PROVISIONS IN CORPORATE CHARTERS AND BY-LAWS GOVERNING THE INSPECTION OF BOOKS BY STOCKHOLDERS*

Samuel M. Koenigsberg†

I. INTRODUCTION

This study is an attempt to describe one of the phases of the concentration of control in America's large corporations, and of the conflict in interest between corporate management and the stockholder which often accompanies it.

The attainment and maintenance of control may be achieved through a variety of methods. The increased use of non-voting stock has been one device; the disparity in capital contributions between the "control" group and the "outsiders" has been another. The various acts administered by the Securities and Exchange Commission and such proposals as the Federal Licensing Bill,1 have in large measure been directed at the prevention or amelioration of some of the injurious results of these and other by-products of the development of the modern corporation. This study will examine a further consequence of the concentration of control: the efforts of management to regulate a fundamental right of the stockholder—his right to examine the books of the corporation whose shares he holds.

"The basis of the right of stockholders to inspect the books and records is the ownership of the corporate property and assets through ownership of shares; as owners, they have the right to inform themselves as to the management of their property by the directors and officers who are trustees in direct charge of the property."2 This is the traditional basis of the stockholders' right to inspect corporate books.

---

*The statements contained in this article represent solely the personal views of the writer. The assistance of several friends in the preparation of this study is gratefully acknowledged.

†A.B., 1933, Columbia College; LL.B., 1934, Columbia Law School; Member of the Bar of the State of New York; Attorney, Securities and Exchange Commission.


The corporation is their property; they have a concomitant right to look into its affairs.

The right has its limitations. A stockholder cannot, under the guise of protecting his interests, be permitted to inspect the books for the purpose of harassing the officers or to serve ends hostile to the corporation. Some form of regulation is necessary to assure that the right will not be abused. The common law rule limited the examination of books by a stockholder to reasonable times and places and for proper purposes. Some statutory provisions on the subject are declarative of the common law. Others vary from it. Some in turn have been modified by the courts. In a large number of instances, however, the right is defined in the corporation's charter or by-laws. This introduces a new element into the situation. For the charter and the by-laws are instruments of corporate management. The charter, either when enacted by a legislature or when filed under a general incorporation statute, is drafted by the promoters of the corporation or their lawyers. The same holds true of the by-laws. The promoters and their successors in the management of the corporation are normally interested in having their conduct of corporate affairs free from "outside interference," and these desires are often embodied in the charter and by-laws, which regulate the rights of the stockholders vis-à-vis the corporation and vis-à-vis its management.

This inquiry proposes to examine such provisions in the charters and by-laws of 100 of the largest American corporations. These firms comprise one half, selected at random, of those studied in The Distribution of Ownership in the 200 Largest Non-Financial Corporations. The 100 corporations form an important segment of the American economy. Their assets total about $35,000,000,000. Their names are household words. Their security holders are legion. The rights of these security holders to examine the books and records of these corporations as granted by the charters and by-laws form the subject matter of this study.

---

*Guthrie v. Harkness, 199 U. S. 148 (1905); In re Steinway, 159 N. Y. 250, 53 N. E. 1103 (1899).*


*Birmingham News v. State ex rel. Dunston, 207 Ala. 440, 441, 93 So. 25 (1921); Chas. A. Day & Co. Inc. v. Booth, 123 Me. 443, 123 Atl. 557 (1924).*


*Temporary National Economic Committee, Mono. No. 29, 76th Cong., 3d Sess. (1940).*

The corporations are listed in an appendix. Six of the 100 corporations are not registered with the Securities and Exchange Commission, and their charters and by-laws are not on public file there. These corporations graciously consented to the writer's use of these documents submitted by them to the Temporary National Economic Committee, or else furnished the relevant information to him directly. The writer expresses his appreciation for these courtesies.
A large number of these corporations, it will be shown, are silent on the question of inspection by the stockholders. A very small number have charter and by-law provisions more liberal toward the stockholders in some respects than the letter of the law requires. A somewhat larger number follow the language of the governing statute on one or more phases of the right to inspect. But in a substantial number of cases the examination will reveal how, by means of provisions in the charter and by-laws, limitations are sought to be imposed on the stockholders' rights, limitations often so drastic that the courts refuse to enforce them. And yet they were undoubtedly intended by their draftsmen to be taken at their face value, and undoubtedly have been so accepted by a large number of stockholders.

The study, therefore, reveals the ways in which management, through its authorship of the provisions of corporate documents, is often enabled to limit the rights of minority stockholders and correspondingly increase the powers of the group in control.

II. PREVALENCE OF PROVISIONS

Of the 100 corporations whose charters and by-laws were studied forty-eight have no provisions of any nature in either document governing the inspection of books by the stockholders. In these cases, the stockholders' right of access to the corporate books is obviously governed by the statutes on the subject or in their absence by the common law.

A provision governing inspection is apt to appear in charters and by-laws of more recently organized corporations rather than those established in earlier days. This is part of a broader trend toward a more specific definition of the rights of stockholders which has paralleled the increased use of the corporate device. A summary of the presence or absence of inspection provisions is chronologically set forth in the following table:

<table>
<thead>
<tr>
<th>Date of incorporation</th>
<th>No. of corporations</th>
<th>No. of corporations with no inspection provisions in charter or by-laws</th>
<th>No. of corporations with inspection provisions in charter or by-laws</th>
<th>Percent 4 of 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>- 1870</td>
<td>9</td>
<td>7</td>
<td>2</td>
<td>22.3</td>
</tr>
<tr>
<td>1871 - 1880</td>
<td>2</td>
<td>2</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>1881 - 1890</td>
<td>6</td>
<td>5</td>
<td>1</td>
<td>16.7</td>
</tr>
<tr>
<td>1891 - 1900</td>
<td>14</td>
<td>8</td>
<td>6</td>
<td>44.9</td>
</tr>
<tr>
<td>1901 - 1910</td>
<td>14</td>
<td>11</td>
<td>3</td>
<td>21.4</td>
</tr>
<tr>
<td>1911 - 1920</td>
<td>29</td>
<td>9</td>
<td>20</td>
<td>69.0</td>
</tr>
<tr>
<td>1921 - 1930</td>
<td>23</td>
<td>5</td>
<td>18</td>
<td>78.3</td>
</tr>
<tr>
<td>1931 - 1940</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td>66.7</td>
</tr>
<tr>
<td>TOTAL</td>
<td>100</td>
<td>48</td>
<td>52</td>
<td></td>
</tr>
</tbody>
</table>
The sequence of percentages in column 5 indicates that in more recent times there has been a greater tendency to include a provision on inspection than was formerly the case. Furthermore if column 4 in the table were to enumerate only charters with inspection provisions, without reference to by-laws, this trend would be even more apparent, as the following table indicates:

**Chronological Distribution of Corporations Where Charter Contains Inspection Provision**

<table>
<thead>
<tr>
<th>Date of Incorporation</th>
<th>Number of Corporations</th>
<th>Charters Containing Provision</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>1870</td>
<td>9</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1871-1880</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1881-1890</td>
<td>6</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1891-1900</td>
<td>14</td>
<td>2</td>
<td>14.3</td>
</tr>
<tr>
<td>1901-1910</td>
<td>14</td>
<td>3</td>
<td>21.4</td>
</tr>
<tr>
<td>1911-1920</td>
<td>29</td>
<td>17</td>
<td>58.6</td>
</tr>
<tr>
<td>1921-1930</td>
<td>23</td>
<td>15</td>
<td>65.2</td>
</tr>
<tr>
<td>1931-1940</td>
<td>3</td>
<td>2</td>
<td>66.7</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100</strong></td>
<td><strong>39</strong></td>
<td></td>
</tr>
</tbody>
</table>

Until 1890, the table demonstrates, the corporate charters studied contained no provisions on inspection. Among corporations formed since then an increasing proportion of charters includes some such regulation: 14.3 per cent of the charters of firms incorporated in 1891-1900, 21.4 per cent in 1901-1910, 58.6 per cent in 1911-1920, 65.2 per cent in 1921-1930, and 66.7 per cent in 1931-1940.⁹

A comparison of this with the previous table indicates that the trend toward including a provision on inspection is more marked if charters alone are considered rather than charters and by-laws together. There is good reason for this. The by-laws constitute a more flexible set of regulations than the charter, and they can be amended and added to with

⁹A word of explanation is in order as to the meaning of the date of incorporation. In very few cases does this date refer to the actual formation of the business organization. In most of the cases, an incorporation occurred upon the merger or consolidation of several companies, possibly very sizeable ones, or upon the recapitalization of a firm already in existence for some time. The three firms incorporated during 1931-40, for example, are Consolidated Edison Company of New York, General Telephone Corp., and a trust not registered with the Securities and Exchange Commission. The properties of these new corporations were all going concerns before the incorporation dates. A summary of the occurrences or the non-occurrences of certain charter or by-law provisions by dates of incorporation therefore reflects trends in the rights granted by these documents over a period of time and bears no necessary relation to the existence or non-existence of the business organization as such.
far greater ease and less of the corporate formalities than are required in altering charters. In addition, from the rarity of the appearance of provisions regulating stockholders' rights to inspect, it would seem that in the earlier decades under review, draftsmen of corporate charters were little concerned with the question of inspection. It is probable that this lack of concern extended as well to the drafting of by-laws. While it is impossible to learn the dates of enactments of various by-laws, it is a safe assumption that because of these factors many of their provisions are of more recent adoption than the charters of their corporations. It is likely, therefore, that in cases where the charter does not contain an inspection provision while the by-laws do, the latter were added well after the date of incorporation. The frequency of the occurrence of the provision in the by-laws of older corporations is therefore subject to some discount.

The prevalence of inspection provisions in by-laws is indicated in the following table:

<table>
<thead>
<tr>
<th>Date of Incorporation</th>
<th>No. of Corporations</th>
<th>By-Laws Containing Provision</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>- 1870</td>
<td>9</td>
<td>2</td>
<td>22.3</td>
</tr>
<tr>
<td>1871 - 1880</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1881 - 1890</td>
<td>6</td>
<td>1</td>
<td>16.7</td>
</tr>
<tr>
<td>1891 - 1900</td>
<td>14</td>
<td>6</td>
<td>42.9</td>
</tr>
<tr>
<td>1901 - 1910</td>
<td>14</td>
<td>1</td>
<td>7.1</td>
</tr>
<tr>
<td>1911 - 1920</td>
<td>29</td>
<td>11</td>
<td>37.9</td>
</tr>
<tr>
<td>1921 - 1930</td>
<td>23</td>
<td>13</td>
<td>56.5</td>
</tr>
<tr>
<td>1931 - 1940</td>
<td>3</td>
<td>2</td>
<td>66.7</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100</strong></td>
<td><strong>36</strong></td>
<td></td>
</tr>
</tbody>
</table>

According to this table the prevalence of an inspection provision in by-laws shows an increase during the period summarized, but the trend is irregular, and is not as marked as the trend in charters. For the reasons indicated above, there is reason to believe that the inspection provision in the by-laws of the older firms may have been added some time after their incorporation, and this may account for the difference between the two trends.

Geographically, the corporations with no inspection provisions in either charter or by-laws are distributed as follows:
### Geographical Distribution of Corporations With No Inspection Provisions

<table>
<thead>
<tr>
<th></th>
<th>Private charter</th>
<th>Legislative grant</th>
<th>Both</th>
<th>Total of Corporations</th>
<th>Private charter</th>
<th>Legislative grant</th>
<th>Both</th>
<th>Total of Corporations with no inspection provisions in charter or by-laws</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Delaware</td>
<td>27</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Illinois</td>
<td>3</td>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kansas</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maine</td>
<td>4</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maryland</td>
<td>412</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Massachusetts</td>
<td>2</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Michigan</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Minnesota</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Missouri</td>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Montana</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nevada</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>11</td>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York</td>
<td>1513</td>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>6</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>6</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Utah</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Washington</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>88</td>
<td>11</td>
<td>1</td>
<td></td>
<td>40</td>
<td>7</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td><strong>Grand Total</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>100</td>
<td></td>
<td>48</td>
<td></td>
</tr>
</tbody>
</table>

Worth noting in this table is the fact that of the twenty-seven Delaware corporations in the 100 studied, all but one have some specific regulation on the matter of inspection. This too is linked with the relative recency of inspection provisions, since only one of the twenty-seven Delaware firms was incorporated prior to 1911. (This, however, is not the firm which omits the provision.) The frequency of the appearance of firms incorporated by an act of the legislature among those with no inspection provisions, is due, on the other hand, to the fact that such firms are the older ones, all having been organized prior to 1900.

The absence of inspection provisions among Pennsylvania firms is probably due to the short-form charter commonly used in that state, which, setting forth only information specifically required by the general

---

10A charter filed by individuals pursuant to a general incorporation statute.

11A charter enacted by a state legislature.

12Including one also incorporated in Pennsylvania.

13Including one also incorporated in New Jersey.
law, does not mention inspection.  

III. CONTENT OF PROVISIONS

Regulation of the stockholders' rights of access to a corporation’s books in charters and by-laws falls in the main into two categories. One group of provisions grants to the directors the power to regulate these rights and concomitantly denies any rights of inspection to the stockholders except as are conferred by statute or by a resolution of the directors or the stockholders. Another group of provisions requires the production of stockholder lists for a specified interval before and during stockholders’ meetings. These two types of provisions compose the great bulk of corporate regulations on the inspection of books in the corporations under study. There are also a minor number of miscellaneous rules not within these categories. The latter will be dealt with first in the following discussion.

A. MISCELLANEOUS

1. Liberal provisions

One corporation organized under the laws of Maine grants its stockholders relatively broad rights of inspection. The charter of this corporation, dated October 7, 1915, and an amendment dated January 10, 1929, both contain the following provision, unique among the 100 charters and by-laws:

"The books of account of the Company and its record books and the reports upon all . . . audits shall be open and free for examination to all the stockholders of the Company at all reasonable hours."

This is the only instance among the 100 corporations studied in which the rights of inspection are granted by the charter to all stockholders and in which the books of account and record books are directed to be open to examination.

The terms "books of account" and "record books," used in the charter, are obviously comprehensive in scope. The former, it would seem, includes all corporate accounts and the latter, in addition to accounts, apparently includes minute books, books containing stock subscriptions and accounts, stock transfers, stock certificates, etc. In addition there is some authority indicating that even "business documents" and

---

15 This explanation, however, does not account for the absence of the provision in the by-laws.
16 The Cudahy Packing Company, Art. II.
18 In re Citizens Savings & Trust Co., 156 Wis. 277, 145 N. W. 646 (1914).
contracts\textsuperscript{19} are comprehended in these terms, which would thus embrace corporate documents of practically every description.\textsuperscript{20}

**The Law of Maine on Inspection Rights**

The Maine statute in effect at the time of the incorporation of this firm granted the stockholders rights broader than those accorded under the common law. It provided that:

"All corporations existing by virtue of the laws of this state, shall have a clerk who is a resident of this state, and shall keep, at some fixed place within the state, a clerk's office where shall be kept their records and a book showing a true and complete list of all stockholders, their residences, and the amount of stock held by each; and such book, or a duly proved copy thereof, shall be competent evidence in any court of this state to prove who are stockholders in such corporation and the amount of stock held by each stockholder. Such records and stock-book shall be open at all reasonable hours to the inspection of persons interested, who may take copies and minutes therefrom of such parts as concern their interests. . . ."\textsuperscript{21}

In litigation under this provision prior to the incorporation of this company, and in fact until a subsequent reversal of the trend of Maine cases,\textsuperscript{22} the statute received an almost literal interpretation. The pur-


\textsuperscript{20}Reports upon audits" will be discussed below.

\textsuperscript{21}ME. REV. STAT. (1930) c. 56, § 32. The discussion of the Maine statute and cases on inspection is included here because it sheds light on the probable interpretation of the charter provision. Whether the Maine law will govern in actions for inspection of this corporation's books brought in some other jurisdiction, however, is not certain. "The remedy (when inspection is desired) is properly sought in the forum where the records are kept, since otherwise the right would be unenforceable, but the courts are in direct conflict as to whether the right (to inspect) is to be determined by the laws of the forum, or those of the state in which the corporation is chartered." S Fletcher, op. cit. supra note 2, § 2229. The alternative to discussing the Maine law, then, would be to discuss the law of several jurisdictions as it affects the charter under consideration. The size of such a task, however, makes it inappropriate, and the discussion is accordingly confined to the law of the state of incorporation.

\textsuperscript{22}Charles A. Day & Co., Inc. v. Booth, Same v. Drummond, Same v. Farnham, 123 Me. 443, 123 Atl. 557 (1924). Petitioner, a brokerage firm employed in dealing chiefly in unlisted and inactive securities, held a single share in each of three Maine corporations, and sought by mandamus to compel the clerks of the corporations to grant it access to the stock books for the purpose of copying the stockholders' lists for use in its business. There was evidence that the petitioner secured a large number of stockholders' lists by this method and circulated them, and then disposed of the stocks it had acquired for this purpose. Held, all Maine cases heretofore have regarded possession of one or more shares of stock sufficient to establish the petitioners as "persons interested" within the meaning of the statute. But where the stockholding is only colorable or solely for maintaining proceedings of this kind, the petitioner cannot be regarded as a "person interested," entitled as of right to inspect and take copies. Mandamus denied.

The Court thus impliedly overruled Knox v. Coburn, 117 Me. 409, 104 Atl. 789 (1918) and Day v. Booth, 122 Me. 91, 118 Atl. 899 (1922), in both of which partners of Charles
pose of the inspection, it was held, was not material.\textsuperscript{28} The inspection need not relate to the interest of the stockholder as stockholder.\textsuperscript{24} Both of these rulings are contrary to the common law on inspection by stockholders.\textsuperscript{25} The only judicially imposed limitation was when the inspection was requested "merely to serve curiosity, or to promote a vexatious or unlawful purpose," in which case the right to inspect would be denied.\textsuperscript{26} It is probable that the broad grant to all the stockholders of the right to examine books of account and record books in the charter of the Maine corporation under consideration would be subject to a parallel judicial interpretation. In other words, a refusal by the management to permit inspection where the bad faith of the stockholder was evident would be sustained by the courts despite the absolute charter provision granting inspection with no limit as to circumstances.\textsuperscript{27}

The Maine courts have also held that under the statute the right to make copies of entries in corporate records and the stock book does not parallel the right to examine them. The right to inspect is unlimited, while the right to take copies and minutes is limited to such parts as concern the stockholders' interests.\textsuperscript{28} This ruling, too, would probably be applied by the Maine courts to the provision of the charter, which, it should be noted, makes no provision at all for copying the records and accounts examined.

\textit{The Right to Inspect "Reports Upon Audits"}

The right of the stockholders to inspect "reports upon audits," included in the above-quoted extract from the corporation’s charter, refers to another unique provision in the charter of this company. The preferred stock of the company has special voting rights exercisable only under specified contingencies. Chief among these is the failure to pay dividends on the preferred stock when net earnings reach certain stated amounts or proportions. On the question of the calculation of net earn-

A. Day & Co. (later, under its subsequently acquired corporate name, the petitioner in the case digested above), successfully sought authority to copy stock lists for purposes identical to those in this case. In both the earlier cases it was admitted that the petitioners would use the lists in their brokerage business, and the Court, applying only the test of whether the purpose was "vexatious, improper, unlawful or inimical to the interests of either the corporation or its stockholders," found that it was not and granted the writs.

\textsuperscript{28}White v. Manter, 109 Me. 408, 84 Atl. 890 (1912).

\textsuperscript{24}Ibid.; Withington v. Bradley, 111 Me. 384, 89 Atl. 201 (1914); Knox v. Coburn, 117 Me. 409, 104 Atl. 789 (1918); Day v. Booth, 122 Me. 91, 118 Atl. 899 (1922).

\textsuperscript{25}FLETCHER, op. cit. supra note 2, §§ 2218 and 2219.

\textsuperscript{26}White v. Manter, 109 Me. 408, 84 Atl. 890 (1912); Withington v. Bradley, 111 Me. 384, 387, 89 Atl. 201 (1914); compilation of a "sucker list" was refused in Eaton v. Manter, 114 Me. 259, 95 Atl. 948 (1915).

\textsuperscript{27}Wyoming Coal Mining Co. v. State ex rel. Kennedy, 15 Wyo. 97, 87 Pac. 337 (1905).

\textsuperscript{28}White v. Manter, 109 Me. 408, 84 Atl. 890 (1912); Withington v. Bradley, 111 Me. 384, 89 Atl. 201 (1914).
The books of account of the Company shall be prima facie evidence of the amount of the net earnings of the Company, during any year, and shall be final and conclusive upon the Company and all of its stockholders as to the Company's net earnings during, and surplus at the end of, said year, unless an audit of such books, covering the business of said year, shall be requested of the Company, in writing, within ninety (90) days after the end of the respective year, by the holder or holders of at least one-fourth (¼) in amount of the outstanding shares of the Company's preferred stock. In case any such request for an audit of said books shall be made, said books shall not be final and conclusive as to the year for which the audit is so requested. Such audits of the books of the Company, when requested as aforesaid, shall be made either by Price, Waterhouse & Company, or Arthur Young & Company, or some other responsible public accountant or firm of accountants, according as the stockholders making the request for an audit and the Company may agree, and if they are not able to agree, the respective audit shall be made by such responsible public accountant or firm of accountants as the President, or, in his absence, the Vice President, of the Northern Trust Company of Chicago shall nominate.

In the event that such request for audit is at any time made, the respective audit shall be made as soon as reasonably practicable, and the report upon such audit shall be final and conclusive upon the Company and all its stockholders as to the amount of net earnings made and surplus accumulated by the Company during the year covered by the respective audit. If the result of the respective audit does not show that the net earnings of the Company for the respective year are Ten Thousand Dollars ($10,000) more than the net earnings for such year as shown by said books, then the expense of such audit shall be paid by the holders of the preferred stock requesting the audit; but if the audit shows that the net earnings of the Company for the respective year are more than Ten Thousand Dollars ($10,000) in excess of the net earnings as shown by said books, or if such audit shows that the surplus accumulated by the Company during the respective year exceeds by more than Ten Thousand Dollars ($10,000) the amount of such surplus as shown by said books, then the expense of the respective audit shall be paid by the Company.”

It is the reports under these audits that, by the previously quoted provision in the charter and the amendment, are to be “open and free for examination to all the stockholders of the Company at all reasonable business hours,” along with the company’s books of account and its record books. While an independent periodic audit of the books of certain types of corporations is now provided for by Federal statute and regulation, this charter provision goes beyond that requirement in giving the shareholders requesting the audit some voice in the selection of

---

the accountant. The provision is unique among those governing disclosures to stockholders in the 100 corporations studied. Its rationale has found recent approval in the recommendation of the Securities and Exchange Commission to have auditors elected by a vote of the stockholders, and in the veto power over the directors’ selection of an accountant accorded the stockholders by the Investment Company Act.30

Further instances of a grant by the charter or by-laws of broader rights to inspect than are granted by statute will be found in the subsequent discussion of access to stock books.

2. Provisions following statutory language

Some corporations model their provisions defining the stockholders’ inspection rights upon the statutes of the state of their incorporation. This practice is more frequently encountered in regulations governing access to the stock book or to stockholders’ lists. The by-laws of an Illinois corporation,31 however, adopt the statutory language to regulate inspection of “books and records of account, minutes and record of stockholders,” and repeat the statute literally. The statutory provision follows:32

“Books and Records. Each corporation shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of its shareholders and board of directors; and shall keep at its registered office or principal place of business in this State, or at the office of a transfer agent or registrar in this State, a record of its shareholders, giving the names and addresses of all shareholders and the number and class of the shares held by each. Any person who shall have been a shareholder of record for at least six months immediately preceding his demand or who shall be the holder of record of at least five per cent of all the outstanding shares of a corporation, shall have the right to examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, its books and records of account, minutes, and record of shareholders, and to make extracts therefrom. A record of shareholders certified by an officer or transfer agent shall be competent evidence in all courts of this State.”

