we have quoted, further says—notwithstanding the two centuries or more which have elapsed: "It is not an exaggeration to say that by collecting, collating and analysing the material ready to his hand Stair created for Scotland a ready-made and almost complete legal system."  

And Aeneas J. G. Mackay has said, "He sees law not as most lawyers from one or two points of view only, but as a lawgiver who has watched and taken part in its formation, as an advocate who has tested it, as a judge who has applied it, as a writer who is expounding it. His opportunities had been unrivalled, and he used them all." And Mr. Mackay's conclusion, as quoted by Mr. Black, is that the "*Institutions* will probably never be surpassed", it being highly improbable that "to equal talent" there will ever again "be granted equal experience".  

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We have perhaps already drawn somewhat heavily upon Lord Macmillan's Introduction, but the temptation to quote a writer
whose delightful wit is equalled only by the clearness and penetration of his thought is difficult to withstand. In fact we find ourselves yielding to the temptation to the extent of quoting from an admirable presidential address delivered by his lordship on “Scots Law as a Subject of Comparative Study”, before the International Congress of Comparative Law held at The Hague in 1932.16

Referring to the adoption of the Roman law in Scotland, Lord Macmillan traces the causes of this phenomenon to the fact that the leading members of the Scots bench and bar received their legal education on the continent, but even more to the Scottish aptitude for philosophy and logical principles. There was, however, he tells us, another national characteristic which played a part in the process: “The Scot, whether from the poverty of his own land or from a naturally adventurous spirit, has always been more cosmopolitan, and early won for himself the sobriquet of the ‘gangrel Scot’. When he went abroad he took with him an inquiring mind and was ready, in Molière’s phrase, to ‘prendre son bien où il le trouva’. He never shared his southern neighbour’s resistance to foreign ideas; he preferred to appropriate them if he thought them valuable!”

We have said that Burns endowed Scotland and the world with his ballads. Will the Scots law, based as it is on the firm foundation of Roman law, likewise pass Scotland’s frontiers? A distinguished French jurist, M. Henri Lévy-Ullmann, Professor of Law in the University of Paris, is of the opinion that it will not only cross Scotland’s frontiers, but will ultimately affect, if not completely alter, the legal system of the vast continent of Europe. He says so much and intimates even more.17 In the combination

17 Lévy-Ullmann, Le Droit Écossais (1924) 53 Bulletin de Législation Comparée 147, 149.

To justify his contention that Roman law forms an integral part of Scots law, the following passages are quoted from the decision upon which the distinguished French publicist relies:

“... The first question which we have to decide is whether a stabler falls within the Praetor’s Edict ‘Nautae, caupones, stabularii’. The Edict is in these terms:—‘Baute, caupones, stabularii, quod cujusque salvum fore receperint, nisi restituenit, in eos judicium dabo.’... No doubt the liability imposed is a stringent one, and accordingly the Edict must be strictly construed. ... I am of opinion that stablers as such as well as innkeepers, according to the law of Scotland, fall within the ambit of the Edict. ...”—Mustard v. Paterson, 1928 Session Cases, 142, 147.

The sum involved which was awarded to the “defender”—was infinitesimal in comparison with the principle which the judgment established.
of law of Roman origin, with a law whose roots are Anglo-Saxon, M. Lévy-Ullmann asks us to remember—to give his words in accurate, and we believe acceptable, paraphrase—that in those matters where Roman law does not offer an impassable front the English law has penetrated Scotland and the Roman spirit not only absorbs but assimilates it and gives it flexibility. And this fusion points the way, in M. Lévy-Ullmann’s opinion, for the legislative unification of the countries of the Occident. Furthermore, Scots law as it now exists is a demonstration that in the future—perhaps by the end of the present century—there will be a law of civilized nations, a law consisting of a union of the Anglo-Saxon and the continental systems. The law thus amalgamated—wherever such amalgamation is possible—will replace the ancient principles governing the conflict of laws, principles which arose in England as the direct result of the constant conflict between Scots and English law. This unification, in the view of the learned French jurist, will be realized chiefly in the domain of commerce and the practical affairs of life, where the ingenious and mercurial Scotch mind has already aroused a ferment which will profoundly affect the substance of future legislation. Indeed it may be due to the efforts of Scotch jurists who constitute the true bond between the continental and the Anglo-Saxon law, that we—or rather our successors—will one day see a legislative unity which M. Lévy-Ullmann firmly believes is destined to take form and shape in the future.18

In this great and far-reaching process the work of Viscount Stair and his successors will have a fundamental and enduring influence.

Would that every country had a Stair and a Stair Society!

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18 For a detailed examination of the Scots law and its indebtedness to Roman law, see André Bérard’s doctoral thesis, *La Survivance du Droit Romain en Ecosse* (Paris, 1925), from which we quote (p. 9): “... ouvrant les traités de droit écossais, nous aurons à chaque page un nouvel étonnement de voir combien ce droit est demeuré fidèle aux principes romains pour être encore, à l’heure actuelle, un droit à sa base foncière romanisé.”

This is a competent piece of work by a competent hand. The proper function of a second edition of a successful casebook is to preserve the original scheme, but to embellish it with the growth of the times. And Professor Whiteside has done this well.

It must be remembered that the first edition (1918) and the second are abridgments of the larger casebook of Professor Kales, and are designed for a course of two lectures a week for half a year. With deference to Professor Philip Mechem’s observation on the teachers of future interests which Professor Whiteside prints on page 509, it is submitted that this assignment is one half too short a time in which to teach so important and unified a subject.

The present editor has wisely adopted the method of Ames’ Cases on Trusts of long, well written notes on omitted, and on partially included, subjects. He has not adopted the scheme of annotation by problem cases which has worked most satisfactorily in Professor Leach’s longer book, over which 64 hours can be spent. In a shorter course much can be developed only by notes.

The first edition contained 729 pages and the present one has 781. A new chapter on statutory modifications of the Rule against Perpetuities, a subject with which Professor Whiteside is peculiarly well fitted to deal, has been added; and we are glad to find a number of statutory references and citations of law review articles in the footnotes.

What an excellent case for classroom discussion of the Rule in Shelley’s Case is the new one of Lauer v. Hoffman.1 We like, too, the inclusion of Seabrook v. Grimes,2 on future interest in a business; and of Gilman v. Missionary Society,3 which must be compared with Boston Safe Deposit and Trust Co. v. Waite4; and the authorities5 on taxation of estates under powers and in default thereof. On the other hand, we would like to have seen, even in a short edition, the brief case of Walker v. Marcellus & O. L. R. R.,6 printed in full instead of mentioned in the note. Such

† Late of the Chicago Bar.
‡ Professor of Law, The Cornell University Law School.
2 107 Md. 410, 68 Atl. 883 (1908).
4 278 Mass. 244, 179 N. E. 624 (1932). P. 229 n.
5 P. 331, et seq.
questions, however, depend upon the "taste and fancy" of the editor.

Mr. Kales gave 181 pages to the Rule against Perpetuities, and he had only a handful of hours at his disposal. He met this difficulty, in the only way it could be solved, by selecting decisions from a single jurisdiction—England. Indeed he included here only three American cases. Mr. Whiteside's edition has 216 pages, with eleven American decisions; and of these eleven, six are in the chapter on Statutory Modifications. It is submitted that this is the proper way to deal briefly with such a fascinating subject as the Rule, and that an American lawyer can be adequately educated in this field by a judicious arrangement of the opinions of the English Chancery judges.

Elsewhere in the book, the editor states that he has selected recent cases which illustrate modern types of settlements. He has not overlooked the relation, highly developed since the first edition, between taxation and the law of future interests. Note, in addition to succession taxes already referred to, Walker v. Commissioner of Internal Revenue,7 at the end of the chapter on Vesting of Legacies.

One gets the impression from an inspection of the book outside the classroom (where of course there has been no chance to use it) of a freshness, and treatment of a large problem, requiring discrimination, performed with ability. The last twenty years have been most adequately developed.

The present book could almost, but not quite, be used for the full time of 64 hours. We have now two collections for such a course, Professor Powell's and Professor Leach's, differing in varying degrees from Kales' longer edition (1917), which is closer to Professor Gray's pioneer production. And now, what is to become of Kales' larger book as yet unedited?

JOSEPH WARREN.*


This book is a realistic story of the work of the constitutional convention in making the original American Constitution. It is not a treatise on the constitution or on constitutional law. It is not a series of biographies of the fifty-five members of the constitutional convention. It is merely a story of their work in

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7 72 F. (2d) 225 (C. C. A. 2d, 1934).
* Weld Professor of Law, The Harvard University Law School.
† Associate Professor of Law, Yale University School of Law.
the constitutional convention. It sets forth the aims which they wished to accomplish, the economic motives by which they were actuated, the antagonism between the small states and the large states, between the Northern states and the Southern states, and the vivid, sometimes acrimonious, debates between the different members of the convention. It is, in other words, a picture of the constitutional convention in action.