The statute and the by-law modeled upon it limit the common law rule in requiring record ownership of stock for a period of six months or, as an alternative, record ownership of five per cent of the shares. On the other hand the probable judicial interpretation of “books and records of account” will include all corporate documents.33 The statute appears to

---

30S. E. C., Report on Investigation, In the Matter of McKesson & Robbins, Inc. (1940) 365 et seq. The Investment Company Act § 32(a), 54 Stat. 838, 15 U. S. C. § 80a-31(a) (Supp. 1940), requires the ratification by the stockholders of the directors’ selection of an independent public accountant in the case of management and face-amount certificate companies, and authorizes the termination of employment and the removal of such accountant by a majority of the shares of beneficial interest in the case of common law trusts.
32JONES, ILLINOIS STATUTES 32.045; BUSINESS CORPORATION ACT, § 45.
strike a just balance between the interests of the stockholders and the management. In such a case, basing the charter or by-law provision on the statute seems a sensible and fair method of defining the stockholders’ rights.

3. Reports to Stockholders

The requirements of the Acts administered by the Securities and Exchange Commission on periodic reports and proxy statements have encouraged corporations to make their reports to stockholders much more complete than the corporate regulations require. These provisions and, of course, the registration procedure under the statutes have resulted in a wide dissemination of corporate information. Provisions in charters and by-laws affecting reports to stockholders nevertheless merit a brief discussion at this point, as part of the general question of the disclosure of information to stockholders. Because they constitute a subject distinct from the matter of inspection, however, the provisions on reports to stockholders were not included in the statistics on the prevalence of inspection provisions previously discussed.

The most specific provisions on the subject among those encountered appear in the by-laws of two Delaware corporations and a Massachusetts corporation. One Delaware firm’s provision is:34

"The Board of Directors shall publish and submit to the stockholders, at least fifteen days in advance of their Annual Meeting, a statement of the physical and financial condition of the Corporation, a consolidated income account of the Corporation, and its subsidiary companies, covering the previous fiscal year, and a consolidated balance sheet showing the assets and liabilities of the Corporation and its subsidiary companies at the end of the preceding fiscal year. The Board of Directors shall also publish semi-annually a consolidated income account and balance sheet of the Corporation and its subsidiary companies."

Another Delaware corporation’s by-law provides:35

"The President shall make and present to the annual meeting of stockholders a report showing a Balance Sheet and an Income Statement for the preceding fiscal year. A copy of such report shall be mailed to each stockholder of the corporation at least fifteen days in advance of the annual meeting of the Corporation. Such report may also contain such other information and may be in such detail as the President and Board of Directors may determine in their absolute discretion."

The Massachusetts firm’s provision is:36

"There shall be submitted to the stockholders at every annual meeting thereof a statement of the earnings of the Company and its subsidiaries for the previous fiscal year and a statement of the assets and liabilities at the end of such year,

34General Motors Corporation, Art. VIII, § 1.
35The Commonwealth & Southern Corporation, Art. 43.
such statements to be upon a consolidated basis or by separate companies or partly consolidated and partly separate as the Board of Directors may decide.\textsuperscript{39}

There are no directions, however, as to how detailed these statements are to be, and the directors naturally have great latitude in preparing them. This is even more true of two other Delaware corporations, which provide in their by-laws\textsuperscript{87} that the board of directors

"shall make a report and render an account to the annual meeting of the stockholders showing, in detail, the condition of the property and the financial affairs of the Company. . . ."

Some other corporations have by-laws of the same general effect,\textsuperscript{38} and one has an ancient charter, granted by the legislature, with a somewhat similar provision.\textsuperscript{39} In these last-noted instances there is a duty laid on the officers or directors to "report" or to "report in detail" or to prepare a "clear and distinct statement" of the corporation's affairs. The content of the reports, however, rests in the discretion of the individuals directed to prepare them and need disclose only what they choose to disclose.

This is true also of requirements of reports which appear in by-laws setting forth the order of business to be followed at stockholders' meetings. Seventeen of the by-laws studied contain prescriptions on the order of business, sixteen of which include "reports" as one of the items, but without further provision as to their content. Such regulations are of little value in insuring adequate knowledge by the stockholder of his corporation's affairs.\textsuperscript{40}

The proxy rules of the Securities and Exchange Commission\textsuperscript{41} require the submittal of comprehensive financial information to stockholders where proxies are solicited for the authorization and issuance of securities,\textsuperscript{42} for the modification of securities or their exchange for outstanding securities,\textsuperscript{43} for plans of liquidation, dissolution and formal or informal mergers and consolidations,\textsuperscript{44} and possibly under certain other circum-

\textsuperscript{39}Cities Service Company, Art. III, \$ 1; Phillips Petroleum Company, Art. III, \$ 1.
\textsuperscript{38}International Telephone & Telegraph Company, Art. III, \$ 2; The Kansas City Southern Railway Company, Art. III, \$ 6, Art. XVI, \$ 7; International Shoe Company, Art. VIII, \$ 6.
\textsuperscript{39}The Baltimore & Ohio Railroad Company, General Assembly of Maryland, Act of February 28, 1827, \$ 9.
\textsuperscript{40}The state statutes requiring the filing of periodic reports with state regulatory bodies or the furnishing of such reports to stockholders are usually of as little help in securing a comprehensive financial picture of the corporation as are the charter and by-law provisions. See statutes cited in Utility Corporations, infra note 4, pp. 335-348; 5 Fletcher, op. cit. supra note 2, \$ 2272a, n. 386; cf. Payne, Effect of Recent Laws on Accountancy (1935) 10 Accounting Rev. 84, 87.
\textsuperscript{42}Regulation X-14, Schedule 14A, D, Item 9(e).
\textsuperscript{43}Id. Item 10 (f).
\textsuperscript{44}Id. Item 11(e) (2).
stances. The solicitation of proxies in connection with a routine stockholders' meeting, at which the only matter of importance is the election of directors, need not be accompanied by financial statements or other reports as to the company's condition.

The proxy rules apply to solicitations in connection with securities listed on an exchange, securities of registered holding companies or subsidiaries, and securities of registered investment companies. The submittal of financial information of a specified character to security holders is also required in the case of registered investment companies and in the case of debt securities issued under an indenture qualified under the Trust Indenture Act. There remains a large area of corporate activity, however, where there are no requirements that stockholders be informed of their company's activities or financial condition. The charter provisions, as the discussion indicated, are of little assistance to the investor in this respect.

B. REGULATORY RIGHTS GRANTED DIRECTORS—ACCESS DENIED STOCKHOLDERS


Forty-two of the 100 corporations have a provision in the charter, the by-laws, or both, making the right of the stockholder to inspect the corporate books subject to regulation by the directors. Twenty-one of the forty-two have the provision in their charters, seven in their by-laws, fourteen in both.

Of the total of thirty-five charters in which the provision appears, one subordinates the directors' powers to the statutory provisions, and one to a resolution by the stockholders. Eight of the thirty-five except the stock book from the directors' powers. The charter of a thirty-sixth corporation grants the directors the power to regulate the inspection of the minute book and of books of account, and makes no mention of other

---

48 Id. § 30(d), 54 Stat. 836, 15 U. S. C. § 80a-29(d) (Supp. 1940).
50 On the inadequacy of reports to stockholders, see Kaplan and Reaugh, Accounting, Reports to Stockholders, and the S. E. C. (1939) 48 Yale L. J. 935.
corporate documents. Fifty-One

Twenty-one by-laws of these 100 corporations similarly grant the power to regulate the inspection of books to the directors. In the case of fourteen of these twenty corporations the provisions in the by-laws substantially duplicate those in the charters. In the remaining seven cases, the provision appears in the by-laws alone. In six of the twenty-one by-law provisions, books and records which are by statute open to inspection are excepted from the regulatory powers of the directors. In one of the by-laws the power to regulate access to the books is conferred upon the executive committee of the corporation as well as upon its directors. The corporation referred to in the previous paragraph whose charter makes the regulatory power of the directors subject to a resolution of the stockholders has a somewhat similar provision in its by-laws.

It is almost standard practice to link the directors' powers to regulate inspection with the limitation of the stockholders' rights in that respect. A recurrent provision in the charters reads somewhat as follows: Fifty-Two

"In furtherance, but not in limitation of the powers conferred by law, the Board of Directors are expressly authorized . . . from time to time to determine whether and to what extent, and at what times and places, and under what conditions and regulations the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders . . ."

This is the clause the frequency of whose occurrence has just been discussed. The charter provision then continues:

". . . and no stockholder shall have any right to inspect any account or book or document of the corporation, except as conferred by statute or authorized by the Board of Directors or by a resolution of the stockholders."

A clause substantially to this effect appears in the charter or by-laws of thirty-six corporations. In twenty-three it appears in their charter, in four in their by-laws, in nine in both. It appears in thirty-one of the thirty-five charters in which the stockholders' rights of inspection are subject to the directors' regulations, and it appears by itself in four by-laws.

A frequent form of the clause which limits inspection rights is, with minor differences, the one quoted above. There are some variations, however, in the enumeration of the possible sources of the stockholders' rights. In tabular form these are:

---

51 The corporation is not registered with the Securities and Exchange Commission. This charter is not included in the total of forty-two in the previous paragraph, which refers only to those cases in which the directors' powers cover corporate books and records in general, and not, as in this case, two specific corporate books.

52 This example is from E. I. du Pont de Nemours and Company, charter, Art. VIII (i).
No stockholder has any right to inspect, except as conferred by:

<table>
<thead>
<tr>
<th>Source</th>
<th>statute, directors or stockholders</th>
<th>statute, by-laws, directors or stockholders</th>
<th>statute, directors, executive committee, or stockholders</th>
<th>statute, by-laws or stockholders</th>
<th>statute or directors</th>
<th>statute or by-laws</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>23</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>6</td>
<td>1</td>
</tr>
</tbody>
</table>

There are thus enumerated five possible sources for the stockholder's power to inspect: (1) the statute, (2) the by-laws, (3) an authorization or a resolution by the directors or (4) by the executive committee or (5) by the stockholders. From these sources, in the combinations indicated in the table, are derived the rights of inspection accorded by the charters and by-laws.

The statutes of the jurisdictions in which the vast majority of the corporations having this regulatory clause are organized—Delaware, New Jersey and New York—define inspection rights only partially. As subsequent discussion will indicate, the Delaware and New York laws require only that the stock book, whose contents are defined by the statutes, be made available to stockholders. New Jersey authorizes the inspection of the transfer book as well as the stock book. Delaware also requires the preparation of a list of stockholders before elections which is to be available for inspection. Apart from these provisions, however, the statutes in these states are silent on the right to inspect. There are no statutory rights to inspect books of account, financial records, correspondence, contracts—all of which may be of greater importance to the inquiring stockholder than the stock or transfer book or the stockholders' list. In other words, the recognition accorded by the charters and by-laws to inspection rights granted by statute in these three important jurisdictions is of value to the stockholder only when he desires to inspect the stock or transfer book or the stockholders' list, as the case may be in each state. It is of no value to him when he desires to inspect any other corporate document.68

The charters of three corporations list the by-laws among the sources of the right to inspect. In two of these, however, the by-laws have no

68The discussion in this paragraph is confined to statutes of Delaware, New Jersey and New York. The Public Utility Holding Company Act gives the Securities and Exchange Commission power to require registered public utility holding companies, their subsidiaries, and affiliates subject to the Act to submit to the examination of their security holders "accounts, cost-accounting procedures, correspondence, memoranda, papers, books, and other records." § 15(g), 49 Stat. 828 (1935), 15 U. S. C. § 79o(g) (Supp. 1940). No rules making such requirements have as yet been promulgated by the Commission. This statute affects a substantial number of the 100 corporations under discussion.
provision on the subject. In the third, a Delaware corporation, the by-laws repeat, with some variations, the substance of the Delaware statute on the furnishing of a list of stockholders for corporate meetings. The existing by-laws in these cases supply no stand on which a stockholder can base his right to examine the books. To write in a by-law granting and defining such a right is a step that ordinarily can be initiated only by the directors or in some cases by a majority of the stockholders. It will hardly be taken at the request of a minority stockholder who desires access to the books.

It will usually be difficult too for the inquiring stockholder to obtain authority to inspect the books from the board of directors or the executive committee. They are likely to interpret a request for inspection as dissatisfaction with the management or hostility to it rather than as an exercise of a normal right. Where the right to inspect is theirs to grant or withhold, they naturally will not facilitate an examination.

Finally, the fact that the right to inspect can be conferred by a resolution of the stockholders is likewise of little avail. It is a rare stockholders' meeting that is not dominated by the management, and the request of a minority stockholder to examine the books is apt to receive a cool response. It is interesting to note, in addition, that in a small number of corporations there is not even a provision empowering the stockholders to grant the right to inspect.

Taking these provisions at face value it would seem then that where a charter or a by-law explicitly denies a stockholder the right to examine books, accounts or documents of the corporate except as conferred by certain possible sources of the right—the statute, the by-laws, the directors, the executive committee, or the stockholders—these will usually be of little avail in securing the stockholder the right to inspect. Furthermore, if the right is not granted him through these sources, he has, by the terms of the charter or by-laws, no right to inspect at all.

An even more drastic limitation appears in a by-law of one corporation which provides that

"No stockholder shall have the right to inspect the stock book or any other books of the Company, except as to the registry of his own stock."

Judging by the provisions in the charters and by-laws, then, it would seem as though in a substantial number of cases the right of stockholders to inspect books is drastically limited.

2. Judicial limitations on provisions

The restrictive provisions as to the stockholders' power predominate in

54American Can Company and Standard Oil Company of California.
charters of Delaware corporations. Of the forty-two corporations in which the power to regulate access to the books is granted to the directors, twenty-five are Delaware corporations. Or since there are twenty-seven Delaware corporations among the 100, every Delaware corporation but two grants the power to the directors. Of the thirty-six corporations which deny the stockholder the right of access except as conferred by statute or authorized by a resolution of the directors or the stockholders (or by one of the variants noted above) twenty-three are Delaware corporations. It is accordingly appropriate to examine the law of Delaware on the subject.

The Delaware statute regulating the inspection of books and records by the stockholder relates only to access to the stock book. The Delaware General Corporation Law\(^\text{57}\) provides that

"... The original or duplicate stock ledger containing the names and addresses of the stockholders, and the number of shares held by them, respectively, shall, at all times, during the usual hours for business, be open to the examination of every stockholder at its principal office or place of business in this State . . . ."

A small number of Delaware corporations recognize this statutory provision by excepting the stock books from the directors’ regulatory powers. The provisions of these corporations authorize the directors

"... from time to time to determine whether and to what extent, and at what times and places, and under what conditions and regulations the accounts and books of this corporation (other than the stock ledger) or any of them shall be open to inspection of stockholders; and no stockholder shall have any right of inspecting any account, book or document of this corporation except as conferred by statute, unless authorized by a resolution of the stockholders or directors.\(^\text{58}\)

Eight charters of the 100 have such a provision, seven of which are Delaware charters. There is also at least an implicit recognition of the effect of this section in the subordination of the directors’ powers to the statutory provisions in general.

In addition, Delaware has enacted an empowering statute, general in language:

"The Certificate of Incorporation may also contain any provision which the incorporators may choose to insert for the management of the business and for the conduct of affairs of the corporation, and any provisions creating, defining, limiting and regulating the powers of the corporation, the directors and the stockholders, or any class of the stockholders . . . provided such provisions are not contrary to the laws of this State.\(^\text{59}\)

Both of these statutes are of long standing.\(^\text{60}\) On its face the latter pro-

---

\(^{57}\) Art. 1, § 29.

\(^{58}\) This example is from Continental Oil Company, charter, Art. IX. Italics supplied.


\(^{60}\) See 21 Laws Del. c. 273, §§ 8 and 17 (1899).
vision permits the incorporators wide latitude in the restriction of the stockholders' rights of access to a corporation's books and their powers of inspection. Taken together with the restrictions of the charters and by-laws, it would appear that, except for access to the stock book, the stockholders' rights are limited indeed.

The Delaware courts, however, have handled the question with considerable liberality. The net of the decisions is this: Despite the broad powers of the incorporators under the statute, and despite the existence of a highly restrictive clause in Delaware charters and by-laws, and despite the fact that access to the stock books is the only right specifically granted the stockholders by statute, the common law rule on the stockholders' right to inspect books and records prevails in Delaware.

In State ex rel. Cochran v. Penn-Beaver Oil Co.,61 a restrictive charter provision such as that quoted above was expressly declared invalid. The Court's opinion declared:

"The defendant contends that the eighth paragraph of section 5 of the General Corporation Law (Rev. Code 1915, § 1919) warrants the following provision in its Certificate of Incorporation authorizing the directors—

"(c) To determine from time to time whether and, if allowed, under what conditions and regulations the accounts and books of the corporation shall be open to the inspection of the stockholders, and the stockholders' rights in this respect are and shall be restricted or limited accordingly, and no stockholder shall have any right to inspect any account or book or document of the corporation, except as conferred by statute or authorized by the board of directors, or by a resolution of the stockholders.'

"The eighth paragraph of Section 5 of the General Corporation Law, relied on by the defendant, is as follows:

"8. The certificate of incorporation may also contain any provision which the incorporators may choose to insert for the management of the business and for the conduct of affairs of the corporation, and any provisions creating, defining, limiting and regulating the powers of the corporation, the directors and the stockholders, or any class of the stockholders: Provided such provisions are not contrary to the laws of this State.'

"The first question that arises is this: Does the authority to create, define, limit and regulate the powers of stockholders embrace the power to absolutely deny to stockholders the right to examine the books and records of the company? It seems to us that those words were not intended to give the corporation the power to prevent any inspection or examination of the company's books. Given their natural and obvious meaning, they would seem to confer upon the company the power to reasonably limit and regulate a power that the stockholder possessed, and not to entirely deprive him of it.

"Under the common law a stockholder had the right to examine the books and records of the company, and that right could not be taken away except by a statute that expressly or by necessary implication authorized it. There is no such statute, and we conclude that the provision in the certificate of incorporation of defendant company, under which the relator was denied the right to inspect

---

61 W. W. Harr. 81, 83, 143 Atl. 257, 259 (Del. 1926).
the company's records, forms no part of its charter and should be disregarded.62 . . .

"The words 'creating, defining, limiting and regulating' the powers of stockholders may have been designed by the draftsman to give incorporators the power the defendant seeks to exercise, but it is impossible for us to believe the Legislature intended that the words should have such meaning.63 It is important of course, in the conduct of its business, that a corporation should have to a large extent the right to regulate the stockholder's power of examination and inspection. Otherwise, the proper conduct of its business might be seriously embarrassed by troublesome and unreasonable stockholders seeking to exercise the right of examination. But we do not think the Legislature, in enacting paragraph 8 of section 5 of the general corporation law, intended to take away that right entirely. It was meant that the corporation might provide in its charter that such right should be exercised at proper times, under proper conditions, for a proper purpose, and so as not to unreasonably interfere with the company's business. Such is the law of this and most of the other states."

In State ex rel. Miller v. Loft, Incorporated,64 a similar provision in the corporate charter and an implementing provision in the by-laws were likewise disregarded by the Court, which applied the common law rule as to inspection, and on the merits granted the relator's right to examine the books relating to certain transactions and denied it as to others.

Similar views are held in other jurisdictions. State ex rel. Smalley v. Sterns Tire & Tube Company,65 declared invalid a provision similar to the one under discussion in the by-laws of a Delaware corporation doing business in Missouri, in the face of a Missouri statute entitling any stockholders to have access to, and to examine the books of the company at all proper times "under such regulations as may be prescribed by the by-laws."66 The Court held that the clause

"does not, however, authorize a board of directors by resolution to determine what book or books, if any, shall be open for inspection to its stockholders, for the statute specifically states that 'the books of the company' meaning that all the 'books' of the company, are open for inspection, and we are of the opinion, and so hold, that section 3349, Revised Statutes of Missouri of 1909, merely authorizes the adoption of by-laws prescribing reasonable rules and regulations as to the manner and time of such inspection and nothing more."

Similarly, in Hodgens v. United Copper Company,67 which concerned a New Jersey corporation, the opinion stated

" . . . the respondents, under the authority conferred by the statute, have

---

62 (Italics supplied).
63 (On the draftsman of state corporation laws, see 1 THE AUTOBIOGRAPHY OF LINCOLN STEFFENS (1931) 192 et. seq.; Berle, Investors and the Revised Corporation Act (1929) 29 Col. L. Rev. 563.)
64 W. W. Harr. 538, 156 Atl. 170 (Del. 1931).
65 202 S. W. 459, 460 (Mo. 1918).
embodied in their certificate of incorporation the following clause: 'The board of directors from time to time shall determine whether and to what extent and at what times and places and under what conditions and regulations the accounts and books of the corporation or any of them shall be open to the inspection of the stockholders and no stockholder shall have any right to inspect any account or book or document of the corporation except as conferred by statute or authorized by resolution of the board of directors or by a resolution of the stockholders.' This clause, it is contended, protects them from the right of a stockholder, excepting in accordance with its terms, to have an inspection of the books. They have also embodied this clause in their by-laws. I am unable to give to the clause in question the same force which the learned counsel for the respondents has given it in his brief. I do not think it will prevent a stockholder in any case from examining the books, unless the directors permit him. Such a by-law, if it were to be so construed, would be oppressive and unreasonable. The clause, 'and no stockholder shall have any right to inspect any account or book or document of the corporation except as conferred by statute or authorized by resolution of the board of directors or by a resolution of the stockholders,' in my view, does not change the statutory power of the court to order the books to be brought into the state, and, when here, to be examined by a stockholder. 'The power conferred by statute' which is referred to in the by-law, to summarily order the books to be brought into the state, is a futile power, if, after brought here, the provision in the certificate of incorporation or a by-law could nullify the order of the court for the stockholders to inspect and examine the books, and such a construction should not be given to the statutory authority authorizing the making of such a by-law, unless it were not possible to give it any other construction. A provision such as this, which says that no book of a corporation shall be open to the inspection of a stockholder except as authorized by resolution of the board of directors, or by a resolution of the stockholders, is not held operative. If there be no resolution passed by the directors or by the stockholders, then there is nothing in such a provision in conflict with the common-law right. The fair intent of such a by-law is that the directors will make some provision for inspection at proper times and places and under proper regulations for such inspection or examination. The court should not construe such a provision in a certificate or by-law to mean that no right to inspect shall exist where the directors or stockholders fail to take action; that is, such a by-law should not be held operative as against the right of the stockholder.'

From the foregoing discussion one arrives at the interesting conclusion that a provision widely included in charters and by-laws, appearing in over one-third of those of the largest corporations, and appearing almost universally in those of the largest Delaware corporations, is not binding on the stockholders if through its use they would be deprived of their common-law or statutory rights to inspect. While the courts will rule that it is not binding on the stockholders, the provision nevertheless may be of value to corporate management when confronted with a demand for an inspection of the books. It may serve to create uncertainty in the stockholder's mind as to his precise rights. It may be used to give a color of right to a denial by management of the power to inspect which such action would not possess in the absence of the restrictive provision or in the presence of a provision in conformity with the law on the in-
spection of corporate books.  

It should be noted, furthermore, that the courts have ruled the clause invalid only where the management of the corporation has attempted to deny the stockholders' right entirely. Under the authority of this clause, however, the directors are empowered to formulate regulations which, while ostensibly granting the right to inspect, nevertheless may delay or circumscribe the exercise of the right to a point where, as a practical matter, it becomes useless. They may provide, for example, that requests for inspection may be taken under advisement by the directors for, say, three successive meetings, or they may require a stockholder to hold five per cent of the stock in order to inspect, or they may limit access to the books to one day a month. There are no cases holding such "regulations" invalid, and it is possible that they may be upheld as a legitimate exercise of the power to regulate access to the books. The stockholder's right to inspect under such conditions would be of little practical benefit.

C. INSPECTION OF STOCK BOOKS AND STOCKHOLDER LISTS

1. Prevalence

A stockholder may have information in his possession which he desires to communicate to his fellow shareholders, or he may wish to propose or oppose a course of action at a forthcoming meeting, or he may be so dissatisfied with the management of the corporation that he desires to organize the stockholders in an attempt to oust it. For these purposes, he must know at least the names and addresses of the shareholders. He may also find it helpful to know the number of shares—or the number of voting shares, or of certain classes of shares—which they hold. To distinguish those who are trading in the security from bona fide investors, he may wish to know the length of time they have held the stock. He may want to learn how much they have paid on the stock. What regulations apply to the ascertainment of such information from the corporation's records?

---

68 It is interesting to note that even in the case of a corporation where the provision denying stockholders the right to inspect "except as conferred by the statutes of the State of Delaware or authorized by the directors or stockholders" was judicially declared invalid the provision remains in the charter. Of the five corporations noted here as respondents in mandamus actions to compel inspection—Penn-Beaver Oil Co., supra note 61, Loft, Inc., supra note 64, S terns Tire & Tube Co., supra note 65, and United Copper Co. and Citizens Bank of Jennings, supra note 67—one corporation, Loft, Inc., is registered with the Securities and Exchange Commission. The charter of Loft, Inc., (S. E. C. Docket No. 1-1183-1), filed in 1935 and apparently still in effect, contains the provision which the Delaware court held invalid in 1931 (Art. IX, § 6). The provision remains despite the Delaware statute quoted above, p. 244, which permits provisions to be included in a charter "provided such provisions are not contrary to the laws of this state." It goes without saying that restrictive inspection rules which have not been litigated remain in the charters despite the statute.
Twenty-six corporations of the 100 have some provision governing the availability of stock books or stockholders' lists for examination.\textsuperscript{69} Twenty-four of these provisions appear in the by-laws, two in the charters. They almost always accompany one of the inspection rules discussed in the earlier portions of this study. In the case of only three corporations does a provision affecting access to the stockholder lists appear as the sole regulation of the right to inspect.

In addition, eight corporations have a charter provision expressly excluding the stock books from the directors' powers to regulate the stockholders' inspection rights.\textsuperscript{70} Six of these eight corporations have separate provisions governing access to lists of stockholders, five in the by-laws and one in the charter.

It will also be recalled that in the discussion of the frequent provision denying stockholders the right to inspect "except as conferred by statute or authorized by the board of directors or by a resolution of the stockholders" (or by some variation of this phrasing) the exception for the right conferred by statute was recognized in all provisions of this nature.\textsuperscript{71}

By this exception, rights of access to stockholder lists, if granted by the statute, cannot be denied by the directors through their powers to regulate inspection. The succeeding discussion will therefore include some analysis of the statutory provisions on stockholder lists.

Provisions governing the examination of lists of stockholders fall into two categories. One group includes regulations governing access to the stock book. The other, more frequently encountered in the charters and by-laws, regulates the preparation and inspection of lists for corporate meetings and elections. These two types of regulation will now be discussed.

2. **Access to stock book**

General regulations governing access to the stock book usually follow the statutory requirements very closely. The Delaware General Corporation law provides\textsuperscript{72}

> "... The original or duplicate stock ledger containing the names and addresses of the stockholders, and the number of shares held by them, respectively, shall, at all times, during the usual hours for business, be open to the examination of every stockholder at its principal office or place of business in this State. ..."

The by-laws of four Delaware corporations repeat this provision almost

\textsuperscript{69}One corporation, already mentioned above, p. 243, provides in its by-laws that "no stockholder shall have the right to inspect the stock book or any other books of the Company, except as to the registry of his own stock." This corporation is not included in the total of twenty-six.

\textsuperscript{70}Discussed above, pp. 240, 242.

\textsuperscript{71}See discussion above, p. 241 ff., especially table on p. 242.

\textsuperscript{72}Art. 1, § 29.
literally.73

The New Jersey General Corporation Act74 similarly provides that

"Every corporation of this state shall keep at its principal office the transfer books, in which the transfer of stock shall be registered, and the stock books, which shall contain the names and addresses of the stockholders and the number of shares held by them respectively, open at all times during the usual hours for business to the examination of every stockholder, and for the transfer of stock."

The by-law of one New Jersey corporation varies somewhat from this provision.75 This by-law provides that the secretary

"... shall, during the usual hours of business keep and exhibit the stock books and transfer books, and list of stockholders of the corporation for the inspection of stockholders whenever requested so to do, which list shall be a full, true and complete list in alphabetical order."

The by-law does not specifically include the statutory requirement that the stock book contain the names, addresses and the number of shares of the stockholders. The by-law adds to the provisions of the statute in requiring the list to be alphabetical, imposing the duty to keep such a list on the secretary, and making the books available on request. None of these deviations, however, appear to affect the stockholders’ right of inspection.

The charter of another New Jersey corporation,76 on the other hand, while substantially repeating the terms of the statute, confines the inspection of the transfer and stock books to "the registered stockholders in person." This provision, if applied would deny access to an executor or administrator of a deceased stockholder, who under New Jersey law has a right to inspect,77 or to an attorney or agent of a stockholder or to an accountant or other expert employed by him, whose aid the stockholder is by law permitted to utilize.78 The provision thus curtails the stockholder’s right to inspect.

The charter of a New York firm, incorporated by an act of the legislature, provides that79

"The directors of said corporation shall keep, or cause to be kept, at its office books of account of its business and transactions, and a book to be known as the 'stock book,' containing the names alphabetically arranged of all persons who

---

74 14 N. J. STAT. ANN. (1939) c. 5, § 14:5-1.
75 American Car and Foundry Company, Art. XI.
76 Not registered with the Securities and Exchange Commission.
78 Fletcher, op. cit. supra note 2, § 2233.
are, or within two years have been stockholders of the corporation, showing their places of residence, the number of shares of stock held by them respectively, and the time when they respectively became the owners, and the time when the same was transferred to them respectively on the books of the company. The stock book of such corporation shall be open daily during business hours for the inspection of its stockholders and creditors who may make extracts therefrom."

The statute provides:80

"Every stock corporation shall keep at its office correct books of account of all its business and transactions, and a book to be known as the stock book, containing the names, alphabetically arranged, of all persons who are stockholders of the corporation, showing their places of residence, the number of shares of stock held by them respectively, the time when they respectively became the owners thereof, and the amount paid thereon. . . .

"The stock book of every such corporation shall be open daily, during at least three business hours, for inspection by any judgment creditor of the corporation; or by any person who shall have been a stockholder of record in such corporation for at least six months immediately preceding his demand; or by any person holding or thereunto in writing authorized by the holders of at least five per centum of all of its outstanding shares; provided (a) that such inspection shall not be for the purpose of communicating with stockholders in the interest of a business or object other than the business of the corporation, and (b) that such stockholder or other person has not within five years sold or offered for sale any list of stockholders of such corporation or any other corporation, or aided or abetted any person in procuring any stock list for any such purpose; and provided further that such inspection may be denied to such stockholder or other person upon refusal to furnish to such corporation or its transfer agent a written statement that such inspection is not desired for purpose (a) and that such stockholder or other person has not been connected with any stock list as provided in (b). Persons so entitled to inspect stock books may make extracts therefrom."

The charter provision is more liberal with respect to the inspection of the stock book than the statutory provision. The charter, it will be noted, requires no qualifications for inspection beyond that of being a creditor or stockholder. The statute, on the other hand, requires that the person seeking to inspect shall be a judgment creditor, or a record stockholder for six months previous, or a holder or the representative of the holders of five per cent of the outstanding shares, in addition to imposing other restrictions designed to insure the legitimate purpose of the inspection. The charter requires the stock book to be open daily during business hours while the statute permits it to be open for only three business hours. Since this charter was enacted by the legislature, it is the charter rather than the general statute which will govern the inspection of the stock books of this corporation.81

The by-laws of another New York corporation provide82

---

80Stock Corporation Law, Art. 3, § 10.
81State v. Stoll, 17 Wall. 425 (U. S. 1873).
82Continental Oil Corporation, Art. VII, § 55.
"Examination of Books by Stockholders. The stock book shall be open daily, during at least three business hours, for inspection by any judgment creditor of the Corporation or by any person who shall have been a stockholder of record of the Corporation for at least six months immediately preceding his demand; or by any person holding, or thereunto in writing authorized by the holders of, at least 5% of its outstanding shares. Persons so entitled to inspect stock books may make extracts therefrom."

It will be observed that the statutory language is followed, as it is in another by-law of this company which describes the contents of the stock book. In the above-quoted by-law, however, there are omitted the important statutory provisions designed to insure that communications with stockholders resulting from the inspection will not be in any interest other than the corporation's business and that the person inspecting has not been previously connected with the sale of a stock list. But unlike the New York corporation referred to previously, in which the inspection provision was included in a charter granted by the legislature, the provision here appears in the corporate by-laws. The effect of the by-law's variation from the statutory language is not entirely clear. Since the absence of the statutory safeguards may adversely affect the corporation and its stockholders, the courts, following the general rule that by-laws must be consonant with the statutes, may hold that the statute governs. On the other hand, the courts may hold that the corporation is permitted to waive the statutory requirement in the direction of greater liberality toward the stockholder desiring to inspect.

In addition, one of the Delaware firms which grants access to the stock book in the language of the Delaware statute also provides for such access in an adaptation of the language of the New York statute. The New York statute quoted above applies to domestic corporations. Another section in the New York Stock Corporation Law imposes practically identical requirements on foreign corporations with an office for doing business within the state. Under the New York statute the stock books are required to contain more information that under the Delaware statute. The latter requires only the name and addresses of the shareholders and the number of shares held. The former requires in addition, that the list be alphabetical, that it show the time when the holders became the owners of the stock, and that it state the amount paid on the stock. The by-law of the Delaware corporation referred to, whose executive offices are in New York, includes the regulations of both statutes.

One corporation provides in its charter that upon default for twenty-

84FLETCHER, op. cit. supra note 2, § 4185.
86Art. II, § 113.
87Consolidated Oil Corporation, Art. IX(h).
four months in the payment of accrued dividends on preferred stock the holders of five per cent of the preferred, which ordinarily has no voting power, may call a special meeting to elect a majority of the directors, and for this purpose they may have access to the stock books. The common stock is given a corresponding right upon the curing of the default. Another corporation requires the president or secretary to call a special meeting of the stockholders upon the written request of one-tenth of the outstanding stock entitled to vote. If within fourteen days after the delivery of the request the officers fail to call a meeting, three of the signers of the request may call a meeting upon notice, and for this purpose they or their agents may have access to the principal share register.

In general, with respect to the cases here discussed, the similarity of the statute and the language of the corporation's regulation is fairly close. In two cases the corporate provisions are more liberal toward the stockholder than the statute requires. In one case they seem more restrictive.

It is also significant that, while the three states in which the largest number of incorporations of the 100 firms occurred—Delaware, New York and New Jersey—all grant access to the stock book, only eight corporations of the sixty-three incorporated in those states refer to the right in their corporate instruments.

3. Stockholders' Lists for Corporate Meetings

Twenty corporations provide in their by-laws for the preparation of lists of stockholders for corporate meetings. The provisions are modeled generally on a statute, but they also appear in its absence.

Although there are a large number of variations in the text of the provisions of the various corporations, the following, of an Illinois company, is fairly representative:

"Voting Lists. The officer or agent having charge of the transfer book for shares of a corporation shall make, at least ten days before each meeting of shareholders, a complete list of the shareholders entitled to vote at such meeting, arranged in alphabetical order, with the address of and the number of shares held by each, which list, for a period of ten days prior to such meeting, shall be kept on file at the registered office of the Corporation and shall be subject to inspection by any shareholder at any time during usual business hours. Such list shall also be produced and kept open at the time and place of the meeting and shall be subject to the inspection of any shareholder during the whole time of the meeting. The original share ledger or transfer book, or a duplicate thereof kept in this State, shall be prima facie evidence as to who are the shareholders entitled to examine such list or share ledger or transfer book or to vote at any meeting of shareholders."

88Not listed with the Securities and Exchange Commission.
This provision is a verbatim reproduction of the Illinois statute.\textsuperscript{90} The Delaware statute provides: \textsuperscript{91}

"It shall be the duty of the officer who shall have charge of the stock ledger of a corporation to prepare and make, at least ten days before every election of directors, a complete list of the stockholders entitled to vote at such election, arranged in alphabetical order. Such list shall be open at the place where said election is to be held for said ten days, to the examination of any stockholder, and shall be produced and kept at the time and place of election during the whole time thereof, and subject to the inspection of any stockholder who may be present."

A few Delaware corporations provide the stockholders with somewhat more information than an alphabetical list of stockholders entitled to vote at an election, which by statute is sufficient. Of the by-laws of thirteen corporations of that state which relate to the compilation of a stockholders’ list, eight require the list to contain the number of shares held by the stockholders.\textsuperscript{92} Five corporations add residences or addresses.\textsuperscript{93} One requires the list to be presented at “meetings” although the statute limits it to “elections.”\textsuperscript{94} The former is the more comprehensive term, since it includes meetings of all types, while the latter is restricted to meetings at which elections are held. The by-law provisions are therefore broader than those of the statute. The remainder of the Delaware by-laws adhere substantially to the statutory terms.

New York has no statute governing the preparation of a list of stockholders. One New York corporation instead requires the production of the stock book at meetings upon the request of any stockholder.\textsuperscript{95} Another New York corporation, however, requires the compilation of a stockholders’ list.\textsuperscript{96}

There are a number of other minor variations. Two corporations provide that the list is to be produced at meetings on the request of a shareholder rather than as a matter of course.\textsuperscript{97} One corporation speci-

\textsuperscript{90} JONES, ILLINOIS STATUTES 32.032; BUSINESS CORPORATION ACT, § 32.
\textsuperscript{91} GENERAL CORPORATION LAW, Art. I, § 29.
\textsuperscript{93} Armour and Company of Delaware, Continental Oil Company, and General Foods Corporation, supra note 92; and two corporations not registered with the Securities and Exchange Commission.
\textsuperscript{94} Cities Service Company, supra note 92.
\textsuperscript{95} Consolidated Oil Corporation, by-laws, Art. II, § 9.
\textsuperscript{96} California Packing Corporation, by-laws, Art. I, § 5.
\textsuperscript{97} Consolidated Oil Corporation, supra note 95; The Cincinnati Gas and Electric Company, regulations, Art. IV, § 10.
fies that proxies as well as stockholders may examine the list.\textsuperscript{98} There are variations, too, in whether the books are to be prepared for meetings—as distinct from elections—and, in either case, whether they may also be inspected for a ten day minimum period prior thereto. There are variations in whether the books are to be exhibited at the place of meeting or election or at the corporation’s principal office, the terms not being necessarily synonymous.

In short, the number of variations in this provision is so large that hardly any two by-laws are alike, and orderly classification becomes practically impossible.

IV. Summary and Conclusion

On the whole, the survey of provisions in charters and by-laws governing the inspection of books and records indicates that, with few exceptions, their tendency is to limit unduly the stockholder’s right to inspect.

The inclusion of occasional inspection provisions in charters and by-laws which are more liberal toward the stockholder than is required by the governing statutes and cases suggests that some of the statutes may be unduly restrictive. A liberal modification in the corporate documents is in such cases merely an act of fairness toward the stockholder, granting him only such rights as in simple justice should be his. In no case does it appear that the corporation, in granting too broad a right to inspect, may be doing itself an injustice by subjecting itself to possible harassment at the hands of an unscrupulous stockholder. Provisions more liberal than the law requires, in any event, are rare and do not present any substantial problem.

Of greater consequence are the far more frequent cases where the corporate documents are silent on the question of inspection of books and records or where they attempt to limit the rights of the stockholders more drastically than the law permits. Equally important are the uniformly inadequate provisions on reports to stockholders and the instances where the statutes themselves, either expressly or by grants of broad regulatory power to corporate management, result in denying to the stockholder information which should be his as of right.

Almost half of the 100 corporations included in the study have no inspection provision of any nature in their charter or by-laws, and are governed by the relevant statutes and judicial decisions. As a practical matter, however, it would seem that such silence assists a reluctant management in denying the right to inspect to the inquiring stockholder, rather than helping the latter to stand on his common law or statutory right. To the small stockholder, who is frequently unable to engage

\textsuperscript{98}California Packing Corporation, supra note 96.
counsel, the fact that the corporate documents do not grant the right of inspection may indicate an absence of such a right, whereas, in fact, the inspection privilege may be authorized by statute or the common law. It would seem to the stockholder’s interest therefore that corporations should include a provision in their charters or by-laws specifically granting inspection rights.

A widely prevalent provision permits the directors to regulate access to the corporate books and records, and simultaneously denies the stockholders any right to inspect except as granted by statute, or by a resolution of the directors or stockholders. This is a formidable regulation with which to confront a stockholder seeking information. It is true that courts have declared such provisions to be invalid when the management has utilized them to deny stockholders the right to inspect. They still remain on the corporate books, however, and serve to give such a refusal by the management a semblance of authority.

Furthermore, such clauses have been judicially declared invalid only where under their provision the stockholder’s rights were sought to be denied in toto. Through these provisions, however, it is possible that the directors, while conceding the stockholder’s right in principle, may nevertheless circumscribe it with drastic regulations so as to render it useless to him. The existence of a provision denying the stockholder the right to inspect except as conferred by statute or authorized by the directors or stockholders is a standing invitation to management to limit his right as closely as the law permits.

With respect to periodic reports to stockholders the study indicates that only a small proportion of the corporations require such reports. Where the requirement does appear it is rarely ever sufficiently specific and detailed to insure the presentation of a true and comprehensive statement of the corporation’s affairs.

Finally, there is the question of the content of the statutes themselves. Where the terms of the statute are equitable it is, of course, entirely proper for charter and by-law provisions to be modeled upon them. In a small number of cases this has been done, chiefly in provisions governing access to the stock book. But in some cases the statutes themselves fall short of requiring the proper disclosure of information. It is, indeed, an empty right to a stockholder, for example, to have available ten days before an election of directors “a complete list of the stockholders entitled to vote at said election arranged in alphabetical order,”—which is all that the statute requires—if their addresses are not required to be supplied.99

Or take another statutory provision, previously quoted:100

99 Supra, p. 254.
100 Supra, p. 244. Italics supplied.
"The Certificate of Incorporation may also contain any provision which the incorporators may choose to insert for the management of the business and for the conduct of affairs of the corporation, and any provisions creating, defining, limiting and regulating the powers of the corporation, the directors and the stockholders, or any class of the stockholders . . . provided such provisions are not contrary to the laws of the State."

Despite the final proviso in this statute requiring that the charter provisions are not to be contrary to law, the provision denying stockholders the right to inspect except as conferred by statute or authorized by the directors or stockholders—repeatedly held invalid by the courts—nevertheless appears in the corporate documents of all but two of the corporations organized in the state where this statute is in effect, and it may very well require expensive and delaying litigation to have the provision declared invalid as to each individual corporation. To be of substantial benefit, the statutes themselves must grant to stockholders adequate rights and must circumscribe the powers of corporate management to limit them.

The variety of statutory provisions on the stockholders' right to inspect, the frequent silences on the subject in charters and by-laws, the prevalence of provisions purporting to curtail the right drastically, the occasional occurrence of provisions nibbling at the right in trifling ways—all suggest the possibility of a solution through the application of a uniform rule of law to the stockholders' right of inspection,101 and the requirement that the rule be specifically included in the corporate charter. The right to inspect is not a complex one; its rules are relatively simple. There is no purpose served by a variety of charter and by-law regulations on the subject, especially when so large a proportion of them are unfairly adverse to the stockholder. If greater participation of stockholders in corporate affairs is an economic and social desideratum, a uniform standard for corporations defining the stockholders' right to inspect books and records may well be a long step toward achieving it.

101The method whereby this end is to be achieved, whether by uniform state law, Federal incorporation or licensing, or otherwise, is beyond the scope of this paper.
<table>
<thead>
<tr>
<th>No.</th>
<th>Name of Corporation</th>
<th>State and Year of Incorporation</th>
<th>S. E. C. Docket No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Allied Chemical &amp; Dye Corp.</td>
<td>N. Y. 1920</td>
<td>1-1269-1</td>
</tr>
<tr>
<td>3.</td>
<td>American Can Co.</td>
<td>N. J. 1901</td>
<td>1-552-1</td>
</tr>
<tr>
<td>4.</td>
<td>American Car &amp; Foundry Co.</td>
<td>N. J. 1899</td>
<td>1-1333-1</td>
</tr>
<tr>
<td>5.</td>
<td>The American Metal Co., Ltd.</td>
<td>N. Y. 1887</td>
<td>1-229-1</td>
</tr>
<tr>
<td>6.</td>
<td>American Power &amp; Light Co.</td>
<td>Me. 1909</td>
<td>1-224-1</td>
</tr>
<tr>
<td>8.</td>
<td>The American Rolling Mill Co.</td>
<td>Ohio 1917</td>
<td>1-873</td>
</tr>
<tr>
<td>10.</td>
<td>The American Sugar Refining Co.</td>
<td>N. J. 1891</td>
<td>1-1286-1</td>
</tr>
<tr>
<td>11.</td>
<td>American Telephone &amp; Telegraph Co.</td>
<td>N. Y. 1885</td>
<td>1-1105-1-5</td>
</tr>
<tr>
<td>12.</td>
<td>The American Tobacco Co.</td>
<td>N. J. 1904</td>
<td>1-92-1</td>
</tr>
<tr>
<td>15.</td>
<td>Anaconda Copper Mining Co.</td>
<td>Mont. 1895</td>
<td>1-1053-1</td>
</tr>
<tr>
<td>16.</td>
<td>Armour &amp; Co. of Delaware</td>
<td>Del. 1922</td>
<td>1-1923-1</td>
</tr>
<tr>
<td>17.</td>
<td>Armour &amp; Co.</td>
<td>Ill. 1900</td>
<td>1-651-1</td>
</tr>
<tr>
<td>19.</td>
<td>Atlantic Coast Line R.R.</td>
<td>Va. 1836</td>
<td>1-1577-1-1</td>
</tr>
<tr>
<td>21.</td>
<td>The Baltimore &amp; Ohio R.R.</td>
<td>Md. 1827</td>
<td>1-923-1-3</td>
</tr>
<tr>
<td>22.</td>
<td>Bethlehem Steel Corp.</td>
<td>Del. 1919</td>
<td>2-4315-1-1</td>
</tr>
<tr>
<td>23.</td>
<td>The Borden Co.</td>
<td>N. J. 1899</td>
<td>1-71-1</td>
</tr>
<tr>
<td>25.</td>
<td>The Brooklyn Union Gas Co.</td>
<td>N. Y. 1895</td>
<td>1-722-1</td>
</tr>
<tr>
<td>27.</td>
<td>Carolina, Clinchfield &amp; Ohio Ry.</td>
<td>Va. 1905</td>
<td>1-1415-1</td>
</tr>
<tr>
<td>28.</td>
<td>The Central R.R. Co. of New Jersey</td>
<td>N. J. 1847</td>
<td>1-600-1</td>
</tr>
<tr>
<td>29.</td>
<td>Central &amp; South West Utilities Co.</td>
<td>Del. 1925</td>
<td>1-1443-1</td>
</tr>
<tr>
<td>30.</td>
<td>The Chesapeake &amp; Ohio Ry.</td>
<td>Va. 1878</td>
<td>1-1261-1-3</td>
</tr>
<tr>
<td>31.</td>
<td>Chrysler Corp.</td>
<td>Del. 1925</td>
<td>1-686-1</td>
</tr>
<tr>
<td>32.</td>
<td>The Cincinnati Gas &amp; Electric Co.</td>
<td>Ohio 1837</td>
<td>1-1232-1</td>
</tr>
<tr>
<td>33.</td>
<td>Cities Service Co.</td>
<td>Del. 1910</td>
<td>1-1093-1</td>
</tr>
<tr>
<td>34.</td>
<td>The Cleveland Electric Illuminating Co.</td>
<td>Ohio 1892</td>
<td>1-2323</td>
</tr>
<tr>
<td>35.</td>
<td>Climax Molybdenum Co.</td>
<td>Del. 1918</td>
<td>1-2985-1</td>
</tr>
<tr>
<td>36.</td>
<td>Colgate-Palmolive-Peet Co.</td>
<td>Del. 1923</td>
<td>1-644-1</td>
</tr>
<tr>
<td>37.</td>
<td>Columbia Gas &amp; Electric Corp.</td>
<td>Del. 1926</td>
<td>1-1098-1</td>
</tr>
<tr>
<td>38.</td>
<td>The Commonwealth &amp; Southern Corp.</td>
<td>Del. 1929</td>
<td>1-252-1</td>
</tr>
<tr>
<td>39.</td>
<td>Consolidated Edison Co. of New York, Inc.</td>
<td>N. Y. 1935</td>
<td>2-1901-1-1</td>
</tr>
<tr>
<td>40.</td>
<td>Consolidated Oil Corp.</td>
<td>N. Y. 1919</td>
<td>1-1247-1</td>
</tr>
<tr>
<td>41.</td>
<td>Consumers Power Co.</td>
<td>Me. 1910</td>
<td>1-290-1</td>
</tr>
<tr>
<td>42.</td>
<td>Continental Can Co., Inc.</td>
<td>N. Y. 1913</td>
<td>1-489-1, 2-3408-1</td>
</tr>
<tr>
<td>43.</td>
<td>Continental Oil Co.</td>
<td>Del. 1920</td>
<td>1-1131-1</td>
</tr>
<tr>
<td>44.</td>
<td>Corn Products Refining Co.</td>
<td>N. J. 1906</td>
<td>1-250-1</td>
</tr>
<tr>
<td>45.</td>
<td>Crane Co.</td>
<td>Ill. 1865</td>
<td>1-1657-1</td>
</tr>
<tr>
<td>46.</td>
<td>Crown Zellerbach Corp.</td>
<td>Nev. 1924</td>
<td>1-147-1</td>
</tr>
<tr>
<td>47.</td>
<td>The Cudahy Packing Co.</td>
<td>Me. 1915</td>
<td>1-529-1</td>
</tr>
<tr>
<td>State and Year of Incorporation</td>
<td>S. E. C. Docket No.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>---------------------------------</td>
<td>---------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ill.</td>
<td>1-309-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N. Y.</td>
<td>1-345-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N. Y.</td>
<td>1-443-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Del.</td>
<td>1-815-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pa.</td>
<td>1-956-1-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N. J.</td>
<td>1-87-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Me.</td>
<td>1-222-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Del.</td>
<td>1-799-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Del.</td>
<td>1-1241-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Del.</td>
<td>1-1215-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>1-484-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N. Y.</td>
<td>1-35-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Del.</td>
<td>1-1354-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Del.</td>
<td>1-143-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N. Y.</td>
<td>21-170-1, 2-4299-1-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N. Y.</td>
<td>1-280-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>1-139-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Minn.</td>
<td>1-842-1-2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N. Y., N. J.</td>
<td>1-1526-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ill.</td>
<td>1-1440-1-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Del.</td>
<td>1-641-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N. Y.</td>
<td>1-493-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N. J.</td>
<td>1-101-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Del.</td>
<td>1-91</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Md.</td>
<td>1-1558-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pa.</td>
<td>1-463-1-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mo.</td>
<td>1-707-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mo.</td>
<td>1-782-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mich.</td>
<td>1-327-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N. Y.</td>
<td>1-706-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Del.</td>
<td>1-1355-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ill.</td>
<td>1-870-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N. J.</td>
<td>1-462-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cal.</td>
<td>1-40-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N. Y.</td>
<td>1-82-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pa.</td>
<td>1-1401-1-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pa.</td>
<td>1-720-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pa.</td>
<td>1-83-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pa.</td>
<td>1-1687-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>1-434-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>1-182-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Md.</td>
<td>1-41-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Del.</td>
<td>1-368-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Del.</td>
<td>1-27-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Utah</td>
<td>1-1324-1-2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Md.</td>
<td>1-267-1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Md., Pa.</td>
<td>1-766-1</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In addition to the ninety-four corporations listed above there were studied the relevant provisions in the charters and by-laws of six corporations not registered with the Securities and Exchange Commission.
THE PATENT "FRANCHISE" AND THE ANTITRUST LAWS