Professor Rodell shows that the fifty-five members of the constitutional convention knew why they were there, and that they accomplished their purpose, which was to protect property. The members of the constitutional convention were almost all wealthy men. They had become alarmed at the repudiation of debts which had been going on, and the other threats to the commercial interests of merchants, manufacturers, and bankers. They had sent out a warily worded call for delegates. They had put themselves forth as candidates for the position of delegates to the convention, and had been accepted almost as a matter of course. Their interest in the protection of property was the most significant thing in connection with their work. As to this, they were all agreed.

The delegates to the convention also were all agreed that in order to protect property they must limit the power of the people. Another thing which stands out clearly in the work of the constitutional convention is the distrust of democracy. What they really believed in was a plutocracy. Consequently the original constitution is characterized by provisions taking the power of government away from direct action by the people. They did not set up a government “of the people, for the people, and by the people”. This came gradually by the twenty-one amendments to the constitution and by the method of election of the President in spite of the constitution. The amendments which finally established the power of the people were the sixteenth, giving them the power to tax wealth, the seventeenth, giving them the power to choose senators, the nineteenth, giving women the privilege of suffrage, and the twentieth, abolishing lame-duck sessions of Congress. It was Lincoln who voiced this principle, not the members of the constitutional convention.

The members of the convention were also agreed that to protect property as they desired, they must limit the powers of the states. They were not states’ rights men; they wanted a strong national government to curb the power of the states. The state legislatures had been repudiating debts, and otherwise indulging in “leveling laws”. The members of the constitutional convention felt that to stop these practices in the future, they must
establish a national government strong enough to control the states.

There was a fight in the convention for proportional representation in the Senate as well as the House. This was not due to the fact that those waging this fight believed in states' rights, but that they feared the action which the large states would take as to individual wealth. The representatives from the small states wanted equal representation, not for their states as such but for the commercial interests of their citizens. They were not fighting for states' rights, but for equal representation in the United States Senate. When they obtained that, they did not object to a strong national government. The reason why they wanted equal representation is explained by their fear of what the power of Massachusetts, Pennsylvania, and Virginia would do to the commercial interests of the North, or to the interests of the Southern landholders and their slaves. The struggle between the small and large states was not political but commercial. All agreed that the protection of property was the chief object of government. They disagreed only over the best way to obtain this. All were opposed to states' rights. As soon as the small states had obtained their equal representation, they were willing to have the senators vote in their own names instead of by states. They did not care how their senators voted, so long as they were protected against control by the large states.

All wanted the national government to be strong, and the states weak. In fact, a majority did not want even a dual form of government. They wanted the states to be mere administrative units of a strong central government. They put provisions into the constitution to secure this result. This is why they made the Constitution, the laws made pursuant thereto, and all treaties made by the United States, the supreme law of the land. This is why they authorized Congress to provide for inferior courts, required state officers to take an oath to support the United States Constitution, and required the United States to guarantee to every state a republican form of government. The full faith and credit clause and the interstate privileges and immunities clause still further limited the independence of the states. In reality, the dual form of government theory came in with John Marshall. The doctrine of states' rights is a recent theory of the reactionary majority of the Supreme Court to protect capitalism against New Deal legislation. The constitutional convention expected Congress to legislate on all matters of national interest though they affected the internal policies of the states. For fear there might be some question about carrying out this policy, the committee on detail
enumerated every power of which it could think. Only when individual property interests were endangered (by bills of credit) did they object to national power. It was not until the convention thought it had bottled up the state legislatures, and put the state courts under its thumb that it felt it had accomplished its work.

Yet, in order fully to protect property, the members of the constitutional convention felt that they had to protect it against the national government. They did not provide for a strong national government because they believed in it as such, but only because they wanted thereby to destroy the power of state legislatures and of the people. Therefore, after they had ham-strung the states, they proceeded to ham-string the national government itself. They did this by setting up a separation of powers of government into three branches, with all sorts of checks and balances within their scheme; by establishing two houses of Congress, each to be a check against the other; and by the method of election of the President and the appointment of judges. They did not want to make the federal government a good government as such, but to make it a good government for the owners of private property.

The convention was opposed to the direct election of the President because it was likely to give the President too much power. It was opposed to the election of the President by Congress because it would give Congress too much power. Therefore, it finally agreed upon the scheme of election of the President by electors. This satisfied the property interests of both the small and the large states. When the presidential office was made, the separation of powers was made. The idea in the separation of powers was to protect property against the people, against Congress, and against the President. In other words, the total purpose of the separation of powers was to obtain no government. It was a substitute for a property qualification for voters. Even Madison had this opinion.

For the final protection of property, members of the constitutional convention put faith in the Supreme Court. They did not write a doctrine of judicial supremacy into the constitution, but they more or less took one for granted; otherwise, they would have given the Supreme Court an express veto power. They voted against this veto power, not because they did not want the protection of the Supreme Court, but because they feared the consequences of dragging the judges into politics.

Other provisions in the constitution, like the guarantee of the validity of debts contracted under the confederation, the guarantees of paper money, the non-taxation of exports, and the
protection of slavery, had as their purpose also the protection of the commercial interests and property interests of the country. Even the provision as to submission of the constitution to conventions of the people of the states was not because members of the convention were in favor of popular sovereignty, but because they wanted, on the one hand, to destroy the supremacy of the states and, on the other hand, to obtain a favorable vote.

Such is the story of the Constitutional Convention as told by Professor Rodell. He makes the mistake, which is commonly made, of assuming that our constitution today is the constitution made in the constitutional convention, or at least the original constitution plus the twenty-one amendments thereto. He does not seem to realize that more than one-half of our present constitution is not found in the original constitution and the amendments, but in the reports of the decisions of the United States Supreme Court; and that it was made by the justices of the United States Supreme Court. He also perhaps overemphasizes the property motive of the founding fathers. They had other motives, e.g., to protect the new republic against foreign aggression, and the states against each other. They also created a new form of government, and this perhaps was more significant than the protection secured by them for property. With the exception of these criticisms, Mr. Rodell's book is entitled to nothing but praise.

He has followed carefully the documentary history of the constitutional convention, especially Madison's notes. For this reason his work is accurate. He has written in clear English. He has organized his materials so as to carry the reader along with magnificent momentum. His job has been well done, and it is a job which should have been done before; but, of course, it is a job which could not have been undertaken before the publication in 1911 by Professor Farrand of Madison's Journal and the publication in 1920 by the Carnegie Endowment for International Peace of the debates reported by James Madison. Of course, the complete publication by Congress in 1927 of the documents illustrative of the formation of the union of American states gave the final sources for anyone who wished reliable data on the constitutional convention. In the past too much emphasis has been laid upon such publications as the Federalist, which, of course, was a campaign document of those who desired the adoption of the federal constitution. For this reason perhaps Mr. Rodell's book is as timely a book as we ought to expect.

It is interesting to note that most of the superstructure set up by the founding fathers to protect property has now been swept
away. In the framework of government, which they so carefully contrived for this purpose, only the Supreme Court remains. It is protecting property in many, but not in all of its decisions. When it does so, however, it does not do it in the way contemplated by the founding fathers. If the Supreme Court now wanted to do what the founding fathers wanted to have done, it could veto all state legislation because of the power of the federal government over matters of national interest; but instead of doing that, it is vetoing state legislation under the due process clause which it has extended to matters of substance and by the recognition of states' rights instead of national rights. Even when the Supreme Court is still protecting property against social control either by the federal government or by the state governments, it is likely to do so by a five to four vote, which shows how little is left of the work of the founding fathers.

Those who want to go “back to the constitution” should read Mr. Rodell's book and other authoritative books on the Constitution. If they did so, they would discover, on the one hand, that most of our present constitution is not found in the document made in the constitutional convention, and that some parts of our constitution, in which perhaps they believe most profoundly, like the supremacy of the Supreme Court and the guarantee of due process of law as a matter of substance, are not found in the original document at all; and, on the other hand, when they got back to the original constitution of the constitutional convention, they would find that they had many doctrines which, even if they did believe in, the people of the United States as a whole would never believe in for a moment.

HUGH E. WILLIS.*


Beginning with an introduction which consists of brief readings from Dicey, von Bar, and Nussbaum, our authors continue with the question of jurisdiction over the parties and the limits on the exercise of jurisdiction, and then consider foreign judgments and arbitration. This takes up about the first quarter of the book. After a chapter on the sources and choice of law and

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the internal law of the forum (to which many refer as procedure, remedies and the like), they take up the different problems of substantive law, torts, workmen's compensation, contracts, property (land and movables, tangible and intangible; and marital property), family law, administration of estates, and a discussion of the various types of juristic persons including aliens, partnerships, associations and corporations. The book closes with a chapter on planning as to conflict of laws transactions, including the lawyers' planning and legislative planning.

The text contains introductory notes by the editors; extracts taken from opinions after a very free editing (which seems to be an admirable idea, for, without a very free editing, few are the modern judges whose opinions could be used in a case-book of ordinary size); abstracts of cases which have been briefed by the editors; quotations from text-books, occasionally unpublished; extracts from law review articles and notes; quotations from the Restatement of the Conflict of Laws; and brief statements of law by the editors.