Ernest S. Meyers* and Seymour D. Lewis**

PART II†

All of the practices used to control and dominate industry by patents have not been squarely presented for judicial determination. The Department of Justice recognized only recently that the recorded adjudications have been insufficient guides both to the Government and to businessmen. On December 11, 1939, the Department launched an investigation of patent practices, the first ever conducted on a widespread scale in the history of the enforcement of the antitrust laws. In a public statement88 released on that date, the Department stated that the facts in its possession indicated that patents have been used to divide fields into noncompetitive spheres, establish price-fixing schemes, divide markets into exclusive geographical areas, limit production and quality, restrict the use of products, require that outsiders purchase nonpatented materials and service, enforce tying-in provisions, and prevent the investment of new capital in industry. It emphasized that the necessity for clarification of the line at which proper usages of patent rights end, and monopolies and combinations in restraint of trade in violation of the antitrust laws begin, had become imperative, and that as a result of its inquiry it expected to litigate every type of patent practice that it considered contrary to the policy of the antitrust laws.

The Department took an unequivocal position with respect to the merits of the patent system. It subscribed without reservation to the constitutional provision "which makes it of national importance to develop technologies upon which our national economy rests," and it recognized the historical and contemporary importance of the patent system as a means of protecting the inventor and securing to him the rewards of his invention.

ENFORCEMENT OF THE ANTITRUST LAWS: CLARIFICATION OF THE PROBLEM

Within a period of fourteen months (from December 1939 to January

†Part I of this article appeared in the December issue of the Journal.

* A.B., (1931) University of Pennsylvania; LL.B., (1934) Yale Law School; Member of the Bar of New York State; Editor, Yale Law Journal (1932-1934); Special Assistant to the Attorney General of the United States.

** A.B., (1934) Dartmouth College; University of Paris (1932-1933); LL.B., (1938) Yale Law School; Member of the Bar of New York State; Special Attorney, Department of Justice.

The opinions hereinafter stated must not be construed as expressing the views of the Department of Justice unless they are supported by expressions in its public releases.

88 Public Statement, Investigation of the Misuse of Patent Privileges, released December 11, 1939, Department of Justice.
1941) the Department instituted eighteen civil and criminal actions\(^9\) aimed at patent practices, a few less than the total number of such suits brought by the Government during the first fifty years of the Sherman Act. These actions disclose the types of patent practices allegedly designed to circumvent the antitrust laws in nine separate industries.\(^10\) They present the economic and social consequences of such stratagems. The first adjudication has been by the lower court in the *Univis case*. The trials of the *Hartford-Empire* and *American Optical cases* are in progress. All of the remaining civil actions and a few criminal prosecutions are pending trial. Although in several criminal actions the defendants have pleaded *nolo contendere* and have paid fines, the issues that were there involved are also pending trial in companion equity suits or in the other actions. Thus, since none of the issues have been finally adjudicated it would be impolitic to discuss their legal and economic aspects.\(^11\) However, it can be said that the Department of Justice is fulfilling its obligation to industry and the public in general by attempting to clarify the line between proper and improper use of patents. It is hoped that the following questions, among others, will be soon adjudicated: If it is legal for a patentee to license others with restrictions as to


\(^{10}\)Glass containers, optical and ophthalmic ware, rock wool, gypsum and wallboard, bentonite, hard metal compositions, magnesium, gasoline dispensing pumps, and electric lamps.

\(^{11}\)The writers are attorneys of record in most of these cases.
price, use, production, area, etc., to what extent may competing patent holders cross-license each other with these restrictions? May a patentee license another under a process patent with restrictions as to price, etc., relating to the product of the patented operation? May a patentee, owning a patent relating to an essential feature of a combination of parts, impose restrictions as to price, etc., upon the entire combination? Assuming the illegality of a combination of patents covering competing operations to dominate an industry, is it illegal to combine patents covering non-competing but complementary operations to dominate an industry? A discussion of the pending cases will indicate that several other related issues may soon be adjudicated.

The three broadest and most involved suits instituted by the Government are the Hartford-Empire, General Electric and American Optical equity complaints. Each is aimed at correcting in one action patent practices which allegedly serve to cartelize and dominate an entire industry.

In the Hartford-Empire complaint the Government charges the defendants with obtaining a monopoly of patents covering glass making machinery. In a lengthy complaint the Government has alleged that this monopoly was obtained by a vast assortment of techniques. Among the alleged devices used by the defendants to secure and maintain their dominant position were patent acquisitions, restrictive cross-licensing, threats of litigation, and extensive patent litigation. Broad allegations in the complaint also stress techniques used in the Patent Office by Hartford-Empire to "block off"103 and "fence in"104 competitors and competitors' patents in the manufacturing and licensing of glass making machinery. In this suit the Government seeks a remedy which will throw open the business of glass making machinery and glass containers to new capital. For the first time in the history of antitrust prosecution the Department of Justice seeks the dissolution of a company whose principal assets consist of patents alleged to constitute per se a monopoly.105 Another

102 Complaint, ¶ 34.
103 For an excellent description of this technique of "blocking", see Rose, Foreign Dye Patents—Their Relation to the Development of the American Dye Industry (1919) 11 J. OF IND. & ENG. CHEM. 1073.
104 For an illustration of the procedure of "fencing in", see Vaughn, The Relation of Patents to Industrial Monopolies (1932) 14 J. PAT. OFF. SOC. 95, 103.
105 The distinction must be kept in mind between a monopoly of patents per se and of the articles or products produced under those patents. In one previous case, United States v. Porcelain Appliance Corp. (N. D. Ohio E. D. Oct. 16, 1925), dissolution of a patent holding company was accomplished by a consent decree. The defendant, Porcelain Appliance, was directed under the decree to "... execute proper assignments of such of said patents and patent rights as are now held by it, whether by license, assignment or otherwise, to the persons or corporations who owned or held the same prior to said combination and consolidation ..."

The remedy of dissolution was not asked for in the complaint. The same remedy was
issue raised by the complaint is the alleged use of patented machinery to control the manufacture and sale of glass containers.

In the General Electric complaint the Government charges that the defendants have violated the Sherman Act by acquiring and maintaining monopolies of patents relating to incandescent electric lamps and their constituent parts. It is also charged that patent license agreements have served to eliminate foreign competition from the United States and to restrict sales of American production to the United States. The complaint further alleges that through patents the domestic industry has been so regulated that certain manufacturers produce only certain types of lamps in limited amounts. It is also charged that two manufacturers, producing 80% of all lamps, have, through the exchange of patent licenses, sold lamps at prices, and on terms and conditions of sale fixed by one of them. The complaint discloses allegations that patents have been improperly used to eliminate competitors, to control lamp parts and machinery, and to discriminate in favor of certain companies.106

In the American Optical case, the Government alleges that a scheme of price fixing for the eye-glass industry has been effectuated under color of certain patents. It is charged that licensees are permitted to sell only to wholesalers and retailers who adhere to price and sales policies prescribed by the defendants.107 The Government also charges that the defendants have extended their control to materials used with products covered by their patent claims.108 An interesting issue raised in this case is the extent to which the principal defendant, a manufacturer, may compel its licensees, also manufacturers, to execute 'fair trade' or resale price maintenance contracts with their distributors.109

In the Univis case the Government charged that the defendant Univis Lens Company manufactured certain patented bifocal blanks under a license issued to it by the defendant Univis Corporation. Under this license Univis Lens Company was authorized to sell such blanks only to wholesalers and finishing retailers licensed by Univis Corporation. The wholesaler was required by his license to sell the finished lenses only to the prescription retailers licensed by Univis Corporation at certain fixed minimum prices. Both the licensed finishing retailer and the licensed prescription retailer were required by Univis Corporation to sell the finished lenses to the purchasing public at fixed minimum prices. The Government also charged that the defendants used the power re-

sought but not obtained against the United Shoe Machinery Company. 247 U. S. 32 (1918). The court said that the combination there "did no more than put the different groups of non-competing patents into one control."

106Complaint, ¶¶ 84, 88-102 inclusive.
107Complaint, ¶ 49.
108Id. ¶ 55.
109Id. ¶ 80 et seq.
sulting from this licensing scheme to eliminate competition by refusing licenses to price cutters and by controlling resale prices.\textsuperscript{110} The district court has held that the price restrictions attached to the first marketing step between the manufacturer and the wholesaler or between the manufacturer and the finishing retailer were within the scope of the patentee's privileges. The Court, however, struck down the plan to control the prices to be charged by the prescription retailers to the consumer on the ground that this was an attempt to fix the resale prices of the finished lenses and therefore clearly beyond the scope of the patentee's privileges. In addition, the Court held that the practice of the licensor in notifying its licensees of an alleged infringement by its competitor and thereby causing "directly or indirectly Univis licensees to cancel orders for optical goods theretofore placed by them" with the competitor, could not be "countenanced by the patent monopoly and must be regarded as an abuse thereof."\textsuperscript{110a}

In the \textit{General Electric; Fried. Krupp} indictment, it is claimed that the parties pooled certain United States patents and entered into license agreements whereby prices were fixed for hard metal compositions sold in the United States.\textsuperscript{111} A subsequent amendatory agreement is alleged to have divided the world market between the parties.\textsuperscript{112} A feature of this indictment is the charge that the license agreements were used to fix the prices of unpatented tools of which the hard metal composition composed but a part. Another issue raised is the application of the Wilson Tariff Act to an attempt through patents to cartelize an international industry.\textsuperscript{113}

In the \textit{Johns-Manville case}, the complaint states that the defendant Johns-Manville Company and others were competitors for many years in the installation of mineral wool. Following a suit against it and other defendants on a process patent claiming a method of machine blowing mineral wool, the Johns-Manville Company acquired virtual ownership of the patent sued upon.\textsuperscript{114} This acquisition was made although the Johns-Manville Company believed the patent "void on its face".\textsuperscript{115} The patent was then used according to the complaint to give the defendants illegal control of the manufacture and distribution of mineral wool and

\textsuperscript{110}See Memorandum on Behalf of the Government, filed June 24, 1941, pp. 1 and 2.
\textsuperscript{110a}United States v. The Univis Lens Co., 41 F. Supp. 258, 267 (S. D. N. Y. 1941) (on Dec. 9, 1941, an order was entered allowing an appeal to the Supreme Court).
\textsuperscript{111}Indictment, ¶ 24.
\textsuperscript{112}Id. ¶ 29.
\textsuperscript{113}Id. ¶ 32. See also United States v. General Electric; Fried. Krupp A. G., (S. D. N. Y. Criminal No. 110-412, Oct. 21, 1941) ¶¶ 13 and 14. See the \textit{Bausch & Lomb} indictment, March 26, 1940; plea of \textit{nolo contendere} by Bausch & Lomb entered on May 27, 1940.
\textsuperscript{114}Complaint, ¶ 41.
\textsuperscript{115}Id. ¶ 26.
of the installing operation. The other effects of the licensing practices are alleged to be the fixing of prices of mineral wood and of the operation of installation; the elimination of unlicensed suppliers and installers of mineral wool; and the fixing of prices for unpatented building materials used in connection with blowing operations.\[^{116}\]

The use of process patents to eliminate competition in materials employed in the working of the invention is also charged in the *American Colloid* and the *Dow* indictments. In the first case the Grand Jury had accused the defendants, through the improper use of patents, of preventing all producers of bentonite, other than themselves, from "selling or otherwise marketing bentonite, an unpatented product or article of commerce, to the foundry trade."\[^{117}\] The indictment alleged:

"... the defendants acquired control of the Kraus and Hanley patents, not for the purpose of exploiting those patents by issuing license in return for license fees and thus gaining the normal and reasonable financial reward of a patentee, but for the purpose of using the patents to control, restrain, and monopolize the business of producing and selling bentonite, a substance not covered by the claims of the patents."\[^{118}\]

In the *Dow case* the Grand Jury charges that patents covering processes for fabricating magnesium were used to promote the sale of unpatented magnesium.\[^{119}\] The indictment recites that this was accomplished by the granting of licenses which included the condition that the license was to be granted only so long as the licensee purchased unpatented magnesium from the Dow Chemical Company. The indictment further recites that although the written condition was later abandoned,\[^{120}\] a license was granted by the Dow Chemical Company under its fabricating patents only after the prospective licensee had signed a contract to purchase his magnesium requirements from it. According to these allegations, therefore, the defendants merely substituted "a method of doing business" to accomplish the same results previously effectuated by an allegedly invalid covenant.\[^{121}\] An interesting feature of the *Dow case* is that the sole producer in the United States since 1927 of magnesium is alleged to be the defendant Dow.\[^{122}\] This is the first case of the type where the patent owner was the only source of supply of the unpatented article sought to be promoted by the use...

\[^{116}\]Id. ¶ 72. The practices alleged in the Government's complaint were to some extent attacked in a counterclaim by the defendants in Slayter & Co. v. Stebbins-Anderson Co., Inc., 117 F. (2d) 848 (C. C. A. 4th, 1941), _aff'd_, 31 F. Supp. 96 (D. Md. 1940), who were charged with contributory infringement by the plaintiff-patentee. The court found that the patent was "unlawfully used as a means of obtaining a limited monopoly in the manufacture and sale of an unpatentable material."

\[^{117}\]Indictment, ¶ 20. Pleas of nolo contendere entered on Mar. 18, 1941. \[^{118}\]Id. ¶ 20.

\[^{119}\]Indictment, ¶ 20.

\[^{120}\]Id. ¶ 25.

\[^{121}\]Id. ¶ 26.
of patents. The *Dow* and *American Colloid cases* are the first criminal prosecutions under the Sherman Act for practices which the Supreme Court has held, in infringement suits, were beyond the scope of the patentee's privileges. Thus any attempt to control or tie in other articles with the patented product or patented process now invites action under both the Sherman and Clayton Acts.

In the *Certain-teed case*, it is charged that the defendants became licensees under an invalid patent for the purpose of fixing the price of perforated lath. According to the indictment, each of the defendants knew at the time of the execution of the licenses that the patent was invalid, and facts are alleged in the indictment to show that the patent did not involve invention and that it was acquired by fraud. Here then is a situation where the prosecution is attempting to strike down the limited exception to the operation of the antitrust laws. If the patent is in fact invalid, it would seem that it could not serve to save an otherwise illegal agreement from the prohibitions of the Sherman Act.

In the most recent of such cases \(^{123}\) instituted by the Government, *United States v. Kearney and Trecker Corporation*, \(^{124}\) it is charged that the defendants have violated the Sherman Act by conspiring to take out a patent on a vital part of a milling machine and that armed with this patent the defendants secured illegal control of another essential but unpatented part of the machine. This case terminated in a consent decree by the terms of which the defendants were ordered to dedicate the patent to the public without compensation. \(^{125}\)

**Future Possibilities**

Changes in the relation between patent practices and the antitrust laws may come in the future from two sources, Congress \(^{126}\) and the

---

\(^{123}\) Indictment, ¶¶ 11, 13 et seq.

\(^{124}\) See also *United States v. Barber-Colman Co.* (N. D. Ill. E. D. Civil No. 3491, Oct. 7, 1941) (defendants charged with using patented machinery to control and fix prices of unpatented products); *United States v. Synthetic Nitrogen Products Corp.* (S. D. N. Y. Civil No. 15-365, Sept. 5, 1941) (consent decree entered on same day enjoining defendant licensee from adhering to certain limitations in license executed with foreign non-defendant licensor.

\(^{125}\) N. E. Ill. E. D., Civil No. 3337, Aug. 22, 1941.

\(^{126}\) Id. consent decree entered the same day, see ¶ 3.

\(^{120}\) Of course, one way to eliminate all harmful patent practices would be to abolish the patent system. The supporters of this extreme view argue, first, that our patent system is based upon an erroneous psychological assumption, namely, that inventions are made because of, or encouraged by, the reward contained in a patent grant. This school of opinion holds that inventions are made by men who are so constituted psychologically that they must invent, just as an artist must paint, or a scientist probe for new discoveries which receive no protection under our laws. Those who favor abolishing the patent system claim, secondly, that all invention is simply a putting together of facts already within human knowledge. For example, the automobile is a combination of a combustion engine and a wheel, both familiar phenomena at the time of the automobile's "invention." Thirdly,
courts. Broadly speaking, the nature of these changes will depend upon the respective values which Congress and the courts attach to the policies of the patent and antitrust statutes. The courts have frequently held the patent privilege subject, in addition to the public interest in competition, to other public interests such as the obligation of user;\textsuperscript{127} the right of eminent domain;\textsuperscript{128} state police regulations;\textsuperscript{129} and recently, national defense.\textsuperscript{130}

Coming then to the reforms "to prevent their use (patent laws) . . . to create industrial monopolies", several suggestions have been urged.

**COMPULSORY LICENSING—THE BROAD TYPE**

The recent intense interest in the relation between patents and the anti-monopoly laws was originally aroused by the President's message they claim that most inventions today are turned out by research groups controlled by large corporations who would continue to invent even if the patent system were abolished because of the need to turn out a constantly superior product. In this last contention they are supported by testimony concerning the automobile industry. *See TNEC, Hearings*, pt. II, 256-372; cf. testimony, pt. III, 911 *et seq.* This school of thought does not answer the argument that, lacking a system of limited patent protection, the wealth of inventions now disclosed in patent grants may never become available to the public. Further, without the patent protection whether real or imaginary afforded by present laws, speculative capital would not be attracted to the development of inventions by individuals of small means.


\textsuperscript{130}In *Pollen v. Ford Instrument Co.*, Inc., 26 F. Supp. 583, 584 (E. D. N. Y. 1939), the plaintiff moved for an order requiring the defendant to produce drawings showing the construction of certain military apparatus embodying inventions disclosed in defendant's patents. The Government intervened as party defendant because of the danger of revealing military secrets. The issue in the case was summed up broadly by the Court as follows:

"The situation disclosed is exceedingly interesting. On the one hand we have, through the issuance of these various letters patent, a grant by the Government itself of an absolute monopoly. On the other hand, we have the assertion of a paramount government right, the inherent right of self-preservation for purposes of national defense. In effect, therefore, the motion is resisted because of the paramount law."

The Court stated further:

"There is no question that in the ordinary infringement suit the Government has no greater rights than those of any other alleged infringer and that it would be subject to the same rules of practice as those provided for all litigants. But here we have a unique situation . . . ."

Thus, although in the "ordinary" suit plaintiff's motion would probably have been granted, it was refused in the instant case because of the superior public interest in national defense. *See also* Pierce v. Submarine Signal Co., 25 F. Supp. 862 (D. Mass. 1939).
to the Senate in which he suggested that "future patents might be made available for use by anyone upon payment of appropriate royalties." This suggestion has found complete favor with the TNEC. It has recommended that Congress enact legislation which will require that any future patent is to be available for use by anyone who may desire its use and who is willing to pay a fair price for the privilege. The arguments against such a statute voiced before the TNEC and elsewhere are generally made in the name of the poor inventor by the large corporation. First, it is claimed that to remove the exclusive feature from the patent grant would place the inventor of small means at the mercy of wealthier organizations; that the compulsion of granting a license to every potential competitor with means would prevent the inventor from building up his own large and profitable organization. The opposing arguments, however, would seem to be based on realities. The inventor whose means are small is interested in profits from his invention, and it is immaterial to him whether they are made by way of royalties or in the exploitation of the patented device. This type of inventor is generally forced to seek out persons willing to pay for the use of his invention. It would, therefore, be no burden for him to be compelled to issue licenses at royalties fixed by the courts. But granted that an inventor is interested pri-

131.SEN. DOC. No. 173, 75 Cong., 3d Sess. (1938), Strengthening and Enforcement of Antitrust Laws, VI (5).
132.TNEC, Final Report, p. 36. This suggestion has met bitter opposition. See TOULMIN, PATENTS AND THE PUBLIC INTEREST (1939) 50, 75: "The argument that an outside manufacturer who cannot use the patents of a patent pool or cross-license arrangement should be able to do so is merely the communist argument that all property should belong to the community and any one can use it who desires... The day we have compulsory licensing of patents we write the epitaph on the tombstone of a free America." Cf. Benjamin, Compulsory License Suits in Germany (1935) 17 J. PAT. OFF. SOC. 962. Compulsory licensing bills have been frequently introduced in Congress. The recent McFarlane Bill (H. R. 9295, 75th Cong. 3d Sess. (1938)) would enable any person to secure a compulsory license three years from the date of the issuance of the patent by showing that he was financially responsible and that the "public interest" would be advanced by the issuance of such a compulsory license. As to the constitutionality of compulsory licensing, see Fenning, The Origin of the Patent and Copyright Clause of the Constitution (1929) 17 THE GEORGETOWN LAW JOURNAL 109; Schechter, Would Compulsory Licensing of Patents Be Unconstitutional? (1936) 22 VA. L. REV. 287.
136Bills proposed in Congress have delegated this responsibility to the courts. It is suggested that a panel of non-competing business men would be just as effective in determining a "reasonable" royalty.
marily in exploiting his own invention, a compulsory licensing statute would compel him to grant merely a non-exclusive license, leaving him free to make, use, and vend his own invention. The second argument generally made against compulsory licensing is that it would discourage invention by lessening the value of patents. But courts are likely to compel the issuance of licenses only upon the payment of fair and substantial royalty rates to compensate for the loss of profits. The final argument is that compulsory licensing would enable wealthy corporations to secure the use of all valuable patent rights, placing corporations less financially powerful at a competitive disadvantage. However, it is obvious that wealthy corporations have such an advantage now, for with superior means they may develop or acquire outright more of the valuable patent rights than their financially weaker competitors.

**COMPULSORY LICENSING—THE NARROW TYPE**

It is possible to have a compulsory licensing statute which would not affect all patents, but only those which are suppressed or accumulated for the purpose of eliminating competition. As early as 1913, a Bill was favorably reported to the House of Representatives which would enable an applicant to secure, in a federal court, a license under a patent by showing that the invention was being withheld from the public.\(^{157}\) This Bill was never passed, probably because of some other features.\(^{138}\) While there are many valid arguments against the broad type of licensing statute which would embrace all future patents, there are none from an economic or social view which may be made against a statute limited to curbing acts of suppression or accumulation. Patent accumulations for the purpose of suppression and dominance over an industry are generally considered illegal, although the Supreme Court has not yet directly so held.\(^{138a}\) A private person injured by these activities enjoys the remedy of a suit at law for treble damages. The narrow type of compulsory licensing statute would simply grant him an additional and equitable remedy to compel the issuance of a license.

Under the English statutes there are six classes of abuses for which

---

\(^{157}\) This provision applied only against those purchasing from the original patentee.

\(^{138}\) Oldfield Report, House Committee on Patents, H. R. Rep. No. 1161, 62d Cong., 2d Sess. (1912). This report and its legislative suggestions were bitterly attacked. See Montague, The Proposed Patent Law Revision (1912) 26 Harv. L. Rev. 128; and Barnett, The Oldfield Bill (1913) 22 Yale L. J. 383. The latter, however, suggested that a compulsory licensing statute might well be enacted if limited to operate only against those possessing an illegal monopoly of patents. According to the Oldfield Report, evidence of resale price maintenance of patented articles, restriction of the use of patented articles with unpatented articles, and the suppression of patents constituted justification for the provisions of the Bill.

\(^{138a}\) See Standard Oil Co. of Indiana v. United States, 283 U. S. 163, 174 (1930).
patent grants are subjected to the issuance of compulsory licenses: (1) where the invention is not being worked in the United Kingdom on a commercial scale and no satisfactory reason appears therefor (unprofitability, lack of demand, and lack of capital are apparently satisfactory reasons); (2) where the invention is not being worked in the United Kingdom because of foreign competition stemming from the patentee; (3) where demand for the invention is not being met to an adequate extent and on reasonable terms; (4) where "by reason of the refusal of the patentee to grant a license or licenses upon reasonable terms, the trade or industry of the United Kingdom or the trade of any person or class of persons trading in the United Kingdom, or the establishment of any new trade or industry in the United Kingdom, is prejudiced, and it is in the public interest that a license or licenses should be granted"; (5) where "any trade or industry in the United Kingdom, or any person or class of persons engaged therein, is unfairly prejudiced by the conditions attached by the patentee . . . to the purchase, hire, license, or use of the patented article, or the using or working of the patented process"; and (6) where "it be shown that the existence of the patent, being a patent for an invention relating to a process involving the use of materials not protected by the patent or for an invention relating to a substance produced by such a process, has been utilised by the patentee so as unfairly to prejudice in the United Kingdom the manufacture, use or sale of any such materials."

The remedies provided for under the English act vary in the above six cases. In some instances one may be entitled as of right to a non-exclusive license; in others, to an exclusive license. It is possible, if the objects of the Act cannot be secured by the granting of licenses, to obtain the revocation of the offending patent.

It appears that without a statute the remedy of compulsory licensing in the United States against those possessing an illegal patent monopoly will probably not be made available in the future by the courts to private litigants. At present there are two square holdings in the federal courts that one injured in his business by a company enjoying an illegal patent monopoly cannot compel that company to grant a license on the same terms and conditions as licenses granted to others. Since it appears that Congress will not enact in the near future that which the federal

---

139The Patents and Designs Act, 7 Edw. 7, c. 29 (1907); see also 12 Halsbury's Statutes 593 (1930).
139aThe Patents and Designs Act, 1932; see also 25 Halsbury's Statutes 328 (1932).
140Terrel, Patents (8th ed. 1934) c. 12, Abuse of Monopoly.
courts have so far refused to private litigants the only immediate hope for an effective remedy against illegal concentrations of patents lies in antitrust prosecutions which effectuate some form of dissolution or compulsory licensing.\textsuperscript{143}

\textbf{THE FRANCHISE VIEW—RECOMMENDATIONS BY THE TNEC}

One possibility which in the future would drastically affect the scope of patent privileges would be the enactment of other recommendations of the TNEC.\textsuperscript{144} In brief, these proposals\textsuperscript{145} would amend the patent statute by making illegal any condition which restricts the licensee in respect of the quantity of any article he may produce, the price at which he may sell, the purpose for which or manner in which he may use the patent or any article produced thereunder, or the geographical area within which he may produce or sell such an article.\textsuperscript{146} The Committee also recommended to make illegal any other restriction (e.g. as to quality, time, etc.) which would tend substantially to lessen competition or to create a monopoly, unless the restriction was necessary to promote the progress of science and the useful arts. In other words, apart from the recommendation for a system of compulsory licensing of all future patents, the patent owner would remain free to assign the patent, to grant an exclusive license, to grant a non-exclusive license, or to withhold a license. But if he grants a license, the license must be unrestricted unless it can be demonstrated that a particular restriction, other than those unconditionally outlawed, promotes the progress of science and useful arts. Furthermore, the Committee has recommended that if any of these prohibitions are violated, the “offending” patent should be forfeited to the Government and thereafter become part of the public domain.\textsuperscript{146a}

\textsuperscript{143}Another remedy which may be invoked in an antitrust suit is the cancellation of a patent on the ground of (1) conspiracy to take out a patent for the purpose of restraining trade; or (2) invalidity of the patent because of disclosures in the prior art; where such disclosures appear, it would seem proper to challenge the validity of a patent to meet the defense of immunity under the patent. \textit{See} Lamb, \textit{loc. cit. supra} note 3, at 280; United States v. United Shoe Machinery Co., 247 U. S. 32, 37 (1918); United States v. Standard Oil Co. of Indiana, 283 U. S. 163, 180 (1930); United States v. Porcelain Appliance Corp., unreported (N. D. Ohio E. D. Sept. 9, 1926); \textit{but see} United States v. Motion Picture Patents Co., 225 Fed. 800, 804 (E. D. Pa. 1915).


\textsuperscript{145}TNEC, Final Report, pp. 36, 37.

\textsuperscript{146}Subsequent to the hearings before the TNEC on the automobile, glass container and beryllium industries, the Department of Justice made known to the Committee its conclusions based upon its investigation of a considerable number of additional cases. \textit{See} TNEC, Final Report, Exh. No. 2797, pp. 261, 269.

\textsuperscript{146a}Analogies are numerous. For example, anyone licensed by the Federal Communica-
The unconditional outlawing of quantity, price, use, and geographic restrictions would greatly curtail the patent owner's freedom in exploiting his patent privilege. Inability to divide the patent privilege and control the licensee's price and markets would probably lessen the value of exploiting a patent. And if it is true that the monetary reward arising out of patent ownership is the principal stimulus to invention, then the enactment of these recommendations might discourage invention. It may be desirable, therefore, to adopt a solution which would permit the imposition by a licensor of quantity, price, use and geographic restrictions where the public interest would not suffer. A more elastic approach than the TNEC's blanket condemnation of the above restrictions would seem to lie in the direction of continued vigorous enforcement of the antitrust laws. Antitrust enforcement proceeds from case to case and from industry to industry. It permits discrimination between the legitimate use of patent restrictions and their use to thwart the purposes of the antitrust laws. So long as there exists some active and discriminating agency, whether it is the Department of Justice or an administrative board, a patent owner will be enabled to enjoy his present freedom in granting restrictive licenses so long as such restrictions do not unreasonably restrain trade.

Of all the license restrictions condemned by the TNEC, the most objectionable undoubtedly relates to fixing the selling price. It is possible, however, to construe the two Supreme Court cases establishing the propriety of this type of restriction as narrowly as this: If "A" has a patent and is exploiting it by manufacturing and selling the article em-

147 The creation of an administrative board to police patents, as other government boards now police securities, railroads and other matters affecting the public interest, would provide even greater flexibility in discriminating between the desirable and undesirable patent practices than is now possible in the case by case approach afforded by the Sherman Act. The creation of a federal commission to supervise pooling, cross-licensing, and other patent practices, with power to issue cease and desist orders like the Federal Trade Commission, has been suggested from time to time. See Boyle, A Federal Patents Commission (1940) 22 J. PAT. OFF. SOC. 950. The creation of such a commission would undoubtedly permit the handling of thousands of types of patent practices whereas the present antitrust procedure, requiring a long trial, either criminally or civilly, can deal with only a few. It would not appear advisable to give such an administrative board exclusive power to prevent unfair patent practices. To do so would remove the chief deterrent against abuse of the patent privilege, namely, the fear of criminal prosecution under the Sherman Act. However, the functioning of such a commission side by side with the continued criminal enforcement of the antitrust laws against flagrant patent abuses would seem to retain the beneficial effects of a threat of criminal prosecution and, at the same time, permit clarification of the legal status of many patent practices.

bodying his invention to the public, he may license another to manufac-
ture under that patent on condition that the licensee follow a fixed sales
price. These cases say nothing about the licensing situation where "A"
dominate the entire industry or where "A" has secured a measure of
control through acquiring competing patents; or where "A" and "B"
together dominate the industry; or where "A" and "B" are substantial
factors in the industry; or where "A" is not engaged in manufacturing
under his own patent and does not appear likely to do so;\textsuperscript{149} or where,
in the above instances, other restrictions are also included in the licenses.
These are the situations at which the TNEC's recommendations are
really aimed. However, an existing agency acting under the fifty-year
old Sherman law is in a position to challenge price restrictions without
interfering with their possibly otherwise legitimate use. Furthermore, if
sufficient economic evidence is adduced in pending and future cases to
indicate that the rule of the Bement and General Electric cases should
be completely overturned, the Supreme Court may act as quickly as it
did in overruling the A. B. Dick case. The history of the development
of the relation between patent practices and the anti-monopoly laws
demonstrates that the Court in its interpretation of the patent statute
and the anti-monopoly laws is influenced greatly by economic considera-
tions.\textsuperscript{150} Economic considerations led the Supreme Court to forbid
the use of patents which limited competition in the marketing of patented
goods by resale price maintenance,\textsuperscript{151} and to limit competition in matters
outside the scope of the patent by any device whatever.\textsuperscript{152} Prior to the
time that the Court condemned resale price maintenance and tying re-
strictions, there was agitation in Congress to outlaw these practices.
Evidence of their wide-spread abuse had been accumulating. So, at present
there is also agitation in Congress to legislate away the remaining restric-
tions which may be imposed by a patentee, and evidence of abuse of these
restrictions is likewise accumulating. It is doubtful, however—to venture
a prophecy—that the Court will overrule the General Electric case as
flatly as it did the A. B. Dick case. More likely the rule of the General
Electric case will be construed narrowly to cover only those situations
where the motive for or the effect of the restriction has no relation to any
possible pattern of industrial control.\textsuperscript{153}

\textsuperscript{149} Cf. Straight Side Basket Corp. v. Webster Basket Corp., 82 F. (2d) 245 (C. C. A. 2d, 1936).

\textsuperscript{150} See Mr. Justice Brandeis' concurring opinion, Boston Store of Chicago v. American
Graphophone Co., 246 U. S. 8, 27 (1917); also the opinions in the Standard Oil (Indiana),
283 U. S. 163 (1931), Carbice, 283 U. S. 29 (1931), and Leitch, 302 U. S. 458 (1938) cases.

\textsuperscript{151} Bauer & Cie v. O'Donnell, 229 U. S. 1 (1913).

\textsuperscript{152} See Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502 (1917), and
Carbice, 283 U. S. 29 (1931), and Leitch, 302 U. S. 458 (1938) cases.

\textsuperscript{153} Havighurst, loc. cit. supra note 3, at 518, suggests: "The General Electric case may be
The TNEC proposals, in providing for the abrogation of all other restrictions which "tend substantially to lessen competition" and do not "promote the progress of science and the useful arts", the penalty of forfeiture of patents in situations where the outlawed restrictions are employed and where the above standard is violated, and a system of compulsory licensing of all future patents, represent the most marked swing in American patent history back toward the franchise view. Their enactment would in effect restore the philosophy underlying the origin of the patent grant and its early development in England and Colonial America. The analogies are remarkable. Compulsory licensing in some of the American colonies finds its counterpart in the TNEC recommendation for licensing on a reasonable basis of all future patents. The prohibitions in the Statute of Monopolies against using patents to "hurt trade" or to "inconvenient" the public are matched by the TNEC's condemnation of restrictions which "lessen competition or create a monopoly", unless the restriction is necessary "to promote the progress of science and the useful arts." The penalty of revocation for abuse, so often written into the very terms of the patent grant in the 17th and 18th centuries, is almost precisely the TNEC's proposal for forfeiture. The analogies may be multiplied. It suffices to point out that these recommendations of the TNEC are not new nor radical nor communistic. Their roots are deep in our past and they form part of our legal heritage. The TNEC's recommendations would impose upon the courts the standard in determining the legality of patent practices which was enunciated in Seymour v. Osborne and put into practice in Hoe v. Knap. They would force a narrow construction of the standard set up in the General Electric case that any licensing condition is permissible "which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure." The vice in the broad construction of this standard is its point of departure, namely, the self-interest of the patent-holder. Under the TNEC's recommendations the point of departure for judging the legality of a licensing restriction would be the public's interest, not the patent-holder's. Perhaps a court would reach the same conclusion in many instances under both tests. But the advantage of the latter test is that it would always keep uppermost in the mind of the court the notion that a patent is a public franchise, to be exercised only in accord with the public benefit.

In subjecting all future patents to compulsory licensing, and not mere-

154 See TOULMIN, loc. cit. supra note 3.
155 11 Wall. 516 (U. S. 1870).
156 204 Fed. 204 (C. C. N. D. Ill. 1886).

explained on the ground that there was no evidence of a purpose to monopolize, and the question involved related only to the validity of the license restriction as such."
ly those which are suppressed, monopolized or abused in some fashion, the TNEC has gone farther than is perhaps necessary to realign our patent system in keeping with the public interest. With this modification in the scope of the compulsory licensing system and with the elimination of the blanket condemnation of price, quantity, use and geographic restrictions—these latter restrictions, like any other type of restriction, should be submitted to the same broad test of the effect of the particular restriction upon the public interest—it would seem desirable to enact all of the TNEC’s recommendations here discussed.\textsuperscript{157} With these modifications the enactment of the TNEC’s recommendations would reestablish the franchise view and reorient the patent system in a direction consistent with its history and purpose.

\textsuperscript{157}Other reforms in the patent system have been recommended by the TNEC. See Final Report, p. 37.
THE
GEORGETOWN LAW JOURNAL
Volume 30 Number 3
JANUARY, 1942

THE BOARD OF EDITORS

Timothy Peter Ansbeery, of the District of Columbia . . . Editor in Chief
Charles E. Thompson, of Pennsylvania . . . . . . Associate Editor
James A. McKenna, Jr., of New York . . . . . . Associate Editor
Robert D. Scott, of California . . . . . Administrative Law Editor
William Blum, Jr., of Maryland . . . . . Federal Legislation Editor
John Preston, Jr., of the District of Columbia . . . . Note Editor
David Arthur Wilson, Jr., of Connecticut . . . Recent Decision Editor
W. Barrett McDonnell, of Iowa . . . . . Recent Decision Editor
John R. Wall, of Virginia . . . . . Book Review Editor
Joseph Lea Ward, of Virginia . . . . . Secretary

STAFF

WALTER AXELROD
Rhode Island

PAUL R. DEAN
Ohio

EDWARD A. DECLERCK
Oklahoma

JOHN H. EVANS
Pennsylvania

JOSEPH FRANCIS GOETTEN
New York

GEORGE J. HAYLON
Massachusetts

JAMES R. HIGGINS
Pennsylvania

JOHN R. HIGGINS
Alabama

EUGENE E. KLECAN
Missouri

JOHN A. KOTTE
Florida

HARRY L. KUCHINS
Missouri

LEO C. LORD
District of Columbia

MILTON A. NIXON
Maine

GILBERT RAMIREZ
New York

CHARLES WILLIAM STEWART
District of Columbia

QUENTIN O. YOUNG
New Jersey

Harold Gill Reuschlein, Faculty Advisor

276
ADMINISTRATIVE LAW
UNEMPLOYMENT COMPENSATION—RIGHT OF ADMINISTRATIVE AGENCY TO APPEAL FROM COURT REVERSAL

Much has been written about the right of appeal from decisions of administrative agencies and about the scope of judicial review of administrative findings. Little discussion, however, has centered upon the further question of the right of the administrative agency to appeal from a court's reversal of its determination. This question is presented by two recent, conflicting opinions of the Supreme Court of Washington and the Supreme Court of North Carolina.

The pertinent state statutes and the factual situations in the two cases are practically identical. In both, petitioners, alleging former employment by certain companies, filed claim for unemployment compensation benefits. The state unemployment compensation agency, in each instance, allowed the claim and the employers appealed to their respective county courts which reversed the determinations of the agencies and directed a denial or partial denial of benefits on the ground that the services on which the right to benefits was based were not covered by the statutes. Statutes in each of the states provided that the agency should be deemed a party in any judicial review of its determinations and that appeals in unemployment compensation cases should be allowed to aggrieved parties as in other civil cases. The claimants in both cases did not appeal. The agencies, however, did appeal, and in each instance the employer-respondent challenged the right of the state agency to do so.

The North Carolina Supreme Court denied the right of the agency to appeal. The Supreme Court of Washington, on the other hand, held that the agency had the right to appeal from a judgment contrary to its ruling and thus secure a decision thereon by the supreme court of the state. This question had not previously arisen in the field of unemployment compensation. It seems safe to predict, however, that because of the great similarity of other state unemployment compensation laws it may be the subject of frequent litigation in the future.

1In re Foy, 116 P. (2d) 545 (Wash. 1941).
2In re Mitchell, 16 S. E. (2d) 476 (N. C. 1941).
4In re Mitchell, 16 S. E. (2d) 476 (N. C. 1941).
5In re Foy, 116 P. (2d) 545 (Wash. 1941).
6Magnier v. Kinney, 4 CCH Unemployment Insurance Service 3053 ¶ 8068 (Neb. 1941); Brown v. Haith, 4 CCH Unemployment Insurance Service 30503, 30504 ¶ 8069 (Neb. 1941); Deshler Broom Factory v. Kinney, 4 CCH Unemployment Insurance Service 30505, 30507
Where the problem has occasionally arisen in other fields, the courts have not been consistent in its solution. A number of courts have looked solely to statutes for their answer. With this basis of determination some courts have held that in the absence of a statute specifically providing for such appeal the right of the agency to appeal should be denied. On the other hand, it has been held that the agency's right to appeal should not be denied unless a statute specifically prohibited such appeal. These views seem to establish only the rather obvious conclusion that where there is a statute specifically granting or denying the right to appeal, the intention of the legislature being clear, such statute will be controlling. Where the statute is not specific, a sounder basis for determining the legislative intent than the mere absence of a specific provision would seem to lie in an analysis of the position of the administrative agency and the effect upon it of a reversal by the court. In other words, is the agency an aggrieved party? In ascertaining the interest of the administrative agency and the effect upon it of reversal by a lower court, some courts have been concerned only with the personal or pecuniary loss sustained. Other courts have noticed a public interest when an administrative decision is reversed.

THE AGENCY'S PECUNIARY LOSS

In the instant cases, the employers challenged the agencies' right to appeal upon the ground that no pecuniary loss had been suffered; for the court reversal in each case required the agency not to pay any benefits or to pay less than had been previously allowed by the agency. The fallacy of this argument is apparent upon consideration of the nature of an unemployment compensation benefit decision, which, when final, would seem to be res judicata as to the employer's liability for contributions to a fund from which benefits are paid, and which, if it reversed the allow-

---

§ 8073 (Neb. 1941). These citations are for decisions of the lower (county) courts of Nebraska. The cases are now on appeal to the Supreme Court of Nebraska. On November 7, 1941, counsel for the agency and the attorney for the employer in Brown v. Haith, supra, were called into chambers by that court and questioned as to the propriety of the agency appearing as a litigant (appellee in this instance) in these appeals. The counsel for the agency was asked to prepare a brief on the subject as quickly as possible.

7 Yockey v. Woodbury County, 130 Iowa 412, 106 N. W. 950 (1906); Board of Zoning Appeals v. McKinney, 174 Md. 551, 199 Atl. 540 (1938).


9 Kirchoff v. Board of Commissioners of McLeod County, 189 Minn. 226, 248 N. W. 817 (1933); Lansdowne Borough Board of Adjustment's Appeal, 313 Pa. 523, 170 Atl. 867 (1934).

10 Moede v. Board of County Commissioners of Stearns County, 43 Minn. 312, 45 N. W. 435 (1890); Rommell v. Walsh, 127 Conn. 16, 15 A. (2d) 6 (1940), 26 Iowa L. Rev. 382 (1941); People ex rel. Burnham v. Jones, 110 N. Y. 509, 2 N. Y. Supp. 148 (1888).
ance of a claim by the agency, would seem to preclude that body from recovering contributions from the employer on the basis of claimant’s services. Since rates of employers’ contributions and employees’ benefits are determined in accordance with statistical and actuarial studies designed to insure an adequate unemployment compensation fund, it is likely that the total contributions from all employers will exceed the total benefits paid. Moreover, in normal times an individual employer’s contributions will very frequently exceed the benefits paid to his employees. Consequently, there may be a net pecuniary loss to the unemployment compensation fund from the denial of benefits to a class of employee claimants. As trustee of that fund, charged with the duty of administering a public program, the unemployment compensation agency may thus be a party aggrieved even in a pecuniary, although not personal, sense.

PUBLIC INTEREST

An unemployment compensation agency by its very creation is endowed with a public interest and is charged with the duty of administering a public program; consequently, it may be argued, it is aggrieved by any interference with the discharge of that duty. Other public interests which may be protected by appeal of administrative agencies have been recognized by the courts; and a pecuniary interest in caring for a public fund does not appear to be essential. In the field of workmen’s compensation where there ordinarily is no such fund it has been held that the Commission had sufficient interest in the matter of denial of compensation benefits to appeal although the claimant did not appeal. It has also been held that a board of county commissioners, as the representative of the public, to whom is intrusted the matter of forming school districts, may appeal from an order of the district court reversing their action. Similarly, courts have held that zoning boards represent a sufficient public interest to appeal from court reversals. The Court of Appeals of New York has ruled that upon reversal by the supreme court of a decision of the land commissioners as to the title to certain land under the waters of Lake Ontario, the commissioners may appeal though resolution of the dispute could in no way affect the public

13Moede v. Board of County Commissioners of Stearns County, 43 Minn. 312, 45 N. W. 435 (1890); Board of Commissioners of Carter County v. Woodford Consolidated School District No. 36, 165 Okla. 227, 25 P. (2d) 1057 (1933).
14Rommell v. Walsh, 127 Conn. 16, 15 A. (2d) 6 (1940); Board of Adjustment of City and County of Denver v. Handley, 105 Colo. 180, 95 P. (2d) 823 (1939).
body.\textsuperscript{15} The Supreme Court of Wisconsin has held that a sheriff, if he is required by \textit{habeas corpus} to restore his prisoner to liberty, is a party aggrieved within the rule that only such a party is entitled to be heard on appeal or review on writ of error.\textsuperscript{16} In all of these decisions, the basis upon which appeal was allowed the administrative agency was its capacity as representative of the general public. The courts' statements clearly indicate the basis for their reasoning. In \textit{Moede v. Board of County Commissioners of Stearns County\textsuperscript{17}} the court said:

"... In support of the second ground, counsel urges that the county board is not a party to the certiorari, the writ being merely directed to them to bring up their proceedings for review; that the board is not a party aggrieved, having no interest in the subject involved,—likening the case to one where the judgment of a court is reviewed on certiorari, in which it is uniformly held that the court or judge whose judicial action is reviewed and reversed is not interested in the result, and hence cannot appeal, not being a party aggrieved. But, in our judgment, the cases are not at all analogous. The court or judge in the case supposed has no representative capacity, but is merely the tribunal by whom the rights of others have been determined. But the board of county commissioners is the representative of the county or public, to which is intrusted the matter of forming new school-districts, and uniting, dividing, or changing the boundaries of old ones, as public interests require. The public has a special interest in the establishment and preservation of these districts, and we think that the board of county commissioners, to whom that matter is intrusted, as the representative of the public in that regard, a party interested in and aggrieved by the order of the court reversing and setting aside their action, and therefore has the right of appeal."\textsuperscript{18}

In \textit{Rommell v. Walsh\textsuperscript{19}} the court said:

"... While these boards have ordinarily no corporate existence as such but are merely agencies of the municipality, and while they have no direct interest in the litigation, it would be a logical conclusion that because of the function they perform they should represent the public interests entrusted to them in appeals taken from their decisions. ..."