In the notes we find abstracts of a number of cases, citations of other cases; references to text-books, law review articles and notes, and to the Restatement of the Conflict of Laws; and a number of questions for the student; questions in many of which the facts of the principal case have been changed somewhat and the student is asked to determine what effect this change of fact would have had upon the outcome of the principal case. It should be observed that, in this book, there are at least three kinds of notes; notes which follow a case, and which appear in the text between the case in question and the next case; explanatory notes by the editors, which appear in the text; and footnotes at the bottom of the page.

Early in the introduction\(^1\) we have an explanation of the symbols used throughout the notes to designate the different states. A transaction may be what has been called, by some of the teachers of conflicts, in semi-technical semi-slang, a two-state transaction; that is, all of the facts which determine the substantive right (assuming that any satisfactory line can be drawn between substantive right on the one hand, and procedure, remedies, etc. on the other) take place in one state, and the action is brought in another. A transaction may be a three-state transaction (not a very accurate name for it); that is, one in which the facts which determine the substantive right occur in more than one state. The action may be brought in some one of the states in

\(^1\) P. 6.
which part of these facts occur, or it may be brought in another state. While the facts may occur in a number of different states, the problem is usually about the same whether the facts take place in two states or in twenty. Accordingly, our editors use X and Y to indicate the states in which take place the facts which determine the substantive rights; and F to indicate the state in which the action is brought, if it is brought in a third state: while if it is brought in one of the States in which part of the facts occur, that letter is repeated. Thus if an action on an X-Y contract is brought in Y, it is called an X-Y-Y case. This makes for clarity of thought and economy of language.

To see ourselves through the eyes of an alien critic is often to purify the understanding and to bring low the pride. An eminent authority on private international law, viewing some of our Anglo-American conflict of law problems from the standpoint of the civil law, once said that private international law had had three different purposes at different stages of its development. The first, the most crude and primitive, and the one in which Anglo-American law is still struggling, was the purpose of choosing law so as to give a preference to one system of law over the other for the transaction in question or for the different parts of it. In the second stage the purpose of private international law was to search for a rule of conciliation of positive laws—a system of rational combination assuring to each the degree of influence and scope of application that should properly belong to it. In the third stage its purpose is to discover new rules conformable to the international nature of international rights.

Each of these theories is suggested, at least, in the readings which are found in this book. The cases, being nearly all taken from Anglo-American decisions, assume, for the most part, that the court must prefer one system of law, as to the transaction in question or as to a part of it, over some other system.

In most problems which involve substantive law, the courts are likely to be faced with a mass of popular custom, rough and unformed, but often of compelling force. The economic needs of the community, and occasionally its ethical ideals, drive the courts now this way and now that. In matters of procedure, remedies and the like, now that we are emerging from the rigid formalism of common law actions, the purpose, it is to be hoped, is that of simplifying procedure so that the merits of the case can be disentangled from all irrelevant and adventitious matter; and that the case may be determined upon these merits.

In conflict of laws there is no mass of popular custom to which the courts must yield, or which will furnish to the courts the
rough material out of which juristic custom can be developed. There seem to be no economic needs of the community to be helped or hindered by the selection of one rule or the other; and the only ethical problem seems to be whether we will recognize either the rights of foreigners, or foreign rights; and, if we recognize them, whether we will give them any adequate protection. Not even the feeling of nationalism is of any help in determining which rule to select. One who is involved in litigation seems to demand regularly the choice of the rule of law which will be most advantageous to him in the particular litigation; and if the rule of some foreign state will be more advantageous to him, than the rule of his own state, the adjudicated cases do not disclose a party who has demanded the rule of his own state from motives of patriotism, or of intense national feeling.

The courts have accordingly been left free to formulate such clear and consistent principles as they could; and then to deduce from these principles, by the application of logic, clear, consistent and uniform results. No other topic of law has given to the courts so free a hand. In no other topic of law have the courts come so nearly to landing in chaos; and some of the text-writers have done much to make the situation worse. Story, whose great work was published in 1834, was all on the side of confusion. In his combination of Anglo-American law based on decided cases and readings from continental jurists whose speculations, if based on any system of positive law, were based on Roman law, support could be found for almost any theory. And if the courts had taken some of the modern commentators seriously, the confusion which we have would have been even worse confounded.

Is this desirable? If problems of conflict of law are to be determined either by ideals or by expediency, is not some degree of certainty ideal? Is it not highly expedient? In one of the readings it is suggested that the primary object of the conflict of laws should be to get a just result. Heaven forbid that we should urge the courts to strive for unjust results! Unjust results are all too easy in this world. Our present plight seems to be due to the fact that the courts have tried to reach just results, and to reach them have suggested reasons without considering how these reasons would work in other cases in which the facts were generally similar and yet different in occasional details. The courts, especially the earlier courts, have invoked, and often misapplied, tests which embodied the speculations of jurists in situations which arose under the civil law, and which could not arise, at least

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2 P. 347.
in the form in which they were stated, under the common law. When later cases, with facts substantially similar, but differing in details, have come before the courts, they have often under pressure been compelled, if they were frank, to admit that they had not meant what they said. If they were not frank, or if they did not realize what they had said, they were very likely to pile one inconsistent case on top of another.

Whatever approach to harmony and to certainty has been made by the State courts is now being upset by the Supreme Court of the United States. The intruder is crowding his way into what, up to a few years ago, was well recognized as the exclusive sphere of the State courts; and it, in effect, says to the State courts: In conflict of law questions you must take the same view as I do or I shall say that you are giving a judgment to the wrong person, that you are refusing to comply with the full faith and credit clause of the United States constitution, if the transaction took place in another state of the union, or that you are impairing that liberty of contract guaranteed to all by the fourteenth amendment, or that you are taking a right from the defeated party without due process of law; and for these errors in said law, I shall reverse the judgments of your State courts. A striking example of this attitude is found in Home Insurance Co. v. Dick,\(^3\) which appears under Chapter 10, Contracts, Section 1, Commercial Contracts, Sub-section J. Constitutional Limitations.\(^4\) The same question has been decided, again, though under facts which make it a less extreme exercise of power, in John Hancock Mutual Life Insurance Company v. Yates.\(^5\) This line of decisions has received little attention from the avowed supporters of the states' rights, whether of the old school or of the new. Parenthetically, it may be wondered whether this doctrine is limited to conflict of laws, or to insurance cases. Are not the reasons strong enough to apply to every rule of common law or equity, to every construction of a state statute or of a state constitution?\(^6\) Even if local law alone is involved, it would seem that due process and liberty of contract could be invoked even if the full faith and credit clause could not.

Accordingly the editors have devoted a great deal of space to United States Supreme Court cases, and, it would seem, very properly. They are putting before us the common law, primarily the

\(^3\) 281 U. S. 397 (1930).
\(^4\) P. 560.
\(^6\) P. 543.
law of the United States in 1936; not of Altruria, nor of Utopia, nor even of England.

Perhaps the cases on Constitutional Limitations hitherto referred to, should have been placed at the fore front of the battle to show that conflict of laws is no longer a common law question, a statutory question, or a question of State law. On the other hand, perhaps putting these cases at the beginning would assume that the principle there laid down applies to all conflict of law cases; and whether it does or not, time alone will tell. The day may come when every case book on every subject will have to begin with the cases in which the Supreme Court of the United States has reversed the State Supreme Courts and laid down rules, the ignoring of which, by the State courts, will be a violation of due process.

A number of old friends appear among the cases, but the greater number of the cases are quite recent. This, again, would seem the wiser choice. We cannot have all the cases. A picture of the life about us is of the greatest importance; and in conflicts, even more than in other topics, many of the cases known as "leading" do not lead anywhere. The book gives us an excellent picture of our law, and if occasionally it pictures it as in a state of marvellous confusion, the reality is worse than the picture. The combination in the text of text-books, law review articles and the Restatement of Conflicts will enable those who use it to find how seriously students will take readings after they have learned how to get law from cases. A wealth of information is found in the cases, abstracts of cases and readings in the book itself. When we add the information made available by the references, the result is almost an embarrassment of riches.

Our editors have given us a most helpful weapon to use in a renewed attack on this most interesting and most difficult of legal topics.

William H. Page.*


This book is the fifth and latest volume of a series published by the Office of the Comptroller of the Currency on the subject of court decisions relating to national banks. The earlier four volumes cover the period from 1864 to 1933, while the present
issue embraces the period since 1933. It includes not merely those national bank cases decided by the various Federal courts, but also many important national bank liquidations which have taken place in state courts. The current digest far surpasses its predecessors in usefulness of arrangement and lucidity of exposition. Its system of references and cross-references are an invaluable aid to legal research. In addition, the subject matter has been carefully classified under certain major headings, and a chapter has been devoted to each of them. All of the cases appearing under each heading are accompanied by a succinct summary of facts, and the more important ones are buttressed by notes mentioning recent affirmances, dismissals and modifications as well as useful annotations and titles of pertinent legal articles. Due credit must be given to Mr. William V. O'Connor, Jr., the compiler, for these notable improvements which add so much to the facility with which the book may be used as a reference tool.