"... We know of no compelling reason why an administrative board, where it represents the public interests entrusted to its care, may not, as such, be made or appear as a party defendant in an appeal taken from an order it has made or may not, where the trial court has overruled its decision, prosecute an appeal to this court. The frequency with which such a practice has been allowed in the case of boards performing administrative functions indicates that it conforms to a general understanding that the procedure is proper and apt for the determination of the issues in litigation."\textsuperscript{20}

In \textit{People ex rel. Burnham v. Jones,\textsuperscript{21}} the court, speaking of the position of the Commission, said:

\textsuperscript{16}State \textit{ex rel. Durner, Sheriff v. Huegin}, 110 Wis. 189, 85 N. W. 1046 (1901).
\textsuperscript{17}43 Minn. 312, 45 N. W. 435 (1890).
\textsuperscript{18}Id. at 312, 313, 45 N. W. at 435.
\textsuperscript{19}127 Conn. 16, 15 A. (2d) 6 (1940).
\textsuperscript{20}Id. at 21, 15 A. (2d) at 9.
"... It is their duty, representing both public and private interests, to defend any determination which they have made and which they believe to be right. Having determined that the Bartholomay Brewing Company was the adjacent upland owner, and thus entitled to the grant asked for, they should defend their decision, and not permit the land to be conveyed to any other claimant. While, therefore, they did not have any property or pecuniary interest in the matter in controversy, they were nevertheless, we think, in a legal sense, aggrieved by the decision appealed from..."²²

In Workmen's Compensation Board of Kentucky v. Abbott²³ the court said:

"... Involved in that question is the further one as to the extent of the Board's interest in the matter involved, i.e., whether under the act it is only a mere nominal party to the proceedings on appeal either to the circuit or to this court; or whether it has, as the representative of the public, a substantial interest beyond that of a mere nominal party and which question will be hereinafter answered to the effect that it is more than a mere nominal party. Notwithstanding that fact, however, it, perhaps, would have been competent for the Legislature to deny it the right of appeal to this court and to have conferred it alone on the employer and the employee; but the fact that the Board is more than a nominal party and represents some substantial interests of the public in the due and proper administration of the act (as hereinafter shown) is persuasive that the Legislature did not intend to withhold from it the right of appeal so that it might protect that interest in this court to which an appeal may be taken; and, therefore, such right should not be denied, unless the act does so in clear and explicit terms..."²⁴

In the light of these opinions, it seems proper to view the public interest in taking care of the unemployed as sufficient to entitle the unemployment compensation agency to appeal from a court reversal. In the words of the Washington Supreme Court,

"... the legislature has declared the concern of the public with involuntary unemployment and the importance of legislation intended to lighten the burdens thereof. The preamble continues: 'Social Security requires protection against this greatest hazard of our economic life. This can be provided only by application of the insurance principle of sharing the risks, and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment. ... The legislature, therefore declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, and that this act shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum.' "²⁵

²¹ N. Y. 509 (1888).
²² N. Y. 509, 511 (1888).
²³ 212 Ky. 123, 278 S. W. 533 (1925).
²⁴ Id. at 126, 278 S. W. at 535.
²⁵ In re Foy, 116 P. (2d) 545, 549 (Wash. 1941).
RES JUDICATA IN UNEMPLOYMENT COMPENSATION

As previously mentioned, a judicial decision which denies a claimant's right to benefits on the ground that his services are not covered by the statute may be res judicata of the employer's liability for contributions in any subsequent action brought by the unemployment compensation agency.26 In the North Carolina decision the court sought to apply the res judicata doctrine to the lower court's decision in order to deny the unemployment compensation agency the right to appeal therefrom.27 Thus, the court ruled that the agency, being a party to the suit in the lower court, was bound by the decision there; for the claimant, whose interests had been established in the earlier proceeding, was not before the court on appeal. In effect, this decision views the appeal as a separate proceeding. But this decision is not consistent with the previously mentioned rule which forecloses the employer's right to challenge a benefit decision in an action brought against him for contributions. In a contributions case, the issues determined in a benefit case are not open to attack; however, the employer's right to appeal from a benefit decision is fully protected. Although convincing arguments have been advanced for denying such appeals by employers,28 the courts have not followed them. Not only have the courts allowed employers to appeal from benefit decisions involving coverage, i.e., whether the particular alleged employment is subject to the state unemployment compensation act, but they have also allowed appeals from decisions involving less than coverage. For example, in some states the unemployment compensation laws provide for employers' reserve accounts in which contributions collected from each employer are kept separate; and the rate of contribution is determined from the ratio of the employer's average payrolls to past contributions, less benefits paid. Other state unemployment compensation laws do not provide for separate employers' reserve accounts but contain various provisions for the pooling of funds with merit rating whereby the employer's rate of contributions is determined to some extent by the success of his past employment experience. Most of these laws provide a minimum below which the contribution rate may not be reduced. The effect of a single benefit payment upon a rate of contribution so established would be problematical and conjectural; nevertheless, because of such effect the courts have allowed employers to appeal from benefit decisions when questions other than coverage were the issue.29

---


27In re Mitchell, 16 S. E. (2d) 476 (N. C. 1941).


In such cases employers have been allowed to appeal from the determination of such issues as “availability for work,” “refusal of suitable employment,” “discharge for misconduct,” and unemployment “arising out of a labor dispute.” If appeals from benefit decisions, so freely granted employers, are denied the state unemployment compensation agency, agency rulings may be reversed and the agency not only prevented from defending them but also precluded from later actions for contributions. Should such reversals occur to an appreciable extent, the unemployment compensation fund might soon be depleted, thus rendering the helpless agency financially unable to carry out the legislative program for which it was created.

Aside from the pecuniary loss sustained, reversals by lower courts have a fundamental effect upon the administrative body which is twofold in character and upon which the very functioning of the body may depend. This effect reaches both the program itself and the administration of the program. First, by diverse holdings of the various lower courts of the jurisdiction, uniformity of application of the program as intended by the legislature is defeated. Secondly, the diversity in lower court holdings would lead to a complexity and difficulty of administration bordering upon the impossible. An analogy is found in the field of labor disputes. There, zones which had been insulated from the jurisdiction of the National Labor Relations Board by injunctions against that body, even though temporary, would prevent effective administration of the legislative program. Congress specifically provided against such impediments by granting injunctive immunity to the acts of that agency in carrying out its national program. The administrative problem is the same at the state level.

CONCLUSION

The position of the administrative agency in such appeal may be clarified by a consideration of the nature and development of this rather novel organ of government. An administrative agency, unlike a legislature, executive, or court, is not a body exercising only legislative or executive or judicial functions; it is rather an expert body established to administer a detailed program and possessing the various functions necessary to carry out that duty.


"... As the governance of industry, bent upon the shaping of adequate policies and the development of means for their execution, vests powers to this end without regard to the creation of agencies theoretically independent of each other, so when government concerns itself with the stability of an industry it is only intelligent realism for it to follow the industrial rather than the political analogue. It vests the necessary powers with the administrative authority it creates, not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of governmental organization. The dominant theme in the administrative structure is thus determined not primarily by political conceptualism but rather by concern for an industry whose economic health has become a responsibility of government. ..." 32

"But the administrative differs not only with regard to the scope of its powers; it differs most radically in regard to the responsibility it possesses for their exercise. In the grant to it of that full ambit of authority necessary for it in order to plan, to promote, and to police, it presents an assemblage of rights normally exercisable by government as a whole." 33

Does not the establishment of such an expert body imply the legislative intent that in matters affecting the administration of its program that body shall have the right and duty to present its expert testimony to the highest court of the jurisdiction and to recommend necessary and desirable changes to the legislature?

"With the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy. ..." 34

"Equally deserving of notice is the power that the administrative possesses to conduct independent explorations as a prelude either to the fashioning of policies, by way of case decision and specific regulations, or to the obtaining of additional powers from the legislature in order to achieve more effective control over an industry." 35

It seems proper to conclude that the right of an administrative agency to appeal from a lower court's reversal is implicit in the very nature of the administrative process.

JOSEPH FRANCIS GOETTEN

33Id. at 15.
34Id. at 23, 24.
35Id. at 41.
FEDERAL LEGISLATION
PATENTS: WAR SECRECY AND BEYOND*

THE inventive genius of Americans is one of the nation's great assets in the current war effort. To foster this asset, the Secretary of Commerce, with the concurrence of the President, established the National Inventors Council to bring to the attention of the military and naval authorities inventions and suggestions valuable to the national defense. Such suggestions have been received at the rate of 100 per working day. Further recognition of the importance of inventions to the defense program was manifested in the creation by executive order of the Office of Scientific Research and Development in the Office of the President.

The 1st Session of the 77th Congress has joined in the protection and encouragement of inventive ability. The outstanding patent legislation of this session is a revision of the tentative enactment of the 76th Congress intended to prevent the publication of inventions, "in the national interest." The law enacted by the 76th Congress amended the Act of October 6, 1917. That Act authorizes the Commissioner of Patents to issue a secrecy order and during wartime to withhold a patent of any invention if its publication would be "detrimental to the public safety or defense or might assist the enemy or endanger the successful prosecution of the war." The statute also prohibits publication of the invention or application for a foreign patent in violation of the order of secrecy. The 1917 Act is effective only during a state of war. The statute governing abandonment of patent applications, although applicable at all times, is very limited in scope insofar as it affects national defense inventions. It merely stipulates that applications for patents owned by the United States shall not be held to be abandoned upon failure to prosecute within the statutory period if the inventions disclosed are certified by designated authority within three years after filing date.

*The opinions or assertions contained herein are the private ones of the writer and are not to be construed as official or reflecting the views of the Navy Department or the naval service at large.

1Dept. of Commerce press release, April 28, 1941.
2Executive Order, June 28, 1941.
6This Act is almost identical with § 10(1) of the Trading With The Enemy Act, 40 Stat. 411 (1917), enacted on the same day. Under the latter the authority was effective only for the duration of the World War. This authority was delegated by the President to the Federal Trade Commission.
to be "important to the armament of the United States". Since an assignment of the application to the Government is prerequisite to applicability of this Act, its practical effectiveness is nil. Moreover, the statute does not purport to prevent disclosure or publication by the assignor. Thus, prior to the enactment of the Act of 1940, maintenance of the secrecy of inventions important to the public interest was practically non-existent.

The 1940 law, effective for two years, provides when an application for patent has been filed, the Commissioner of Patents may order that the invention be kept secret, and may withhold the grant of a patent for such period or periods as in his opinion the national interest requires. The legislation recognizes the property interest of the inventor applicant by the validation of an agreement between the applicant and the Secretary of War or the Secretary of the Navy or the chief officer of any established defense agency of the United States in full settlement for damages suffered and for the use of the invention by the government. Interpretations of the 1917 Act in its original form hold that alternative to the agreement is the right to sue in the Court of Claims for compensation for use, providing a tender of the invention has been made.

\[\text{This particular provision was incorporated in the amendment of July 6, 1916, 39 Stat. 348 (1916), 35 U. S. C. § 37 (1934).}\]

\[\text{For a detailed discussion of administrative procedure under the Act see Note (1941) 9 Geo. Wash. L. Rev. 445, 449.}\]

\[\text{If there had been no use by the Government damages could not be recovered under the wartime legislation. 86 Cong. Rec. 8425 (1941). Even under the amendatory Act, damages are not recoverable in the Court of Claims.}\]

\[\text{It was held under the 1917 Act that no right to sue exists unless a secrecy order has actually issued; voluntary maintenance of secrecy did not suffice. Rodman Chemical Co. v. United States, 65 Ct. Cl. 39 (1928); cert. denied 277 U. S. 592 (1928). It is not a condition precedent to recovery, however, that the patent application be allowed before the order of secrecy issues, nor is the Commissioner of Patents required to act on the application before issuance of the order. Allgrun v. United States, 67 Ct. Cl. 1 (1929). The rationale of In re Haskell, 278 Fed. 326 (App. D. C. 1922) is apparently contra, the court holding that issuance of the order of secrecy is evidence of the patentability of matter disclosed in the invention. (The validity of these decisions and those cited in notes 13, 14 and 16, infra would appear to be unimpaired by the 1940 amendment).}\]

\[\text{The right to sue in the Court of Claims was the only recourse available under the original Act of 1917, no provision being made for an agreement between the applicant and government officials.}\]

\[\text{Use by government contractors is use by the Government if such use has been directly or indirectly authorized by the Government. See Allgrun v. United States, 67 Ct. Cl. 1 (1929).}\]

\[\text{Express tender of use so as to serve notice of intent to hold the Government liable for compensation is prerequisite to the right to sue. Ordnance Engineering Corp. v. United States, 68 Ct. Cl. 301 (1929); Supplemental opinion, 73 Ct. Cl. 379 (1931). Mere use by government contractors and subcontractors is insufficient; the tender must be directed to the Government. Zeidler v. United States, 61 Ct. Cl. 537 (1926); cert. denied 273 U. S. 724 (1926). Formal tender proceedings are not necessary. Barlow v. United States, 82}\]
The 1940 enactment is not without sanctions. A violation of the official order of the Commissioner of Patents effects an abandonment of the subject invention and forfeiture of all rights of the inventor. An application for a patent in a foreign country, disclosure,\(^{15}\) or publication,\(^{16}\) abrogate the requirement of secrecy.

The statute is premised on the assumption that the American patent system, as then constituted, was the most effective mechanism for controlling national defense inventions. The assumption obviously was predicated on the theory that inventions in the national interest would not be published or disclosed prior to the filing of a patent application in this country. Experience under the statute\(^{17}\) proved it could be evaded by filing a patent application in a foreign country before an order of secrecy issued, or even before an application for patent was filed in the United States.\(^{18}\) This inherent weakness in the legislation can perhaps be excused by the necessity for speedy action. Moreover, merely a basic law was agreed to, and the legislature understood that subsequent clarifying and strengthening amendments might be necessary.\(^{19}\)

The legislative remedy adopted by the 77th Congress was simple. It amended the prior enactment by providing that a license\(^{20}\) must be obtained from the Commissioner of Patents to authorize filing in any foreign country of any patent application or application for the registration of any utility model, industrial design, or model in respect of any invention made in the United States. Limitation of the purview of the Act to inventions made in the United States avoided technical difficulties involved

---

\(^{15}\)Disclosure (as differentiated from publication) was not prohibited under the Act of October 6, 1917.

\(^{16}\)Under the wartime legislation the inventor was not responsible for incidental publicity of the invention resulting from its use by government contractors. Allgrun v. United States, 67 Ct. Cl. 1, 37 (1929).

\(^{17}\)The Commissioner of Patents appointed a Patent Office Defense Committee which worked with the Army and Navy Patent Advisory Boards, which had been appointed to assist in the selection of patent applications which merited secrecy. Hearings before Committee on Patents of the House of Representatives on H. R. 3359, 77th Cong., 1st Sess. (1941) 2; (1941) 22 J. PAT. Off. Soc. 869.

\(^{18}\)Hearing, supra note 17, 3, 5; 87 Cong. Rec., June 16, 1941, at 5316.

\(^{19}\)The limitation of two years on the life of the legislation enacted by the 76th Congress is evidence of a realization that subsequent amplification of the substance of the enactment would be necessary. The amendatory act, however, does not extend the life of the 1940 law, which will expire automatically on July 1, 1942.

\(^{20}\)Application forms for petitioning for license are designated as Forms DL-1 and DL-2.
in the application of such legislation to inventions made in foreign countries
and subsequently brought into the United States. It was the intent of
the House Committee on Patents, however, that further study be given
to future treatment of such inventions.

Additional provisions of the amendment may be summarized as follows:
(1) failure to procure the prescribed authorization from the Commissioner
of Patents as a condition precedent to foreign filing bars the inventor or his
successors, assigns, or legal representatives from receiving a United
States patent for the invention; (2) willful violation of a secrecy order by
a person having knowledge thereof carries a fine of not more than $10,000,
or imprisonment for not more than two years, or both.

Under section 6 of the act of Congress approved July 2, 1940 and
the order of the Administrator of Export Control, dated April 1, 1941,
patent applications are subject to export license if they fall within the
definition of "technical data". That it was the intent of Congress in
amending the 1940 patent legislation to provide for the licensing of all
applications for foreign patents irrespective of their status under export
control appears in debate in the House of Representatives in the rebuttal
of the suggestion that the proposed legislation constituted a usurpation
of prerogatives exercised by the Administrator of Export Control and
the Division of Controls of the Department of State. It was pointed out
that all patent applications would not qualify as "technical data" since
under export control procedure only a limited number of commodities
were then licensable.

---

21 It was the opinion of Francis M. Shea, Assistant Attorney General of the United States
that the act should cover any invention made in the United States, or brought into the
United States, so that the invention itself becomes subject to the jurisdiction of this country.
Upon consideration Congress restricted the scope of the legislation to inventions made in the
United States. To provide otherwise, it was argued, would result in requiring a cooperative
British inventor who shows his invention to United States naval and army officials to obtain
a permit to file abroad, thus penalizing friendly nations who are constantly exchanging
information and inventions with our Government. Hearing, supra note 17, 25, 26, 39, 40, 81.

22 The Committee thereby recognized the possibility of evasion by merely developing an
invention across the border and bringing it into this country. Hearing, supra note 17, 52,
80, 81, 82.

24 "Technical data" is defined in the Order of April 1, 1941 as inclusive of:
Any model, design, photographic negative, document or other article or material,
containing a plan, specification, or descriptive or technical information of any kind
(other than that appearing generally in a form available to the public) which can be
used or adapted for use in connection with any process, synthesis or operation in the
production, manufacture or reconstruction of any of the articles or materials the
exportation of which is prohibited or curtailed in accordance with the provisions of
section 6 of the act of Congress approved July 2, 1940, or of any basic or intermediary
constituent of any such articles or materials".

Thus, Congress found it necessary to modify our patent system to a certain extent by restricting the right to apply for a foreign patent. The alteration does not disturb the fundamentals of the system and is certainly justified under the circumstances. The legislative history of the Act demonstrates that in principle it was unanimously accepted from its inception, debate merely concerning technical aspects of the proposed legislation. The substance of the final draft of the Act represented a compromise between the original bill introduced by Congressman Lanham of Texas, and the joint proposal of representatives of the Department of Justice, the Patent Office, and the War and Navy Departments offered during hearings conducted by the House Committee on Patents.

**Assignment of Patent Applications**

The other patent law for which the first session of the 77th Congress is responsible is not strictly a national defense enactment. Protection of inventors is, however, of great long-pull importance to our military might. Congress amended the statute relating to assignments of patents and the recordation of such patent assignments, so as to cover applications for patents and assignments thereof.

The statute governing such assignments originally provided that every patent or interest therein shall be subject to a written assignment, but that the assignment shall be void as against any subsequent purchaser or mortgagee for a valuable consideration without notice unless it is recorded in the Patent Office within three months from the date thereof or prior to such subsequent purchase or mortgage. Since the statutory language did not incorporate specific provision as to patent applications, the question of their status was left to the courts.

Patent applications, like patents, are assignable, for a patent

---

[87] Cong. Rec. Feb. 17, 1941, at 1132; May 19, 1941, at 4330; May 22, 1941, at 4450; June 16, 1941, at 5316; June 24, at 5566; June 26, 1941, at 5636; July 22, 1941, at 6373; Aug. 11, 1941, at 7126, 7127; Aug. 13, 1941, at 7251; Aug. 15, 1941, at 7330, 7354; Aug. 18, 1941, at 7358; Aug. 25, 1941, at 7402.


[88] Hearing, supra note 17, 79, 80.


[91] An assignment of a patent under the law is defined as a written instrument purporting to convey the entire title to the patent, or an undivided share in that entire title. Six Wheel Corp. v. Sterling Motor Truck Co. of California, 50 F. (2d) 568, 571 (C. C. A. 9th, 1931).

application is property. The incidents of such an assignment are distinguishable from those of an assignment of a patent. An assigned application for patent carries with it only the assignor's inchoate right to exclusive use of the invention. If that right is not successfully perfected, no exclusive right to use of the invention vests in the assignee. On the other hand, the Patent Office, which records assignments of patent applications as well as patent assignments, will grant a patent to the assignee of the application if it is successfully prosecuted.

Unlike judicial treatment of the assignability of patent applications, there was no unanimity of opinion as to the rights of an assignee of a patent application, recorded in the Patent Office, as against an innocent purchaser for value. The early decisions inclined toward the view that the subject statute was inapplicable to any assignments executed prior to the granting of letters patent; that the record of an instrument is not constructive notice to a subsequent purchaser unless the statute requires the instrument to be recorded. Several more recent cases, however, are

time there was some doubt as to whether the assignment of a pending application for letters patent without an accompanying request that the patent issue in the name of the assignee conveyed the legal title as differentiated from the equitable title. It is now settled, however, that such request is not prerequisite to transfer of legal title as well as equitable title. Electric Auto-lite Co. v. P. & D. Mfg. Co., 78 F. (2d) 700 (C. C. A. 2nd, 1935), cert. denied, 296 U. S. 648 (1935); Individual Drinking Cup Co. v. Osmun-Cook Co., 220 Fed. 335 (D. N. J. 1915); Wende v. Horine, 191 Fed. 620 (C. C. N. D. Ill. 1911).


REV. STAT. § 4895 (1870), 35 U. S. C. § 44, which stipulates that patents may be granted and issued to the assignee of the inventor or discoverer providing the assignment is recorded in the Patent Office, and the application and specification is sworn to by the inventor or discoverer; Heywood-Wakefield Co. v. Small, 96 F. (2d) 496 (C. C. A. 1st, 1938), modifying Small v. Heywood-Wakefield Co., 21 F. Supp. 697 (D. Mass. 1937); Hearings before Committee on Patents of House of Representatives on H. R. 8441, 76th Cong., 3rd Sess. (1940) 7.

There can be no doubt that recording is unnecessary as between parties to the assignment, Fyrac Mfg. Co. v. Bergstrom, 24 F. (2d) 9 (C. C. A. 7th, 1928); as against an infringer of the patent, College-Inn Food Products Co. v. Hurff, 60 F. (2d) 128 (D. N. J. 1932); as against any subsequent purchaser with notice, Continental Windmill Co. v. Empire Windmill Co., 6 Fed. Cas. No. 3142, at 366 (C. C. N. D. N. Y. 1871). Also see Walker, PATENTS (DELLER'S EDITION, 1937) 1412.

The leading case is Wright v. Randal, 8 Fed. 591 (C. C., N. D. N. Y. 1881) in which the court said at page 599:

'Section 4898 of the Revised Statutes is confined to assignments, grants, and conveyances of interests in patents after they are issued... The record of an instrument is not constructive notice to a subsequent purchaser unless the statute requires the instrument to be recorded... No assignment of an unpatented invention is required by section 4895 to be recorded, unless it is an assignment on which a patent is to be
holding that a patent application comes within the purview of the statute; therefore, recordation of the assignment of the application constitutes constructive notice.\(^3^9\) An examination of Federal decisions from 1897 to date reveals that those few which are pertinent are contradictory. Although it is difficult to ascertain the weight of authority,\(^4^0\) it must be concluded that on its face the statute is not inclusive of assignments of applications for letters patent.