A perusal of the digest brings to light two strangely contradictory principles that have operated in cases of bank failures. On the one hand, the remaining assets of an insolvent bank have been regarded as a trust fund for the benefit of the general creditors; and, in harmony with this thought, it has been repeatedly held that the assets of a national bank in liquidation must be distributed pro rata among all of the creditors. Now, in obvious conflict with this general principle of justice and equity for the unfortunate creditors is another principle embodied in the law of set-off. Under the protective mantle of this law, the borrowing depositor of an insolvent national bank is permitted to apply his deposit credits with the defunct institution to extinguish his indebtedness to the receiver of the bank. These deposit credits are admittedly worth less than their nominal value inasmuch as they represent claims which the bank has been unable to honor. Nevertheless, these debased credits are accepted by the receiver at their full fictitious value in the satisfaction of debts. This practice has usually been defended upon the ground of mutuality of debts. The theory upon which this is based is that, in good conscience, one ought not to pay his debt, if he cannot ultimately

1 Bankruptcy, Collateral Securities, Deposits, Insolvency and Receivers, Jurisdiction, Negotiable Instruments, Officers and Directors, Offsets, Powers, Preferences in Insolvency, Reorganization and Consolidation, Stockholders, Surety Bonds, Taxation, and Trusts.

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compel his creditor to pay the debt due him. This theory is subject to two criticisms in the case of bank receiverships: first, that this alleged mutuality of debts is present only in very attenuated form, and second, that it gives no consideration to the superior equities of the great number of non-borrowing depositors. It is essential to bear in mind that deposits represent debts owed by the bank, and that these debts exert no correspondingly binding force upon a receiver; he is an entity apart from the bank. His is the duty of keeping all creditors at arm’s length while he exhausts all claims the bank may have had, and of distributing the proceeds pro rata among the creditors. In the second place, the right of set-off in bank liquidations ignores the fact that other creditors of identical standing are injured by the transaction. There is no denying the justice in the principle of the set-off when it concerns merely two parties who are mutually indebted, and no others; but in the case of bank liquidations, this is never the case. A simple illustration will demonstrate this. Let us assume that a bank passes into the hands of the receiver with assets amounting to $400,000 and liabilities totalling $500,000. The depositors might expect to receive $4 for every $5, or eighty cents on the dollar. That would be a fair and equitable distribution! At this point, however, the depositors in debt to the bank decide to exercise their right of set-off, and the receiver is induced to part with $100,000 worth of assets for an equivalent sum of bank credits, these credits being accepted at their factious nominal value. As a result of this transaction, the assets held by the receiver have dwindled to $300,000, while the liabilities have fallen to $400,000. In consequence, the remaining depositors are forced to suffer a further impairment in the value of their claims. Instead of being entitled to eighty cents on the dollar, they may now claim but seventy-five! Under these circumstances, is it possible to hold that set-offs are fair and equitable as between all of the parties involved? Or to contend that there are no superior equities involved?

Of course, it may be argued that the above illustration portrays an extreme case, and that in no instance does the exercise of the privilege of set-off create so extreme an emasculation of assets. Perhaps that is true, but it does not undermine the contention that an emasculation of assets, however slight, does occur, and that the interests of other creditors are adversely affected thereby. The argument relies for its force upon the fact that the cost of the set-off to each remaining creditor is slight, and that it may therefore be calmly ignored. In short then, there is no denying the equity and justice of the set-off where it merely concerns two
parties who are genuinely and mutually indebted to one another and no others; but in the case of bank receiverships, these conditions are conspicuous by their absence!

George W. Strasser.*


About the only thing in common among these four books is the recognition of a Constitution and the importance of the courts in determining the application of such a fundamental document of Government. The Nine Old Men has been written by two newspaper men and they have attempted to tear the judicial robes from the nine justices of the Supreme Court of the United States in order to show that most of them have feet of clay. Whether we agree at all times with the conclusions reached by that great Court—an important organ of our constitutional government—is not material when it comes to a question as to the wisdom of such a book. An editorial in the December 1936, number of the Journal of the American Bar Association has condemned the book in no unmeasured terms. As one lawyer, I thoroughly agree with the mellowed wisdom of former Senator James E. Watson, when he says:

"I believe the great psychological truth that in this life we largely find what we seek and that after we find it and incorporate it into our character we grow to be more and more like it; for it is undeniably true that we gradually approximate the thing we hold constantly in mind and reflect upon. This being so, it is altogether desirable to reflect upon the good in a man's life and not the bad. I have no use for the so-called debunkers, those who attempt to dispel the glory that surrounds some of the greatest characters and to tear from their brows the wreaths placed there by loving millions. I have no patience with that sort of thing in American life, and so far as I am concerned I shall never aid the strength of such a movement." 1

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‡ Late Solicitor-General of the United States.
* Editor, The Nation's Business.
§ Co-author, Washington Merry-Go-Round (1931).
1 Watson, As I Knew Them (1936) 228.
Neither Purse Nor Sword and Whose Constitution restate for us some of the arguments which commenced with the Articles of Confederation as to the powers which the people and the States should surrender to a central government and some of the arguments which greeted the Constitution at the time it was written and adopted and which have continued to this day. It is easy to see that Secretary Wallace is no great believer in the doctrines of Adam Smith, the Moses of the Industrial Revolution, while the late James M. Beck and Merle Thorpe yearn for the days of individualism and laissez faire, when men engaged in conquering a virgin continent struggled ruthlessly with each other for the riches of a Midas—days which they admit are forever gone.

However, it seems to me that neither of these two books really comes to grips with the reasons for the change in the attitude of the people toward the Federal government, a change which has been rolling upon us for the past seventy years or more as resistlessly as the tides of Time. The reviewer may be pardoned for quoting from a recent address delivered by him wherein he stated:

"During the past seventy-five years, since the days of the Granger and Populist movements in America, and with increasing momentum since the World War, the peoples of the Western World have everywhere turned to their governments for more and more protection and assistance—for more regimentation if you please—in their struggles with economic and social forces. That is to say, the regimentation and control thrust upon them from above prior to the Industrial Revolution are being sought by them—with the power of the ballot in America. Both Labor and a large part of Industry are today convinced that ruthless individualism must be restrained for their survival. Could this be due to population and the available means of subsistence approaching each other to such an extent that millions must eat the bread of public charity—even in so-called normal times—and that millions of others see at all times a grave threat to their standards of living? This during a period in World History when technological advances in industry and agriculture are such that many times our existing population could be fed, clothed and housed in decency and comfort if we could work out some means by which these millions could acquire the necessary purchasing power to take the capacity products of farms and factories!"

Taking as their title a statement of Alexander Hamilton that the Supreme Court of the United States possesses neither purse nor sword, Messrs. Beck and Thorpe admit that this great Court can not hold back indefinitely the advancing tides of governmental regimentation and control and they urge that the people rally around the standard of individualism—to the concept of government restated by Thomas Jefferson that the government was the best which governed least. On the other hand, Secretary
Wallace argues that modern industry and agriculture do not know any State lines; that the struggle for existence has caused the people to demand a liberal interpretation of the General Welfare clause of the Federal constitution; and that we could largely solve our social and economic problems within the framework of the Constitution if we use that document as Hamilton anticipated it would be used—in a spirit of common sense.

Both books are ably written from their respective viewpoints and they should be read together by both conservative and liberal. The arguments are pitched on a high plane and in weighing the arguments, we are fortunate in having at hand Mr. Wynes' Legislative and Executive Power in Australia showing how the great liberal Commonwealth of the antipods has worked out some of the constitutional problems arising in that country made up of a number of states and a central government. He says:

"In Australia, as in Canada and all the other Dominions, the powers of the Legislature are, within the appointed limits, absolute and supreme; this principle applies to the Legislatures of the States as well as to the Commonwealth Parliament. The position in the United States is not quite the same for, as has been seen, the Government is there held to be the agent of the people, and this fact has had, it is conceived, a by no means inconsiderable effect upon the course of American constitutional doctrine.

"It follows that a grant of power (in Australia) carries with it every power which is necessary to give complete effect to the main power; the Legislature may adopt any means in order to carry out a given (constitutional) power." 2

That is to say, that if the Constitution for the Commonwealth of Australia confers on the central government a power to regulate commerce among the several States of that Commonwealth the Parliament is free to adopt such measures as it sees fit to carry that power into execution. The High Court for the Commonwealth does not attempt to hold the statute unconstitutional if the legislation is within the "appointed limits". Mr. Wynes further says that the terms of the Australian constitution:

"... must be interpreted by reference to their meaning when the document was framed is undoubted, but this does not involve the consequence that they are to be read as comprehending only such manifestations of the subject matters named as were known to the framers. On the contrary, the Constitution can be and is construed to include such new specific developments of particular matters as may arise from time to time. To this principle the name 'progressive interpretation' has been sometimes given, but convenient as that phrase may be as a

mode of reference to a doctrine, it is misleading for it conveys the notion that the standard of interpretation may be in a state of constant variation. In truth the meaning of the terms of the Constitution does not undergo any change, for the nature of a grant of power remains always the same; the doctrine, to which the name 'generic interpretation' may with greater precision be ascribed, asserts no more than that new developments of the same subject and new means of executing an unchanging power do arise from time to time and are capable of control and exercise by the appropriate organ to which the power has been committed. In other words, while the power remains the same, its extent and ambit may grow with the progress of history."