The legislative action by the first session of the 77th Congress served to resolve this conflict\(^4^1\) by amending the statute governing assignments so as to specifically cover assignments of applications for patents. As in the case of the legislation previously discussed there was little if any opposition to enactment of this law.\(^4^2\) The principle embodied therein was exhaustively studied during hearings conducted by the prior Congress on similar legislation introduced on the recommendation of the American Bar Association.\(^4^3\) An acceleration of the enactment procedure in this Congress resulted.

**PENDING PATENT LEGISLATION**

The attitude of this Congress toward patent legislation is evidenced by the substance of bills pending as well as approved law. Patent bills now before Congress may be classified under three broad categories: (1) insignificant; (2) generally accepted in principle but subject to extended consideration for technical reasons; (3) controversial.

---

\(^{3^9}\) See legislative history of the Act: 87th Cong. Rec.: Feb. 10, 1941, at 919; June 19, 1941, at 5486; July 7, 1941, at 5978; July 22, 1941, at 6372; Aug. 11, 1941, at 7127; Aug. 13, 1941, at 7254; Aug. 14, 1941, at 7321; Aug. 21, 1941, at 7386.

\(^{4^0}\) Granulator Soap Co. v. Haddock, 144 N. Y. Supp. 610 (1913), ruled that recordation in the Patent Office of the assignment of an application for patent together with any improvements thereon was notice to proposed purchasers of the transfer of the improvements as well as of the original invention. An earlier case, National Cash Register Co. v. New Columbus Watch Co., 129 F. 114 (C. C. A. 6th, 1904) held (by implication) that a recordation of an assignment of a pending application for patent would fall within the notice rule of the statute.

\(^{4^1}\) In Ellis, Patent Assignments and Licenses (1936) it is concluded that the weight of authority was that no difference should be made under the statute between assignments of applications and assignments of patents.


\(^{4^3}\) Hearings before Committee on Patents of House of Representatives on H. R. 8841, 76th Congress, 3rd Sess. (1940).
Proposed legislation designated as insignificant is that which contemplates an unnecessary modification of patent law or provides for duplication of present activity or procedure without disturbing any fundamental patent concepts.\textsuperscript{44} Such proposed enactments will probably remain pigeonholed in committee.\textsuperscript{45}

The House of Representatives has approved two bills embodying amendments to the patent statutes generally accepted in principle but debatable on technical grounds. One provides that applicants for patents or patentees be prohibited from establishing invention dates by reference to use or knowledge thereof in foreign countries whether the case involves a suit against an alleged infringer, an attempt to defeat a patent, or interference proceedings.\textsuperscript{46} The other purposes to simplify treatment of patents, which are in part valid and in part invalid, including a provision to the effect that partial invalidation of a patent does not affect the valid portion if such portion is material and substantial.\textsuperscript{47} Neither of these proposals has been acted upon by the Senate Committee on Patents whose Chairman, Senator Bone of Washington, has been ill.

A bill is labeled as controversial when it appears to be inconsistent with certain basic principles of the patent system as expressed in the statutes. During this session of Congress an outstanding example of such legislation provided for the prohibition of the issuance and enforcement of injunctions based upon patents certified by designated officials to be in the interest of national defense and limited recovery of the patent owners in such cases to reasonable compensation for the infringements.\textsuperscript{48} The bill provoked strenuous protestations from members of the patent bar

\textsuperscript{44}Illustrative are proposals to create a National Defense Commission on Inventions, H. R. 3153, 77th Cong., 1st Sess. (Feb. 7, 1941); to empower the Secretaries of War and Navy to ascertain inventions necessary to the national defense, H. R. 3812 (March 5, 1941), H. R. 3819 (March 5, 1941), and S. 1132 (March 17, 1941)—all of the 77th Cong., 1st Sess.; and to authorize the President to accept, on behalf of the United States, any offer of patent rights for national defense purposes, H. R. 5081, 77th Cong., 1st Sess. (June 17, 1941).

\textsuperscript{46}Absolutely no committee action has been taken. Hearings held on H. R. 5081 established conclusively the absence of need for the suggested legislation. Hearings before the Committee on Patents of the House of Representatives on H. R. 5081 and H. R. 5213, 77th Cong., 1st Sess. (1941) 1-34.

\textsuperscript{47}H. R. 2519, 77th Cong. 1st Sess. (Jan. 21, 1941), reported by House Committee on Patents on June 19, 1941 and passed House on July 7, 1941.

\textsuperscript{48}H. R. 5258, 77th Cong., 1st Sess. (Aug. 4, 1941), reported by House Committee on Patents on July 24, 1941 and passed House on Aug. 4, 1941.

\textsuperscript{49}H. R. 3360, 77th Cong., 1st Sess. (Feb. 17, 1941); Hearings before the Committee on Patents of the House of Representatives on H. R. 3359 and H. R. 3360, 77th Cong., 1st Sess. (1941). The bill was designed to resolve any doubt as to the status of subcontractors under the statute which stipulates that whenever an invention covered by a United States patent is used or manufactured by or for the United States without a license, the patent owner's sole remedy is the recovery of reasonable compensation; injunction may not be resorted to. Rev. Stat. § 4919, 4921 (1875), 35 U. S. C. § 68.
that it was an unnecessary\(^4^9\) abridgement of the patentee's fundamental right to restrain infringement by injunctive means.\(^5^0\) The Commissioner of Patents, Conway P. Coe, and representatives of the Department of Justice, on the other hand, were advocates of the bill. Thurman Arnold, upon special invitation,\(^5^1\) testified that the bill, by empowering the United States to prevent utilization of the injunction by patentees to the detriment of the defense program, obviated complete reliance on punitive action under the anti-trust laws.\(^5^2\) Francis M. Shea, Assistant Attorney General, favored even stronger legislation; witness the amendment offered to empower the President, when necessary in the interest of national defense, to condemn a patent or a non-exclusive license under a patent, and to license and sub-license others to use it.\(^5^3\)

Suffice it to say, after extended hearings action on the bill was deferred indefinitely by the House Committee on Patents.\(^5^4\)

**CONCLUSION**

It may be fairly concluded that the 77th Congress is fully cognizant of the role of the United States patent system in our national defense program. Pertinent legislation has been accorded reasonable consideration without adversely affecting the speed of the enactment process.

CHARLES W. STEWART, JR.

---

\(^4^9\)Argument that the proposal is unnecessary was based on several grounds: (1) issuance of an injunction is within the discretion of the court which would not employ this extraordinary power to the detriment of the national defense; the subject statute may be interpreted to cover subcontractors working on government contracts as well as prime contractors; no specific instances of abuse of the right to an injunction and consequent harm to the defense program were cited. *Hearing, supra* note 48, 62, 63, 71, 217, 223.

\(^5^0\)*Hearing, supra* note 48, 62, 63, 71, 217, 223.

\(^5^1\)Chairman Kramer of the House Committee on Patents insisted that Mr. Arnold prove his public allegations that the Congress had failed to amend the patent statutes to protect against national defense interference. During his testimony the Assistant Attorney General denied responsibility for the statements credited him by the public press. *Hearing, supra* note 48, 120, 121.

\(^5^2\)*Hearing, supra* note 48, 124.

\(^5^3\)*Op. cit. supra*, note 48, page 154. The power to condemn a patent should be distinguished from the right of the Government to take a license which is provided for in existing law. *See Note (1941) 54 Harv. L. Rev. 1052.*

\(^5^4\)No action has been taken by the Committee since conclusion of the hearings on April 23, 1941.
NOTES

EXEMPLARY DAMAGES AGAINST CORPORATIONS

THE FEDERAL RULE

All courts hold corporations liable in compensatory damages for torts committed by their agents or employees while acting within the scope of their employment. This unanimity has never extended to exemplary damages; on one side are found the federal courts and some of the state courts, and on the other side a majority of the state courts. The federal courts have long held that the intent or malice must be "brought home to the corporation" before it can be held liable for exemplary damages. According to this view the act or conduct must have been previously authorized or subsequently ratified before the willfulness, wantonness, oppression, or malice of the agent or employee can be imputed to the corporation and thus render it liable for punitive damages. Exceptions have been made in cases of libel or slander, but these decisions have

2 In Salt Lake City v. Hollister, 118 U. S. 256, 261 (1886), the court quotes approvingly the following language of the lower court: "The result of the cases is that for acts done by the agents of a corporation, either ex contractu or in delicto, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances." "This court has often . . . affirmed the doctrine that for acts done by agents of a corporation, in the course of its business and their employment, the corporation is responsible, in the same manner and to the same extent, as an individual is responsible under similar circumstances." Lake Shore and Michigan Southern Ry. Co. v. Prentice, 147 U. S. 101, 109 (1893).


The doctrine of exemplary damages itself received severe condemnation in the past. It was said that its adoption would give the jury the power to make the law of damages in each case, allowing for bias, Stewart v. Maddox, 63 Md. 51 (1878); that it has no historical standing and grew out of misinterpretations of intemperate and many-faceted language in early English cases, Murphy v. Hobbs, 7 Colo. 541, 5 Pac. 119 (1884); that "smart money" referred to compensation for smarts of the injured person, not as way of punishment of the offender (to make him smart), Fay v. Parker, 53 N. H. 342 (1872); that it would bring about an illogical intermingling of civil and criminal law wherein a fine goes to the benefit of the plaintiff and not to reimburse society for the outlay it makes to protect its citizens.

Spokane Truck and Dray Co. v. Hoefer, 2 Wash. 450, 25 Pac. 1072 (1891).
rested chiefly on findings that the corporate powers of the defendant corporation had been delegated to the employee.  

States that follow the federal rule form a respectable array of our jurisdictions; this alignment, however, has changed from time to time.

In Gates v. St. James Operating Company, Inc., 122 N. J. L. 610, 7A. 2d. 632, 634 (1939), exemplary damages were not approved against a corporation, in whose theatre the acting manager assaulted a patron, because there was "no evidence that the defendant master participated in the wrongful act of the servant either expressly or impliedly by conduct authorizing or approving it, either before or after it was committed." Texas courts also require that there be authorization or ratification of the act, but not when the tort is committed by a person representing the corporation "in a corporate capacity." Such person would be a superior officer of the corporation.  

This same view has been sustained by the Supreme Court. Unlike other states, the decisions in Texas on this whole subject have been consistent, extending from the


Employee of defendant corporation in filling of prescription willfully substituted ingredients other than those specified. He was found liable to buyer for actual and punitive damages, but corporation defendant was liable only for actual damages. Hammer v. Gordon, 12 N. J. Misc. 475, 172 Atl. 811 (Sup. Ct. 1934).

7Western Union Telegraph Co. v. Brown, 58 Tex. 170 (1882); Chronister Lumber Co. v. Williams, 116 Tex. 207, 288 S. W. 402 (1926). When "the officers actually wielding the whole executive power of the corporation participated in and directed all that was planned and done, their malicious, wanton, or oppressive intent may be treated as the intent of the corporation itself, for which it was liable to answer in exemplary damages." Bingham v. Lipman, Wolfe & Co., 40 Ore. 363, 67 Pac. 98, 101 (1901). But see Union Deposit Co. v. Moseley, op. cit. 75 S. W. (2d) 190 (Tex. Civ. App. 1934).

8In Sparrow v. Vermont Savings Bank, 95 Vt. 29, 112 Atl. 205, 206 (1921) the court said: "Where the malicious and unlawful purpose relied upon is that of one who was acting as the mere servant or agent of the corporation, it does not affect the principal unless it be shown that the latter directed the act complained of, or participated in it, or subsequently ratified it. But where the malicious and unlawful purpose is that of the governing officers of the corporation, or one lawfully exercising that authority, the corporation is held liable therefor."  

9Where officers and employees of defendant corporation attacked with deadly weapons the employees of another corporation and forcibly took over the property in the latter's possession it was held that punitive damages would lie. Denver and Rio Grande Railway v. Harris, 122 U. S. 597 (1887).
leading case of *Hays v. The Houston G. N. R. R. Co.*, in 1876, to the present time.11

**CHANGED VIEWS OF STATE COURTS**

Other jurisdictions had not adopted the federal rule12 until comparatively recently. In Ohio a corporation was formerly held to be liable for exemplary damages for the torts of agents or employees, without authorization or ratification of the act, on the basis of the rule of *respondeat superior.*13 It was said that in law the act of the servant was the act of the master, that the principal holds out his agent as competent and trustworthy within the scope of his employment. Employees of corporations were considered agents and included within the circle of legal identity between principal and agent.14 This is no longer the law in Ohio. Reversing an award of exemplary damages against a corporation for the wrongful repossession of a car by its employee, the highest court of the state declared: "Furthermore the defendant is a corporation. Whatever action was taken in relation to this automobile, was by its salesman or collector. He was in no sense a chief or ruling officer of the corporation. In 13 Ohio Jurisprudence, 250 Section 147, it is said: 'But in Ohio, punitive damages cannot be allowed under these circumstances;

---

10 *Tex. 272 (1876).*

11 "Where the act is that of the corporation, or of 'one representing it in a corporate capacity', it may be held for exemplary damages." *Aetna Life Insurance Co. v. Love, 149 S. W. (2d) 1071 (Tex. Civ. App. 1941).*

In an action against the holder of a chattel mortgage on an automobile, for malicious conversion by an agent of defendant, the court awarded exemplary damages upon evidence that defendant accepted the automobile from agent and paid him a reward after having obtained knowledge of his act: "The law is also settled (in Texas) that a corporation is liable for exemplary damages occasioned by the wilful or malicious act of its agent taking possession of personal property for the corporation, where it either authorized the act or subsequently ratified or approved it, with full knowledge of the facts". *Wright Titus Inc. v. Swafford, 133 S. W. (2d) 287, 294 (Tex. Civ. App. 1939). Hildebrand, Corporate Liability for Torts and Crimes, (1935) 13 Tex. L. REV. 253.*

12 The rule is given the distinction of a verity in *McClanahan v. Kovziak, 62 Ohio App. 307, 23 N. E. (2d) 975, 977 (1939): 'It is true that a corporation is not liable for exemplary damages, unless through its governing officers it directed, participated in, or ratified the wrongful act justifying the award of exemplary damages." *Accord, Union Deposit Co. v. Moseley, 75 S. W. (2d) 190 (Tex. Civ. App. 1934); Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 70 S. W. (2d) 397 (1934); Virginia Electric & Power Co. v. Wynne, 149 Va. 882, 141 S. E. 829 (1928); Heenan v. Horre Coal Company, 113 N. J. L. 388, 170 Atl. 894 (1934).*

13 Atlantic and Great Western Ry. v. Dunn, 19 Ohio St. 162 (1869).

14 "Now this general doctrine, as to the legal identity of principal and agent is fundamental. It is established. We are not at liberty to ignore or disregard it; and no one dreams that it ever will, or ever ought to be, abrogated. And resting as it does on sound principles of public policy and regard for the public convenience and safety, it seems to me to apply with peculiar propriety to corporations—which are capable of action only through the medium of agents, and which touch, infringe upon, and come in contact with individual persons and the public, only by means of their agents and servants." *Id. at 169.*
according to the rule laid down by the courts of this state, a corporation is not liable for punitive damages for the misconduct of an employee, unless the corporation through its ruling officers participates in, acquiesces in, or ratifies the act of the agent, or knew that he was of such character as to be liable to commit such act, though the earlier cases made no such limitation!"  

A contrary shift is found in the decisions of Oregon. Early cases of this jurisdiction held that the corporation would not be liable for exemplary damages unless it directed the doing of the act, or ratified it when done, or unless it was chargeable with gross negligence in the employment or retention of the employee. But this rule was supplanted long ago by that of *respondeat superior;* in line with the weight of authority. The same change is to be found in the decisions from Oklahoma. The new trend in this jurisdiction is well exemplified by the case of *Mayo Hotel Company v. Danciger,* 143 Oklahoma 196, 288 Pac. 309, 312 (1930), where the court said: "There are numerous cases holding that exemplary damages are not recoverable against corporations, because of the torts of its agents or servants. Under that rule corporations would never be liable at all, because a corporation can only act through its agents and servants. These cases are considerably in the minority, and their doctrine has been generally expressly repudiated."

---

19 "It is a well-established principle of jurisprudence that corporations may be held liable for torts involving a wrong intention such as false imprisonment; and exemplary damages may be recovered against them for the wrongful acts of their servants and agents done in the course of their employment, in all cases and to the same extent that actual persons committing like wrongs would be liable. In such cases the malice and fraud of the authorized agents are imputable to the corporation for which they acted." Wheeler & Wilson Manufacturing Co. v. Boyce, 36 Kan. 350, 13 Pac. 609, 610 (1887).
20 Moore v. Atchison, T. & S. F. Ry., 26 Okla. 682, 110 Pac. 1059 (1910), held that participation, authorization, or ratification were necessary.
22 Gross negligence of employee in permitting salt-water and oil to run into a stream was...
Missouri courts also required authorization or some act of ratification before allowing exemplary damages, but the more realistic rule of general liability now prevails.

ARE EMPLOYEES AGENTS?

Even when deciding in conformity with the older rule, the court in Perkins v. Mo., K. & T. R. R., voiced recognition of the oneness between a corporation and its agents while the latter are acting for the former in line with their duties: "The only way, in which corporations can act in the commission of wrong or otherwise, is by and through their agents. The acts of their agents within the scope of their authority are their acts, and it would seem that there could be no good reason why they should not be responsible for the acts of their agents in the discharge of their duties, when performed in a wanton and malicious manner, just as if the act had been done by the corporation itself." Other decisions have likewise emphasized that a corporation, being merely a legal fiction can act only through its agents. An oblique version of this view is found in the Salt Lake City v. Hollister case, where the Supreme Court quotes with approbation Reed v. Howe Savings Bank, 130 Mass. 443, 445, an action in which a bank was held liable for malicious prosecution: "And, by the great weight of modern authority, a corporation may be liable, even where a fraudulent or malicious intent in fact is necessary to be proved, the fraud or malice of its authorized agents being imputable to the corporation; as in actions for fraudulent representations, for libel or malicious prosecution." The enumeration of actions does not seem to be intended to restrict the meaning and force of the first part of the sentence. The same meaning is discernible in another opinion of a federal court affirming a judgment against a defendant corporation for an assault committed by two detectives employed to investigate a robbery. Liability was said to depend not on whether the particular act was authorized, but whether it grew out of an authority which the employer had conferred upon the employee. There was no authorization or ratification of the act, but the court declared that "for this action by its agents, acting within the scope

imputed to the corporation in Empire Oil & Refinishing Co. v. Rawlings, 178 Okla. 391, 62 P. (2d) 1253 (1936).

Conductor of defendant's train wrongfully and maliciously ejected plaintiff therefrom. His retention in defendant's employment was a ratification of the act. Perkins v. Mo. K. & T. R. R., 55 Mo. 201 (1874).


55 Mo. 201, 214 (1874).

Haehl v. Wabash Ry., 119 Mo. 325, 24 S. W. 737, 741 (1893).

Salt Lake City v. Hollister, 118 U. S. 256, 262 (1886).

of their authority, the defendant cannot escape responsibility." Can a person employed by a corporation, to perform any function for it, be considered otherwise than an agent while acting within the ambit of his duties? In Mobile and O. R. Co v. Seals a brakeman on defendant's train fired a pistol at a trespasser riding upon the trucks of one of the cars. The trespasser fell and his legs were severely mutilated. Referring to the practice in some jurisdictions of holding the corporation liable, in the absence of authorization or participation, only when a superior officer commits the act the court said: "The president of a railway corporation is no more or less its agent than a brakeman on one of its trains. His agency is broader, but it is not boundless, and a matter which lies beyond its limits is as thoroughly beyond his powers as any matter beyond the very much smaller circle of a brakeman's duties; and, e converso, a brakeman is as fully authorized to act for the company, within the range of his employment, as the president is within limits of his office. It can no more be said that the corporation has impliedly authorized or sanctioned the wilful wrong of its president, in the accomplishment of some end within his authority, than that a similar wrong by a brakeman, to an authorized end, is the wrong of the corporate entity." . . . "That punishment may be imposed on corporations for the wilful or wanton misconduct, within the general scope of their duties, of their chief executive officers, is well established, and not questioned in this case. We feel that we stand upon the same principles, and are moved by the same considerations to the same conclusion, in respect of the wilfulness, wantonness, and the like of brakemen and flagmen, while acting within the scope of their employment, and to the accomplishment of the legitimate ends thereof."

THE GENERAL LIABILITY RULE

v.

THE FEDERAL RULE

The decisions holding corporations subject to general liability, for compensatory and exemplary damages, whether or not there has been authorization or ratification, are based on social policy. Following

Id. at 939.
100 Ala. 368, 13 So. 917, 919, 920 (1893).
This is the rule in: Alabama, Arkansas, Illinois, Kansas, Kentucky, Maine, Maryland, Mississippi, Missouri, Oklahoma, Oregon, Pennsylvania, Tennessee.
If corporations—artificial beings, who can act only through agents and servants—in their varied and multitudinous and constantly recurring business dealings with the public, can never be held liable in punitive damages for the acts of their servants unless expressly authorized by them, or unless expressly ratified by them, no matter how gross and outrageous the wrongfull act of the servant, we feel perfectly safe in declaring that no recovery for more than mere compensatory damages will ever again be awarded against corporations." Pullman Palace-Car Co v. Lawrence, 74 Miss. 782, 22 So. 53, 58 (1897).
the days of antipathy toward exemplary damages most courts have adopted their use as a way of deterring the commission of torts. Such use seems as valid and necessary with respect to a corporation, whose acts are those of its employees, as against a private individual. As entrepreneurs, both must, at peril, choose agents who will deal calmly and soberly.

Imposition of exemplary damages against corporations for torts which would make individuals liable in the same manner is a natural and just result of corporate organization. Corporations are legal entities under whose aegis most of the life of our country moves. They are inanimate until some one acts for them. Every one of its employees, while, performing his employment, is acting in the name and for the benefit of the corporation; through its employees the corporation becomes a living reality and comes in contact with the rest of the public. Since a corporation will rarely authorize the commission of a tort and ordinarily will

---

31See note 3, supra.
33Story, Agency, § 452: "It is a general doctrine of law, that although the principal is not ordinarily liable (for he sometimes is) in a criminal suit for the acts or misdeeds of his agent, unless, indeed, he has authorized or cooperated in those acts or misdeeds, yet he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed, know of such misconduct, or even if he forbade the acts, or disapproved them. In all such cases the rule applies, respondent superior: and it is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent, and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency."
34"... this legal unity of the principal and agent in respect to the wrongful or tortious, as well as the rightful acts of the agent, done in the course of his employment, is an incident which the law has wisely attached to the relation, from its earliest history." New Orleans, Jackson and Great Northern R. R. v. Bailey, 40 Miss. 453 (1866).
35"It has been repeatedly held that corporations may be held liable for punitive damages where the wrong was committed by a servant while acting within the scope of his employment." State Bank of Waterloo v. Potosi Tie and Lumber Co., 299 Ill. A. 524, 20 N. E. (2d) 893, 895 (1939). Accord: State ex rel. United Factories Inc. v. Hostetter, 344 Mo. 386, 126 S. W. (2d) 1173 (1939).
36Berle and Means, The Modern Corporation and Private Property, (1932) chap. III. "Already the telephone company controls more wealth than is contained within the borders of twenty-one of the states in the country." Id. at 19.
37Where an employee had general superintendence without specific instructions, of the logging and hauling operations of trains carrying the lumber, the duty of the defendant corporation to arrange and handle properly the trains was said to have been delegated. His gross negligence was that of the corporation. Chronister Lumber Co. v. Williams, 116 Tex. 207, 288 S. W. 402 (1926).
not ratify\textsuperscript{37} one, the protection and safety of the public from tortious acts of omnipresent corporate employees should not depend on these improbable contingencies.