It seems that Messrs. Beck and Thorpe have argued for the Federal Constitution as written in 1787, with such changes as have been made by specific amendments since that time, though they admit that such has not been the uniform rule applied by the Supreme Court of the United States in the construction of that document. On the other hand, Secretary Wallace, in effect, has argued that there should be a "generic interpretation" of that same document, apparently somewhat along the lines adopted by the High Court of the Commonwealth of Australia in the construction of the Australian Constitution.

Unquestionably, this book by the learned Australian lawyer concerning the legislative and executive powers of the Commonwealth Government of Australia should be of great interest and assistance to American lawyers in these days when the people of America are insisting that their Federal government be made more responsive to their needs in the regulation, regimentation, and control of individual and corporate power for what they conceive to be for the common good of all.

O. R. McGuire.*


Two characteristics of Mr. Magill's Taxable Income strike this reader as outstanding. The first of these is its beguiling deceptiveness. Those who have suffered through dosages of cod liver oil from the spoon to find bliss in the present-day genius of the concentrated pill will understand the satisfaction of one who, knowing the general distastefulness of income tax "literature",

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finds himself able through the medium of a 400 page book to down
sizeable chunks of information without minding it a bit. Indeed,
it is almost a pleasure, and were there nothing more to commend
than the apparent ease of the author’s effort, this much would be
a notable accomplishment. Mr. Magill has pioneered the field and
discovered that the income tax law can be made readable. Much
of this result is due, perhaps, to the author’s willingness to sac-
rifice a display of the erudition that is certainly his in order to
put his material across in as clear and lucid a fashion as possible.
The wonder of it all is that he has been able to say so much in so
short a space and still remain coherent. The cohesiveness of the
book is the more remarkable when heed is taken of the fact that
much of the spade work was done by others, to each of whom the
author expresses careful appreciation.¹

Interest is gained at the outset by a 19 page introduction in
which the author outlines the scope of what is to follow, and the
plan of attack adopted. An ultra-functional approach is sug-
gested whereby the reasons for the tax law as it has developed
would be found in the backgrounds of the judges who have de-
veloped it. A study of the nature of the judicial process in tax cases,
giving individual treatment to the judicial process of each of the
Justices who have sat on the court in the twenty odd years since
the 16th Amendment became a part of the Constitution, is replete
with interesting possibilities. Yet Mr. Magill chooses the better
part of wisdom when he leaves such a study to others. In the first
place, the study could not stop with a treatment of the individual
philosophies of the United States Supreme Court Justices alone.²
Moreover it would require a keen scalpel in the hands of a skillful
prober to dissect and analyze a philosophy that has engendered
the masterful dissent of Coolidge v. Long;³ the gymnastic tergi-
versations of Helvering v. Duke⁴ and Becker v. St. Louis

¹ For example, at page 250, speaking of Chapter 8, entitled The Element
of Control the author says:

“Much of the material in this chapter and in section IV of the pre-
ceding chapter was originally collected for me by Stanley S. Surrey,
Esq., and was discussed by him in an article entitled Assignments of
Income and Related Devices: Choice of the Taxable Person, (1933) 33
Col. L. Rev. 791. Some of Mr. Surrey’s analysis has been embodied in
these chapters.”

² “It would not be feasible to analyze the judicial philosophies of hundreds
of judges of the lower federal courts, yet it is the decisions of these courts
which supply the bulk of data for a study of this kind.” p. 12.
³ 282 U. S. 582 (1931).
⁴ 290 U. S. 591 (1933).
Union Trust Co., the majority opinions of competing rationales in Hoeper v. Tax Commission, and Helvering v. City Bank Farmers Trust Co.

The approach actually adopted is posited on the difference between the position of the Supreme Court and that of some eco-

5 296 U. S. 48 (1935). In the Duke case the Court, by a 4-4 split, in a memorandum opinion, affirmed a decision of the Third Circuit Court of Appeals (62 F. (2d) 1057), equally unsatisfactory in its brevity, wherein the Circuit Court sustained the position of the Board of Tax Appeals (23 B. T. A. 1104), that no federal estate tax could be collected on the death of the settlor, James B. Duke, where, seven years before his death, Mr. Duke had set up a trust, naming himself sole trustee and reserving to himself as trustee broad powers of control under which he could substantially alter the interests of the beneficiary, though in no way by which he himself would benefit by such change. The lapse of such a power was held by the Board to be insufficient to support the tax. In the Becker case, the settlor again named himself trustee, with power to increase or decrease the payment of trust income to the beneficiary. The settlor also reserved to himself the possibility of reverter of the corpus. The Court, by a 5-4 split, held no federal tax could be laid on the death of the settlor, on the ground that there was not a sufficient testamentary transfer in the lapse of the power reserved by the settlor as trustee, and the lapse of the possibility of reverter. Mr. Justice Sutherland, speaking for the majority, paid scant attention to the effect of the power reserved by the settlor as trustee. The dissenting Justices paid no attention whatever to this point, holding that the lapse of the possibility of reverter was in itself sufficient to sustain the tax. Sutherland, J., did, however, cite Helvering v. Duke in support of the majority opinion. In the Duke case, the identity of the Justices who favored reversal of the court below is not set forth, but Hughes, C. J., was the member of the Court who did not participate in the decision. In the Becker case, the Chief Justice joined with Brandeis, Stone, and Cardozo, JJ., in the dissent from the majority opinion.

6 296 U. S. 206 (1931).

7 296 U. S. 85 (1935). Compare the following statement from the Hoeper case,

“The claimed necessity (taxing the wife’s income to the husband in order to prevent tax avoidance) cannot justify the otherwise unconstitutional exaction”,

with what was said in the City Bank case (where it was sought to levy an estate tax on the corpus of a trust over which the settlor retained no control that could be exercised except in conjunction with a person in substantial adverse interest): “A legislative declaration that a status of the taxpayer’s creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property without due process.” The Hoeper case was given surface distinction by saying that the measure adopted in that case was not “reasonably requisite” but was rather “grossly unreasonable”. Compare the statement by the same Justice in Stewart Dry Goods Co. v. Lewis, 294 U. S. 550 (1935), holding invalid a Kentucky tax on gross receipts, graduated according to the amount of receipts: “Gross inequalities may not be ignored for the sake of ease of collection.”
nomists with reference to the nature of income, the former insisting that the concept of taxable income includes the idea of gain severed from capital, that is, realization. Analysis of the subject from this viewpoint suggests a not unfamiliar sub-analysis into the two aspects, whether income is realized, and when the realization is deemed to have taken place. It is this plan which the book follows in Part I. Part II deals with The Characteristics of Income, and Part III with The Source of the Payment. Into this skeleton the author has molded the meat of the income tax law contained in legislative declaration, administrative interpretation and judicial decision. There is little surplus flesh. The only instance which remains in retrospect where without appreciable loss the author might have further preserved his economy of space is in the discussion of the British treatment of capital gains. All other sections of the book are uniformly interesting, even those dealing with the most technical aspects of the problem, such as Chapter 2, treating of Corporate Distributions, and Chapter 4, discussing the Statutory Modifications of Judicial Doctrines of Realization. Less technical, and correspondingly easier to read, are Chapter 7 (Benefits Through the Discharge of Obligations), and Chapter 8 (The Element of Control). Particularly provocative of interest is the concluding chapter evaluating the progress made toward a concept of taxable income. The footnotes throughout the book are numerous and expansive. They are wearisome, as all small-type matter is, but they pack a wealth of citation to well-known Supreme Court and lower Federal Court

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8 Pp. 70 to 90. This is the only consistently dull portion of the book. The author justifies its inclusion as follows: "The present British practise, which contrasts with our own, is an outgrowth of statutes and decisions which antedate the Sixteenth Amendment by 100 years. An examination of the British statutes and decisions may therefore appropriately precede the analysis of the later American decisions and statutes, particularly since the British conclusions are frequently misstated in American discussions of the subject of capital gains.” p. 70. Compare this with the following statement from p. 372: “This British interpretation is, of course, no criterion in determining the meaning of the federal revenue acts. Moreover, the British income tax acts have been framed on the theory that ‘income is the surplus of receipts over the current expenditure necessary to earn those receipts, regardless of the appropriation of any part of the receipts or surplus for the purpose of writing off or amortising the capital value of any assets that waste in the process of producing the income’. Nevertheless, the British concept is useful in ascertaining what is included in the term income as used in common speech.”
cases, as well as less familiar Board of Tax Appeals decisions. There is a generous reference to material in legal periodicals.9

The second striking characteristic of the book is its point of view. Taxation may be an "intensely practical matter," 10 as the Supreme Court has so frequently reminded us, but its treatment, even in the hands of that same Court, has not always been as practical as it might have been. Mr. Magill is an ultra-pragmatist when it comes to tax matters. He is interested not in the theoretical adequacy of taxes, but in their revenue producing efficiency. He speaks from the point of view of the good tax administrator, which befits his recently acquired status as Assistant Secretary of the Treasury. He is not unmindful of the taxpayer's increasing woes, yet he seeks to discover in almost every legislative enactment, every administrative regulation, every judicial interpretation, a justification founded in expediency. The complexity of the revenue laws he attributes, at least in part, to an effort on the part of Congress to be as fair, and to make the tax burden as painless, as possible.11 The difficulties experienced by the Court in developing a definition of income 12 are explained as an attempt on the part of the Court to translate into law not the economist's definition, but that of the man on the street, particularly the man on the street in the years when the 16th Amend-

9 In format the presentation is adequate. To acknowledgment of the book's convenient size should be added appreciation of the clear printing, the inclusion of a table of cases, and a good index. Typographical errors are to be found on the following pages: p. 240 (f. n. 103, "condundrums" for "conundrums"); p. 142 (f. n. 50, "Circuit of Appeals"); p. 264 (line 22, "served" for "severed"); p. 290 (line 12, "an" for "as"); p. 307 (f. n. 49, "same years ago" for "some years ago").

10 McReynolds, J., in Farmers' Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930).

11 "Current criticisms of the complexity of the federal revenue laws often fail to take account of the fact that many of the most complex provisions were adopted with the desire to treat the taxpayer more generously than the courts had treated him under the original shorter and simpler laws. The present reorganization and exchange provisions are prime examples." p. 123. These provisions he calls "masterpieces of technical draftsmanship". p. 124. It is possible to have a simple income tax law. The first income taxing statute in 1861 (12 Stat. 292), consisting of but three sections, was simple. Yet it did not concern itself with being fair. It allowed no deductions, save for other taxes paid. See Magill, Taxable Income, 294. The author's view that an income tax statute must be complex in order to be fair toward all upon whom its burden is imposed accords with the idea of a prominent legislative draftsman who remarked that the Lord Almighty would be stumped to write an income tax bill that was not complicated.

ment was adopted.\textsuperscript{13} This man of the street appears and reappears on the stage. He seems to be quite a man.

"Opposed to the first argument are several considerations. If 'income' as used in the Sixteenth Amendment and the Revenue Acts has the meaning commonly understood in ordinary speech, it seems unquestionable that the proceeds received from invested trust estates fall within the term. Difficult as the distinction is in theory, the man on the street would probably regard a bequest in installments as exempt, and the income from a trust for life as taxable income." \textsuperscript{14}

Are we to have that mythical creature of Torts, "the average reasonable man", recreated in Taxation? If so, he is mythical indeed who, while remaining average, will think it possible to find any reason in tax matters. When the author, in discussing the corporate distribution cases, says:

"Treasury officials would be confronted with an enormously difficult task, were they required to check valuations of all property owned by all taxpayers at beginning and end of each year, as some economists' definitions of income would require them to do. They would be confronted with a task of similar difficulty, though much less in scope, were they required to determine whether a new corporation resulting from a reorganization was substantially identical with its predecessor. The Court in fact, though not placing its decisions on these grounds, has carefully steered between these difficulties. A change in the form or extent of an investment is easily detected by a taxpayer or an administrative officer. It affords a reasonable and convenient occasion for taking stock of the accretion in value to the investment as represented by the distribution which the stockholder has received”,\textsuperscript{15}

the average reasonable taxpayer might say: "Why tax me on paper profit at all, when it is not at all unlikely that I will never realize an actual profit?" And he will find difficulty in understanding the explanation that it is not good tax administration to allow the taxation of accrued gains, even when accrued only on paper, to be postponed indefinitely.

In truth, the man on the street has not been of much assistance to the Court. His conception of income has proved too elusive to

\textsuperscript{13} In Merchants' Loan and Trust Co. v. Smietanka, 255 U. S. 509 (1921), the Court said:

"In determining the definition of the word 'income' thus arrived at, this court has consistently refused to enter into the refinements of lexicographers or economists and has approved, in the definitions quoted, what it believed to be the commonly understood meaning of the term which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution.” (Quoted in Taxable Income, at p. 97.)

\textsuperscript{14} At pp. 378, 379.

\textsuperscript{15} At pp. 66, 667.
control. Definitive concepts the Court has abandoned.16 And the difficulties encountered by the Court in attempting to translate into tax law the accounting methods of the man on the street are well known.

And reasonable though he might be, the man on the street would not lend too sympathetic an ear to the author’s unrelent-ting efforts to point a justification for particular phases of the tax burden in the practical exigencies of a sound and efficient tax administration.17 With the possibilities of tax avoidance growing slimmer and slimmer every year, as Congress plugs newly-discovered loopholes as fast as they are found,18 the taxpayer finds nothing congenial in a philosophy that regards in revenue leakage an administrative necessity that compels and at the same time constitutionally justifies measures of otherwise doubtful validity. But the fact that the Supreme Court has been showing an increasing

16 Cf. the author at p. 392.
17 "Moreover, the easy avoidance of a tax on a gain by utilizing an exchange instead of a sale is an important consideration, particularly in the case of securities." p. 107.

"To hold that no income is realized in the constitutional sense unless the property received in exchange has a 'readily realizable market value', or is the 'equivalent of cash', is to make a constitutional question out of a matter of opinion involving investigations and computations peculiarly within the competence of an administrative officer. It will be sound administration to proceed cautiously in computing and taxing a profit which is still wrapped up in a piece of property of doubtful or uncertain value; but it is sound judicial philosophy to leave such questions largely to administrative judgment." p. 110.

"As a practical matter of administration, however, there is much to be said for the solution adopted by this decision [Helvering v. Walbridge, 70 F. (2d) 683 (C. C. A. 2d, 1934), cert. den. 293 U. S. 594 (1934)], in combination with the 1934 law: to recognize no gain or loss upon the transfer to the partnership, but to require the partnership to take as its basis the cost to the transferor." p. 118.

"The case is distinguishable from the gain situation on the ground of practical expediency." p. 145.

"The statutory method of taxation (taxation of annuities) is simply a convenient, workable scheme for separating the two (income from annuity in consideration given for annuity), not unduly favorable to the government." p. 370.

18 For example, availability of the Federal Declaratory Judgments Act to test the constitutionality of Federal taxes was no sooner discovered (Penn Bros. v. Glenn, 10 F. Supp. 483 [D. Ky., 1935]) than it was withdrawn by a provision in the Revenue Act of 1936 (s. 405), withdrawing from the scope of the Act controversies with respect to Federal taxes. Note how the loophole so carefully planned in White v. Poor, 296 U. S. 98 (1935), was blocked by an amendment in section 805 (a) of the 1936 Revenue Act of section 302 (d) of the 1926 Act.
willingness to accept such a philosophy, 19 makes it a matter of prime importance to the taxpayer (and the tax lawyer) however distasteful he may regard it. If once it was clearly established that A cannot be taxed for the income of B, whatever the administrative necessity that might compel such action, it is not now so clear. 20 This is especially true in matters dealing with family income. 21 How far this trend may go no one can say. One thing, however, is clear, and that is the likelihood that the author of Taxable Income will press it to the limits of his ability so far as the exigencies of a tax system sound from the standpoint of administration seem to require.

FRANK C. NASH.


There has been no modern comprehensive treatment or detailed description of government publications and their use, until the


20 "In Hooper v. Wisconsin, it is true, the Supreme Court invalidated a state law which required a husband to pay a tax on the income of his wife and minor children. But this is not precisely the plan which was proposed in connection with the new law. Requiring a husband and wife to file a joint return is a different proposition than requiring A to pay an income tax on B's income. It would be perfectly constitutional to require a consolidated return from affiliated businesses, and the joint return of a husband and wife is not such a different proposition. Moreover, the categorical assumption that A cannot constitutionally be taxed for B's income goes too far. Burnet v. Wells, held very definitely that A may be taxed for B's income, if there is a sufficient reason for the tax. There seems to be a sufficient reason to justify any casual injustice done to the taxpayer by requiring a joint return in the necessity of preventing a very common kind of tax avoidance." Lowndes, The 1934 Edition of the Federal Revenue Act (1934) 19 Minn. L. Rev. 62, 89.

21 "Congress may well have thought that a beneficiary who was of the grantor's immediate family might be amenable to persuasion or be induced to consent to a revocation in consideration of other expected benefits from the grantor's estates. Congress may adopt a measure reasonably calculated to prevent avoidance of a tax. The test of validity in respect of due process of law is whether the means adopted is appropriate to the end." Roberts, J., in Helvering v. City Bank Farmers Trust Co., 296 U. S. 85 (1935). And see cases cited supra, f. n. 19.

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issuance of this book. To attempt an explanation of this gigantic structure is a real task. Mr. Schmeckebier has met this need and really accomplished an excellent work. Anyone using government publications will be grateful to him for his lucid and painstaking explanation of this material. He has brought order out of chaos, and has given one an opportunity to use these documents intelligently.

The description of the publications properly begins with a complete explanation of the guides which are available, the catalogs, and the indexes. This progresses from the date of the earliest publication down to 1936. Improvement in their issuance is very noticeable and duplication seems to be disappearing.

Bibliographies, showing what the government has published within specified fields, such as aeronautics, agriculture and related subjects are discussed next. The Library of Congress has been active in this work, although several of the governmental bureaus have issued many which deal with subjects coming within their scope. There appears to be definite need of a coördination of all of these bibliographies.

Chapter III explains the classification of government publications, and demonstrates their confusing features, peculiarities, duplications, and lack of uniformity in the use of series. An illuminating discussion of the availability and distribution of these documents follows in Chapter IV.

The chapter covering Congressional publications is excellent. These important records are explained carefully and enable one to understand where he should look for material. The steps in the enactment of legislation in Congress are taken up in detail, and information is given in regard to tracing the history of legislation. The introduction of bills together with reports and hearings on them are discussed equally well.

A very complete understanding of the government publication of federal and state constitutions and their amendments is given in Chapter VI.

Mr. Schmeckebier has completed a fine analysis of the published laws of the United States in his chapter on federal laws, which furnishes one with an historical manual and guide. The author states, "The published laws of the United States fall into three well-defined groups: (1) series printed in chronological order; (2) codifications of all the permanent and general laws in force; and (3) compilations dealing with laws on particular services or subjects". Due emphasis is given to the federal indexes which are the keys to finding the laws. Practically every governmental office issues compilations of laws
in force relating to its powers, and the listing by the author of these, according to their respective department, is extremely useful. One feels that he has been led through a maze of complications to a clearer explanation of where federal laws may be found.

The remainder of the chapters on Court Decisions, Administrative Regulations and Departmental Rulings, Presidential Papers, Foreign Affairs, Reports on Operations, Organization and Personnel, Maps, and Technical and Other Departmental Publications indicate by their respective titles that they contain a wealth of information.

It is noteworthy that those in charge of present day government publications have profited by the experience undergone in compiling earlier records, and now are able to avoid incomplete, imperfect public documents.

An appendix contains a list of depository libraries, as of May 1, 1936. A complete index directs one to the innermost part of this bibliography.

One should have no hesitation in recommending this book without reservation. It can be used very advantageously by the law librarian in building up his collection of government publications in a more discerning manner. It is an invaluable guide to any person or student desiring to select material in this field. It will fill an important niche in the bibliographical world. It may best be termed "fundamental".

LEWIS W. MORSE.*


In this volume the Hoover administration is analyzed, documented, and eulogized. Yet, in another sense, the book is wholly an apology. The authors, one a competent student of our political scene, the other closely associated with the central figure in the unfolding drama here presented, set themselves the task of proving that the administrative record of President Hoover entitles him to leading rank among great American statesmen. In fairness, it seems to this reviewer that the authors were by association and open admiration too close to their subject to present a fair, unprejudiced, and impartial evaluation. Later and more

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‡ Sometime Secretary to former President Hoover.
unbiased writers will be in a better position to place the events of these four years against the cold, calculating background of objective history.

The account is presented in two parts: First, the record of the activities, legislative and administrative, which were concerned with the struggle over the depression, is detailed with considerable exhaustiveness. Constant reference is made to the volume of state papers of Mr. Hoover, edited by Professor Myers, from which many excerpts appear as documentary evidence of the correctness of the authors’ interpretations. Indeed, in the preface it is made clear that the march of events will be presented more or less in diary form, frequent reference being made to private papers not previously available to the general public. The textual material is reduced to a minimum, its evident purpose being largely to connect incidents, to give emphasis, and to maintain a consistent point of view.

The second portion of the volume, considerably less than one-half as large as the first part, is devoted to The Normal Tasks of the Administration. Emphasis is placed upon various executive accomplishments and upon the legislative program as it was recommended, acted upon, and administered. The day by day account features the President’s legislative conferences on behalf of the tariff program, the Children’s Charter, and the bonus bill. Included also are frequent references to the creation of commissions, the appointment of their personnel, conferences with their members, and an evaluation of their accomplishments. There is little information which will prove revealing to those who are accustomed to the daily reading of reputable newspapers.

In tone, the volume is devoted almost wholly to the exaltation of a man described as having heroic proportions when he reached the White House. There he was faced almost at once with a panic of foreign origin, which he regarded from the beginning as dangerous, but which most American business men and newspaper editors refused to take seriously for a number of years. Obstructionists in the Congress, both reactionary and radical, complicated the problem and burdened the chief executive. Later, when the Democrats, gaining control of the House and making inroads upon the Senate, refused their cooperation the task became still more difficult. Meanwhile the country had twice faced recovery but was each time plunged more deeply into depression by unfortunate occurrences abroad and by the acts of the enemies within. Finally, when recovery was practically at hand Mr. Hoover was defeated in the 1932 election. Yet, despair took the place of hopefulness only when uncertainty concerning New Deal plans and
positive lack of cooperation by Mr. Roosevelt so frightened the American people that a general business and banking collapse became inevitable. Through all of these vicissitudes Mr. Hoover is described as an executive who assumed constantly more heroic proportions through his courageous activity against the concerted opposition of his enemies. The reader may be pardoned an occasional yawn when the pages reveal the transparency of much wishful hoping but very little constructive statesmanship.

Except for campaign purposes in stating vehement opposition to a few New Deal policies good taste might have dictated that much of this material should remain quietly buried in newspaper files. Neither the authors of this book nor casual readers are in a position at present to ascertain properly the future position in American history of the Hoover administration. And it may be pointed out that at least sixty percent of the voters in the presidential elections of 1932 and 1936 were of the opinion that Mr. Hoover and his supporters were so totally lacking in social consciousness as to unfit them for the responsibility of dealing with the complex social and economic conditions of our time. This reviewer is forced reluctantly to the conclusion, therefore, that the majority of readers will find this volume disappointing both in content and point of view.

HARRY W. VOLTMER.*


The Northwestern University Law School is the only institution in the country which has a fund for periodically giving prizes for essays having to do with some phase of patent law. The prize in 1935 was awarded to the present book.

There has been much dissatisfaction in recent years with the patent system of the United States, and those who have been interested in reforming or changing our patent laws have frequently looked at one or another foreign country as a helpful source of new phases of the patent law. Last winter, the Patents Committee of the House of Representatives held extensive hearings relating to cross licences under patents and the Committee had before it a number of gentlemen who explained in considerable detail the patent laws and procedure in important foreign countries such as Germany, France, England, Russia, Japan, Italy and the like. Some attorneys in the United States who specialize in procuring foreign patents have published pamphlets giving synopses of the laws in various countries and a few years

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ago a student doing graduate work at Harvard published a very elaborate book relating to patent laws of the various countries. In view of these facts it would seem that there was hardly a necessity for offering a prize to procure such a book as that under review. It is surprising, pleasing and refreshing, therefore, to find that the author has made a very real contribution to the growing literature in the United States on Patent Law.

Mr. Vojacek divides his book into two parts, the first part being a comparative survey indicating the origin, nature and policy of patent protection and showing that the various patent systems in the world fall into more or less definite classes. He then compares the various laws with respect to who may apply for a patent, what is patentable, administrative procedure, kinds of patents, terms of patents and fees, obligations and restrictions on the patentee, rights of the patentee and remedy after the grant of the patent. In this connection the comparative parts of laws of significant countries are drawn together and balanced although no effort is made to give a continuous statement of the conditions in any one country.

The second part of the book entitled Historical Survey gives a résumé of the various patent acts showing the changes in them step by step. There follows a summary of their development in such illustrative countries as Great Britain, the United States and Canada, France, Italy, Spain, Germany, Austria, Russia and Japan. The author endeavors to point out the purpose, reasons and results of various distinguishing phases of the separate countries' patent laws. He shows what he thinks are defects needing correction and virtues meriting emulation.

One of the refreshing things to be gleaned from this work is that the United States was the pioneer in instituting a system of examining patent applications for novelty before granting the patents. Mr. Vojacek explains how this system has been copied, imitated or modified in England, Germany, Japan, Russia, and many other nations. France remains about the only important country which persists in the system of freely granting patents without examination, as was done throughout the world generally, prior to the establishment of the examining system in the United States in 1836.

A distinct difference is noted concerning the patent system in the United States, which calls for no fees after the grant of the patent and has no provision requiring the patentee to work or manufacture under his patent; whereas the system prevailing in most of the other countries of the world requires fees, sometimes annually, to keep a granted patent alive as well as continuous or
periodic working under the patent. The tendency throughout the world however, seems to be to relax these conditions and approach more nearly to the conditions in the United States.

The author sets right one of the most persistent fallacies which are urged by many attacking the present condition of the patent system in the United States. Before Congressional Committees and elsewhere for many years, we have been told that a United States Patent once issued is not necessarily valid. It may be attacked in court and, when sued on, may be held invalid despite its issuance by the Patent Office after a careful examination. We are constantly told that the condition in Germany is very much better on the theory that in Germany a patent cannot be attacked later than five years after the grant of the patent. The statute in Germany seems to indicate such a condition, but the courts have continuously done what they could to prevent the injustice inherent in sustaining a patent for something which is not new. The form of claims in Germany is different from the form of claims in the United States and it has been suggested that the claim is even more important in Germany than in the United States because the courts confine their attention strictly to the claim itself. The author points out that the actual procedure in the courts in Germany is approaching the scheme in the United States since in Germany the courts do not confine themselves strictly to the terms of the patent claims. We quote his statement that "the scope as interpreted by law courts may be narrower or broader than is indicated by the patent claims".\(^1\) Again the tendency of the courts in Germany is so to limit a claim, when anticipated by the prior act, that the strict letter of the law requiring a five year old patent to be held valid amounts to substantially nothing.

The volume is very refreshing since it seems to establish quite thoroughly that the United States patent system is the seed from which has grown the patent systems throughout the world. It also indicates that those things which are left out of the United States system may well remain out of the system since their ingrafting in the other patent systems has not produced very satisfactory flowering.

It would be a very material aid to the country if every patent lawyer could carefully study this book, and the same is true of those who are disgruntled with the United States patent system and wish to reform it or even abolish it.  

**Karl Fenning.*

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\(^1\) P. 150.

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BOOK NOTES


A predecessor of this book, entitled International Arbitral Law and Procedure, appeared in 1910, and a revised edition, The Law and Procedure of International Tribunals, was published in 1926. The two later volumes are extensive amplifications of the first one.

The distinguished author has carefully marshalled decisions of international tribunals and has analyzed them in groups to facilitate ready reference to statements of principles of adjective law and of substantive law asserted in opinions of these tribunals. The lawyer engaged in the practical application of the law of nations is deeply indebted to Judge Ralston for these handy, valuable books.

In a much earlier time, Judge Ralston made a notable contribution to the application of international law, when he acted as Umpire in the Italian-Venezuelan Arbitration of 1903. Interesting diplomatic moves had preceded the organization of the several tribunals which in that year functioned in Venezuela in the determination of claims against that country. Terms of submission found in arbitration protocols required that cases should be determined by arbitrators "according to the principles of justice" and on "a basis of absolute equity". No specific mention was made of international law. But Judge Ralston made it clear, as did another American umpire functioning in one of the arbitrations, that he considered that the terms of submission justified nothing but a sound disposition of cases by application of international law. This true view of course precluded decisions grounded solely on notions of arbitrators. Such decisions, which have justly been unsparingly denounced, have at times been rendered in the name of "equity"; they have revealed a weird perversion of that term; and they have resulted in a prostitution of the high purposes of the law.

Fred K. Nielsen.*


Few, if any works have been written that cover the field so fully in such a short space as does Professor Bemis's comprehensive and erudite history of American diplomacy. Too, his style is such that it makes easy and interesting reading for the layman as well as a valuable source book for the specialist.

† Late American Agent, Pious Fund Case; Umpire, Italian-Venezuelan Claims Commission.

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Professor Bemis's history begins at an earlier period than do most writers on the same field—America as the stakes of European diplomacy from 1492 to 1775. Then he reverts to the style so commonly employed, that of combined chronological and topical order. It is difficult to determine, but a history of our foreign relations, presented in a purely restricted topical form, would be perhaps of greater value to a student than Professor Bemis's arrangement. A student of foreign relations would then be able to trace the history and development of a cardinal foreign policy, for example, our neutrality policy from the beginning to the present controversy without being led astray by the inclusion of other material.

This history, although a remarkable narration of the facts, contains certain passages wherein the author digressed from his forward movement to express his own opinions and to suggest other paths than those followed by our Government. The author's opinions are valuable and they offer much "food for thought", but the inclusion of them seems to detract from the historical value of the work. This advice would have made excellent material for another publication.

In bringing the narration to 1936, the author has neglected to mention one important item. He writes of our resumption of normal diplomatic relations with Soviet Russia and he very studiously enumerates the conditions laid down in a series of notes exchanged between President Roosevelt and Mr. Litvinoff, but he fails to record the exchange of notes between the two Governments in 1935, in which the United States protested to Soviet Russia that she had violated her pledge not to permit anti-American activities, or the Soviet reply, which was generally regarded as a sharp rebuke to our Government, refusing to entertain the complaint and very audaciously explaining to our State Department that the Soviet Government never assumed any obligations as regards the Communist International. Surely this was an event of enough importance to warrant consideration in a work that carefully explains the diplomatic blunders and mistakes of the United States.

Another word of praise must be said for the book. It is interspersed with instructive, intelligible maps and diagrams which serve both to condense and clarify otherwise technical material. The extensive index also makes it extremely valuable as a quick reference source.

Marlin S. Reichley.


In recording any period of national history, unless the reason for the work, or its central thesis, is the biography of an individual or the recounting of a series of events such as constitute a war, it is difficult to bind the work together with an adequate theme. James Truslow Adams achieved such a goal in The Epic of * Assistant Librarian, School of Foreign Service, Georgetown University.
America, wherein his thesis was the westward movement of the American frontier. Claude Bowers in The Tragic Era pursued successfully the theme of the Reconstruction Period. Here Miss Tarbell’s theme is clear—the nationalizing of the business, industrial and agricultural, of the United States—but that theme unfortunately is as broad as the history of the period itself and consequently suffers from too brief treatment. To one who has had no previous knowledge of the period, the book simply provides a guide for his future reading—though there is no doubt that its style is such that he is made eager to probe further. To one with a more complete knowledge of the twenty years the book simply consolidates into one brief volume the “headnotes” of that historic period.

There is passing reference and discussion—with a full recognition of their importance—of many of the important cases which arose from the beginning of federal regulation of interstate commerce, the attempts to curb monopoly and to lessen the burdens of unequal taxation, and other historic occurrences of the period. Thus the Standard Oil—marking the beginning of the war upon the Oil Trust—and the American Sugar Refining Company—approving the final set-up of the Sugar Trust—cases (State v. Standard Oil Co., 49 Ohio 137 [1932]; U. S. v. E. C. Knight Co., 156 U. S. 1 [1895]) are discussed; the state regulation of Railroad Rates Cases (Peik v. Chicago & Northwestern RR. Co., 94 U. S. 164 [1876]; reversed by Wabash, St. Louis & Pacific Ry. v. Illinois, 118 U. S. 557 [1895]), which clearly indicated the necessity for federal regulation of interstate rates, and the cases invalidating the Federal Income Tax Law (Pollock v. Farmers Loan & Trust Co., 157 U. S. 429, 158 U. S. 601 [1895]) are among those which received attention.

It is in the unfolding of particular events that the author excels, and thus it is that her exegesis of the policies of the Western Union Telegraph Company during its adolescence, together with its battles (as a result of those policies) with the Bell Telephone Company and the Postal Telegraph Company, form an interesting chapter of the book. So the chapter entitled Electricity Invades Industry is a vivid picture of the successes achieved by Westinghouse, Edison, Henry Villard, Frank J. Sprague and others, while the struggles between capital and labor, and the growth of the political power of organized labor and agriculture (which fill several chapters) are detailed in a well-ordered arrangement. Although the treatments of the tariff and silver situations are graphic they are far too abbreviated to be of value except as general summaries.

As an outline of an epochal period of American history the book is valuable; as a reminder that “there is nothing new under the sun” (because the depression of the 1890’s was strikingly similar in its results to the one recently undergone) it is timely, but as the history of the 20 years (except as a text book or a guide for further research) it is incomplete. Because of the fact (and perhaps here lies the root of the difficulty) that the book is Volume IX of the series A History of American Life, which purports to cover in twelve volumes the complete history of the
United States, many footnotes are used as cross references to the other volumes of the series. Authorities are generously cited throughout the book, and it is illustrated with contemporary cartoons, drawings and photographs.

J. N. S., Jr.


Although Mr. Tutt needs no introduction to the millions who turn the pages of the Saturday Evening Post, Dean John H. Wigmore of the Northwestern University's Law School here gives him what is termed a "salutation". And to this high honor has been added a series of annotations, one for each of the twenty-six stories, or cases, which comprise Mr. Tutt's Case Book. The result is a volume which looks like a case book, externally at least; but neither an introduction by the author of the monumental Treatise on the Anglo-American System of Evidence in Trials at Common Law nor annotations by a member of the New York Bar can make this book anything but what it is: a collection of Mr. Train's good stories.

Dean Wigmore suggests that these tales "give a realistic expression to the contrast . . . between the rule of Law that forms the ostensible issue in the litigation and the merits of the parties when all the circumstances are considered—in short, the Justice of the case". Mr. Train says that Mr. Tutt "enjoyed the law as a science and delighted in it as a craft, joyfully uniting science and craft in a scientific craftiness in which, inevitably, a pleasant time was had by all"—except his opponents. It seems to me that these two quotations sum up Mr. Train's philosophy and purpose—a purposeful philosophy—for beyond peradventure of a doubt, he seeks a Law that will bring justice to rich and poor alike. Mr. Tutt always achieves this result, albeit by technicalities which are usually denounced as defects of the law. In his hands, however, they truly become shields for the defence of the innocent and swords for the punishment of wrong-doers.

The practicing lawyer must sigh on reading these stories because he cannot, like Mr. Train, build his facts to fit the law he plans to invoke; but I agree with the publishers that he can at least "learn something from the experiences of shrewd old Ephraim Tutt". The law student, too, will find Mr. Tutt a more "genial and entertaining instructor" than most of those whom he will meet in the law school; and a perusal of Mr. Wolf's careful annotations will certainly profit him, although in themselves they may perhaps not afford him an adequate preparation for the bar.

M. P. S.

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BOOKS RECEIVED

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


PAMPHLETS AND PERIODICALS