In vain one reads the decisions based on the limited liability doctrine of the federal courts searching for compelling principles on which they may rest. The argument generally is that since exemplary damages are in the nature of punishment of the offender\textsuperscript{38} a corporation should not be subject to them unless it authorized, participated in, or ratified the act. There is a veil of unrealism in this doctrine behind which serious injustices may go unpunished, for it cannot be said that in every case compensatory damages are sufficient redress for the wrong committed. Many torts cause hardships, pain, and anguish not translatable into the limited terms of compensatory damages. The function of law fails to the extent that the injuries hurt and grieve the victim with no punishment imposed on the offender. In \textit{Union Deposit Co. v. Moseley}\textsuperscript{39} agents of defendant corporation induced a woman to buy a bond through fraudulent misrepresentations. When she objected to a request for additional payment on the bond, one of the agents made other fraudulent misrepresentations in writing urging her to turn in the bond and invest an additional amount in exchange for another bond. She went to defendant's office where a vice-president and a state manager, after reading the offer, assured her that it was good and valid. In an action to recover the $460 invested, with interest thereon, and for punitive damages, the appellate court reversed an award for punitive damages and allowed a judgment for $480. It declared that the officer had not been authorized to practice a fraud, and that the corporation had not ratified. A $20 difference between the investment and the judgment seems to bear little relation to the anxiety and worry over the safety of the investment, and the effort, time and incidental expenses incurred in recovering it. Injustices passed over so lightly are apt to be repeated.

Courts have been drawing aside fictions in order to deal with realities, and there is a growing disposition not to allow legal concepts to thwart the end of law.\textsuperscript{40} Many salutary adjustments have been made since the

\textsuperscript{37}Retention of the employee after the act has been held not to be sufficient ratification as a matter of law. Dillingham v. Anthony, 73 Tex. 47, 11 S. W. 139 (1889).


\textsuperscript{38}Lake Shore and Michigan Southern Ry. Co. v. Prentice, 147 U. S. 101 (1893). In cases of assault some New Hampshire decisions have held that exemplary damages are not punitive damages but compensatory damages for the mental injury suffered. Fay v. Parker, 53 N. H. 342 (1872); Bixby v. Dunlap, 56 N. H. 456 (1876).


days when corporations were regarded as little divinities, by nature incapable of committing torts and crimes.

GILBERT RAMIREZ

App. 149, 152 (1872), it was said: "A railway company is a mere abstraction of law. All that it does, all that the law imputes to it as its act, must be that which can be legally done within the powers vested in it by law."
COMMERCIAL HANDBILLS AND THE FIRST AMENDMENT

THE often perplexing question of how far a municipality can go in the regulation or prohibition of the distribution of handbills has again been presented to the federal courts. A regulation of the New York City Sanitary Code was struck down by a majority of the Court of Appeals for the Second Circuit. The regulation, forbidding the distribution of commercial and business advertising matter, was attacked by one Chrestenson who had attempted to distribute a handbill containing a public protest and on the reverse side, statements of a commercial nature. The majority did not decide the validity of an absolute prohibition on advertising (although they seriously questioned it) holding that as applied to a "combined protest and advertisement not shown to be a mere subterfuge" the regulation was invalid. The minority took a more realistic view holding the paper to be in reality two handbills, one a public protest and the other a purely commercial announcement which could not be put outside the operation of the regulation by a merely physical connection with a "totally distinct and easily separable exercise of the privilege of free speech." The minority differed also on the more fundamental question of the power to prohibit advertising handbills, contending that the guaranty of freedom of speech did not include advertising.

The relationship of the municipality to the parks and streets is that of trustee for the people who have an absolute right to use them in any proper way. Can advertising, then, be considered an exercise of free speech or a proper use of the public ways without reference to the question of free speech? If the power of the municipality to prohibit can be established the policy of the regulation is not within judicial control.

As a result of a trio of decisions handed down by the Supreme Court within the last three years many municipalities have had to revise ordinances with regard to the distribution of handbills. The problem of how far such an ordinance can go in regulating or prohibiting distribution has been one of no little difficulty. Previous to these decisions the

---

1. "No person shall throw, cast or distribute or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place, or in any front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letter box therein. . . This section is not intended to prevent the lawful distribution of any thing other than commercial and business advertising matter." New York City Sanitary Code § 318 (italics supplied).
majority of ordinances seem to have been drawn on the theory, as enunciated in *Davis v. Massachusetts*, that absolute title to the parks and public ways was vested in the municipality. On such a basis, of course, very broad and stringent regulations could be imposed. Without expressly overruling the *Davis case* the Court has changed the picture by placing the municipality in the position of trustee with title in the people. Under this theory the people have an absolute rather than a permissive right to use the streets for any lawful purpose. As a result, ordinances restricting the use by the public of the streets must be carefully drawn with an eye to possible constitutional difficulties. The ordinance in the *Chrestenson case* was so drawn being inspired no doubt by a *dictum* by Justice Roberts in the *Schneider case* where he said “We are not to be taken as holding that commercial soliciting and canvassing may not be subject to such regulation as the ordinance requires.” Before this *dictum* can be accepted as a correct statement, or the possible extent of its application determined, the exact status of the communication of commercial ideas as distinguished from social, economic, or political ideas must be determined.

Advertising has been urged as a proper use of the streets on the basis that the citizen has a right to conduct his business in the public ways. Hence he has also the right to carry on the lawful incidents of that business, namely, advertising. The right to conduct business in the street seems to have been accepted at an early date in England and at least one American state. The doctrine, however, finds little support today. It is evident that if the right of an individual to pass a commercial announcement to another on the public streets is to be upheld it must find its basis in the constitutional guaranty of freedom of speech.

The ordinances as applied to advertising circulars fall into two general classes. The first prohibits placing the bill on the property of another without his consent. Regulations of this sort would not seem to be

---

6167 U. S. 43 (1897).
7308 U. S. 147, at 165. The ordinance required written permission from the Chief of Police before distribution could be made and also proof of good moral character.
10McQuillan, Municipal Corporations (2d ed. 1928) § 1459; Commonwealth v. Ellis, 158 Mass. 555, 333 N. E. 651 (1893); but see, In re Thornburg, 55 Ohio App. 229, 9 N. E. (2d) 516 (1936). It is questionable what effect *Davis v. Massachusetts* has in this regard since the *Schneider case*.
11For other classifications which are not pertinent to the discussion here see Lindsay, Council and Court: The Handbill Ordinances 1889-1939 (1941) 39 Mich. L. Rev. 561, 562; recent decision (1938) 5 U. of Chi. L. Rev. 675.
disturbed by the ruling in the *Hague, Schneider*¹³ and *Lovell cases*. Such ordinances do not prohibit distribution since the distributor may hand the material over personally if the recipient is interested.¹⁴ Nor does the guaranty of free speech carry the right to force one’s opinions on another.¹⁵ The second and larger class prohibits or requires a license for the distribution of the handbills.¹⁶ It is on such regulations that doubt has been cast by the *Hague, Schneider* and *Lovell cases*. A reasonable regulation which does not give arbitrary or excessive power to the administrative officer receives full support in *Cox v. New Hampshire*.¹⁷ The power of a municipality to absolutely prohibit is, however, more doubtful. The question has had varied answers in the state and lower federal courts. Prohibitory regulations have been held bad as unreasonable¹⁸ and as a denial of fundamental rights.¹⁹ By and large, however, most ordinances whether regulatory or prohibitory have been upheld as reasonable exercises of the police power.²⁰ Many of these, however, prohibited the distribution of all printed matter except newspapers and, of course, fell with the ruling in the *Schneider case*. Since the only field of regulation not expressly forbidden to the municipalities is advertising doubtful this branch will be in for as extensive regulation or prohibition as is consistent with constitutional principles. A comprehensive decision by the Supreme Court would for this reason be of great value to municipalities and would prevent much needless litigation.

The law on the subject of the extent of freedom of speech must necessarily be evolved by the gradual process of inclusion and exclusion. The present extent of the law is expressed in *Thornhill v. Alabama*. “The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.”²¹ It is almost fruitless to consult the authors on the subject for

---


¹⁴Cf. the Billboard cases *infra* p. 306.


¹⁶61 Sup. Ct. 762 (1941).

²¹The purpose to keep the streets clean... is insufficient to justify an ordinance which prohibits a person rightfully on the street from handing literature to one willing to receive it.” 308 U. S. 147, at 162 (italics supplied).

²⁰Cf. the Billboard cases *infra* p. 306.


²⁶310 U. S. 88 (1940).
the exact scope of the right to speak freely. Freedom of speech as expressed in the Constitution has been defined as meaning freedom of speech as it was understood by the common law at the time the Constitution was adopted. Yet on the one hand it is said to protect such "general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." On the other it is said that under the First Amendment one has the right "to speak, write, and print his opinion upon any subject whatsoever" or to "publish freely whatever one pleases." Professor Dicey points out that in England the extent of freedom of speech is a matter of expediency. It is evident, then, that definitions are of little value in determining the status of advertising. It is also apparent that some distinction will have to be made between the dissemination of commercial and non-commercial information in order to sustain a prohibitory or even a regulatory ordinance under the Schneider case. Justice Roberts' statement as to advertising in the Schneider case will not avail to support a prohibitory ordinance since it will be noticed that he referred to regulation. If such a distinction is made it is difficult to see upon what it could be based except an ipse dixit that the constitutional guaranty was not intended to cover advertising.

The billboard cases were offered by the dissenting justice in the Chrestenson case as authority for a distinction between advertising and so-called public questions. There do not seem to be, however, any attempts to prohibit completely the erection of billboards. The greater part of such regulations are concerned with location and type of construction and all must be necessary, reasonable, and uniform. Where billboard regulations are upheld on grounds other than public safety the basis (at least by implication) is usually the fact that by reason of the billboard's prominent position, its contents are forced upon the passerby who cannot avoid reading them unless he closes his eyes. It must also be borne in mind that when these cases were decided the ruling in the Davis case was still in effect.

---

22 State v. Boloff, 138 Ore. 568, 7 P. (2d) 775, 781 (1932).
24 Story, Constitution (1869) § 1880.
26 Freedom of discussion is, then, in England little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written." Dicey, Law of the Constitution (8th ed. 1914) 242.
27 This distinction has already received recognition with regard to radio broadcasts. (1941) 12 Air L. Rev. 228, 230.
28 McQuillan, op. cit. supra note 10, at § 986.
30 Gardner, supra note 29, at 900.
It would seem, then, difficult to support a complete prohibition such as that in the New York regulation. On the question of regulation, however, different considerations arise. While it would be very difficult to distinguish commercial and non-commercial bills in essence, there are substantial grounds for a distinction in their effect which would support a reasonable classification. The unbridled distribution of commercial handbills might easily reach such proportions as to seriously interfere with the use of the parks and streets by the public and even to constitute a fire hazard. The amount of commercial bills distributed would far exceed the amount of non-commercial bills for the proportion of commercial gain-seekers to social, political, and economic crusaders is undoubtedly very great. Such distribution could be kept within proper bounds by restricting it to certain hours or even to certain sections of the city. There must, of course, be a factual showing of conditions necessitating the regulations which must in their operation be reasonably designed to accomplish the desired end.

The questions of what is advertising and what is the status of a mixed bill similar to the one in the Chrestenson case will be even more difficult of solution. Advertising must, of course, be considered in the commercial sense. It has been suggested that the principal purpose of the distributor be controlling in each case. While this will no doubt be a logical starting point it will result in a subjective test giving rather broad authority to the administrative officer. Yet it is impossible to lay down an inflexible rule since each case will present a different factual situation. However, if the concept of commercial handbills is restricted to those cases where the one causing the distribution is motivated by an expectation of pecuniary gain from the event advertised or the transaction solicited (thus eliminating from consideration the fact that the distributor may be paid for his services) it would seem that the administrative officer would not be given arbitrary power and non-commercial bills would receive full protection. Where the bill is mixed the main question will be whether or not the distributor is attempting to evade the regulation. There, of course, the administrative officer must be allowed reasonable discretion. As the minority in the Chrestenson case pointed out, "We should not be disturbed because in the future, cases will arise where there will be some difficulty in ascertaining the primary purpose in distributing a handbill . . . and the courts . . . may be required to do a more precise job of legal map-making and to fix a definite equatorial line."  

DAVID A. WILSON, JR.

---

1MAURER, loc. cit. supra note 4.
3Chicago v. Rhine, 363 Ill. 619, 2 N. E. (2d) 905 (1936).
4MAURER, loc. cit. supra note 4.
5Note, (1940) 35 Ill. L. Rev. 90, 94.
7Id. at 520.
BOUNDARIES—Variance Between Party Wall and Deed Line

Defendant, who owned two adjoining lots upon which stood connected houses, sold one lot with part of the house thereon to plaintiff. The two houses had a party wall, which wall purported to lie along the boundary line between the two lots. The deed described plaintiff’s lot as having a frontage of 21 feet, and extending at right angles directly back to a rear alley, preserving the frontage width evenly throughout. Shortly after this conveyance it was discovered that the center line of the party wall and the deed line did not coincide, and that the gap between the two lines widened from six inches at the front to 22 inches at the rear. Later plaintiff rebuilt his kitchen, which up to then was completely on his property in the rear, extending it laterally to the center of the party wall. A few years later, and before this suit, the defendant erected a concrete wall extending from the reconstructed portion of plaintiff’s house back to the alley, but along the deed line as shown by the survey, and not along the line extending from the party wall. Plaintiff brought this suit in ejectment for the strip of land bounded by the deed line and the party wall line as extended, in which area stood the concrete wall erected by defendant. Held, the center line of the party wall, extended the entire length of the properties, is the true boundary; and since at no time did the parties intend to make a permanent settlement, the portion of the deed line along which defendant built his wall cannot be considered a consentable line. Furthermore, because of the importance of the issue, and the strength of the dissent, the case was certified to the Supreme Court, in accordance with Pa. Stat. (Purdon, 1936) tit. 17, § 197. Ross v. Golden, 22 A. (2d) 310 (Pa. 1941).

That in boundary disputes, monuments control courses and distances, seems to be the well established rule in almost all jurisdictions. Rowe v. Kidd, 249 Fed. 882 (E. D. Ky. 1919); Jacobs v. Johnson, 227 Ky. 785, 14 S. W. (2d) 200 (1929); Fulgenitti v. Carridi, 292 Mass. 321, 198 N. E. 258 (1933). Permanent objects, such as buildings, when referred to in a description of property conveyed, are monuments. Temple v. Benson, 213 Mass. 128, 100 N. E. 63 (1912).

The above rules, however, have been somewhat modified in certain instances. It has been held that courses and distances yield to natural or artificial monuments only when necessary to cover the land plainly intended to be conveyed. Bedlow v. N. Y. Floating Drydock Co., 112 N. Y. 263, 19 N. E. 800 (1889); Elliot v. Jefferson, 133 N. C. 207, 45 S. E. 558 (1903). Likewise, where deeds to adjoining lots unambiguously described a boundary as a certain number of feet south of a named avenue, the description could not be construed to permit finding that a fence was the true boundary between the lots. Patsloff v. Kasperovich, 116 Conn. 440, 165 Atl. 349 (1933). "Usually both courses and distances are employed, [to describe premises in a deed] and if there be any irreconcilable divergence between them, the courts will look to the intention of the parties, so far as it can be ascertained, to determine which should prevail. But in the absence of evidence of intention on this point, the general presumption is that a call for fixed monuments is to take over inconsistent calls for courses and distances upon the theory that the former are more apt to have been in the minds of the parties than mere imaginary mathematical lines." 2 MINOR, REAL PROPERTY (2d ed. 1928) 1418.

In the present case the court did not consider what the grantor intended to convey. Nor did the fact that there were no ambiguities or inconsistencies in the deed itself affect the court’s opinion. On the basis of the above authority, it seems that the facts of the case present a closer question than that of the usual boundary disputes. The court was justified in its decision to certify the case to the supreme court for full and final consideration.

308
The result of the decision is that the course of the line extended, at the same erroneous angle, throughout the rest of the lot, in spite of the fact that the parties agreed in the deed that the line should run at right angles to the street. The dissenting justices agreed that the dividing line between the houses should be the true line, but considered it unreasonable and unjust that the error in construction should be "perpetuated and extended by arithmetical progression, throughout the lot so as to take twenty-two inches off the defendant's lot at the rear." He suggested that the line extend along the party wall line only as far as the addition of plaintiff's house, and from that point the line should continue at a right angle to the frontage. Defendant would thus lose only the land that was actually built upon by error of the contractor, and the error would not be accentuated and increased by extending its improper and unintended course throughout the entire lot. This dissenting view is supported by authority. Maisano v. Spain, 17 Del. Ch. 133, 150 Atl. 20 (1930). The facts of the Maisano case, supra, were almost identical with those of the instant case. In that opinion the court emphasized the fact that making the continuation of the line at right angles to the frontage was not only as nearly a compliance to the deed line as possible, but also closer to the true intention of the parties.

On the other hand, the majority opinion was based upon the authority of Medara v. DuBois, 187 Pa. 431, 41 Atl. 322 (1898), and that case may be distinguished. The primary question there was whether a deed was good and marketable, when the survey in the deed and the party wall line were at variance. The court rightly held that such a deed was marketable to convey the whole messuage up to the party wall line. The direction of the line extending beyond the party wall line towards the rear was not at issue, nor was mention made thereof.

With these considerations in mind, it is probable that the supreme court will hold in favor of the dissent on the certification.

WALTER AXELROD

CORPORATIONS—President of Corporation Has Power prima facie to do any Act which Directors can Authorize or Ratify

On December 31, 1931, the president of the defendant bankrupt corporation executed a mortgage in the name of the corporation to the First National Bank of Brockport, the petitioner in the instant case. At the time the mortgage was given the corporation was indebted to the First National Bank on loans secured by warehouse receipts for produce owned by the corporation. The bank demanded that the corporation give a mortgage upon its real estate as additional security. The corporation was at the time also obligated to the State Bank of Commerce. When the mortgage was executed and delivered the directors of the corporation and its sole stockholders were Hebbard, Harrison and Terry. Hebbard was president. Harrison was in Florida when the bank demanded the additional security. He was informed of the demand by the bank for a collateral mortgage by a telegram from Hebbard to which he replied, "Use your judgment work with Tom (president of the First National) write situation at once." Following this exchange of telegrams the mortgage was given. Harrison returned from Florida early in the spring of 1932. Both he and Terry knew the mortgage had been given and raised no question regarding it. When bankruptcy proceedings were begun in 1936 the State Bank of Commerce intervened and demanded that the mortgage be set aside on the ground that it was not authorized by the board of directors and was therefore invalid. The referee in
bankruptcy so found, and the First National Bank of Brockport asked for a review of the order. *Held,* for the petitioner. The president of the bankrupt corporation had power *prima facie* to do any act which the directors could authorize or ratify. Even though it be assumed that no meeting of the board of directors was held, at which the execution and delivery of the mortgage was authorized, all the stockholders had knowledge that the mortgage had been given. Their acquiescence amounted to ratification. In re *Henry Harrison Co., Inc.,* 40 F. Supp. 733 (W. D. N. Y. 1941).

With regard to the power of a president to contract for a corporation, the general rule is that a corporation cannot act except by the authority of the board of directors in a meeting, duly convened by consent or notice in accordance with the statutes or by-laws, at which all the directors have opportunity to consult and counsel together. *Merchants' & Farmers' Bank v. Harris Lumber Co.,* 103 Ark. 283, 146 S. W. 508 (1912); *Note* (1928) 12 MINN. L. REV. 756, (necessity that directors act as a board). As to the question of the inherent power of the president to contract as representative of a corporation, there are divergent views. Some courts hold that the president has no implied or presumed authority by virtue of his office alone, to buy, sell, or contract for the corporation. *International Magazine Co. v. National Radio Co.,* 67 Cal. App. 498, 227 Pac. 918 (1924); *Jacob v. Gratiot Central Market,* 267 Mich. 262, 255 N. W. 331 (1934). But the doctrine is growing that the president has, by virtue of his office as head of the corporation, at least *prima facie,* the broad authority of a general manager to conduct the ordinary, everyday business of the corporation, and the burden of proof is upon one who seeks to impeach the president's authority. *Bloom v. Nathan Vehon Co.,* 341 Ill. 200, 173 N. E. 270 (1930); *Warren v. Littleton Orange Crush Co.,* 47 Ga. App. 259, 170 S. E. 337, 340 (1933). Authoritative decisions have indicated that this doctrine is not without its limits. In New York, for example, where the *prima facie* rule obtains and where the case now under consideration arose, it has been held that there is no absolute rule in that state that any contract made by a corporation's president, however out of the ordinary, throws on the corporation the duty of showing lack of authority in the president. *Schwartz v. United Merchants & Manufacturers, Inc.,* 72 F. (2d) 256 (C. C. A. 2d, 1934). See also *Heamen v. E. N. Rowell Co.,* 261 N. Y. 229, 185 N. E. 83 (1933).

In the case of extraordinary contracts, it appears that some conferring of authority upon the president must be shown affirmatively. See *Note* (1934) 4 BROOKLYN L. REV. 207. There are certain exceptions to the general rule requiring formal action by a lawful meeting of the board of directors before the corporation can act, exceptions which will be deemed to dispense with the necessity of a lawful meeting of the board and which will suffice for affirmative authority even where extraordinary corporate acts are involved. One such exception occurs where all of the shareholders in the corporation consent to or ratify the corporate acts. The requirement for directors to act as a board is for the benefit of the shareholders. *Merchants' & Farmers' Bank v. Harris Lumber Co.,* supra. Accordingly, where the shareholders do consent to or ratify the corporate acts they may be estopped to deny the validity of action taken by officers or agents to which they consent. *Gerard v. Empire Square Realty Co.,* 195 App. Div. 244, 187 N. Y. Supp. 306 (1921); *Vawter v. Rogue River Valley Canning Co.,* 124 Ore. 94, 257 Pac. 23 (1927). Such would appear to the basis of the holding in the instant case, for the court finds that all the stockholders of the defendant bankrupt corporation did in fact have knowledge that the mortgage had been given. Their knowledge of and acquiescence in the act of the president thereby amounted to ratification and the mortgage is therefore valid.

It is submitted that the rule as to *prima facie* authority in the president of a corporation to do any act which the directors of the corporation could authorize or
ratify, is sound when kept within the bounds suggested. Where the transaction is one in the ordinary course of business, there is, in the absence of knowledge, an irrebuttable presumption of authority, founded either upon a theory of the managerial nature of the office, Powers v. Schlicht Heat, Light & Power Co., 23 App. Div. 380, 48 N. Y. Supp. 237 (1897), or upon an agency implied in law from the actual functions of the president. See Cody, Private Corporations (1932) § 187. Where the transaction is not one in the ordinary course of business, the authority ought to be sought in some affirmative statement in the charter or by-laws, or in the delegation of authority by the directors by by-law, resolution, contract of hiring, appointment or ratification. Rockefeller v. Lamora, 96 App. Div. 91, 89 N. Y. Supp. 1 (1904); Stanley v. Franco-American Ferment Co., 97 Misc. 401, 161 N. Y. Supp. 365 (1916); Lydia E. Pinkham Medicine Co. v. Grove, 303 Mass. 1, 9 N. E. (2d) 573 (1937); Massachusetts Bonding & Insurance Co. v. Transamerican Freight Lines, 286 Mich. 179, 281 N. W. 584 (1939). It is further submitted that the decision in the case at hand is within the rule as stated and is, therefore, a sound decision.

CHARLES M. NOONE

CIVIL PROCEDURE—Substituted Service of Process Under Nonresident Motorist Statute Does Not Extend to Nonresident Corporations Whose Resident Agent has a Collision in His Own Car

A resident agent of the defendant, a nonresident corporation, injured the plaintiff while driving his own automobile engaged at the time within the scope of his employment. In an action for damages service of process was made on the defendant in accordance with GA. Code (1935) §§ 68-801 et seq., providing: "The acceptance by any nonresident of this State, whether a person, firm, or corporation, of the rights and privileges . . . permitting the operation of motor vehicles . . . shall be deemed equivalent to the appointment by such nonresident user . . . of the Secretary of the State of Georgia . . . to be his . . . attorney upon whom may be served all summonses or other lawful processes in any action . . . growing out of any accident or collision in which any such nonresident user may be involved by reason of the operation by him, for him, or under his control or direction. . . ." The defendant challenged the application of the statute to a nonresident corporation when the automobile is driven and owned by a resident agent. Held, the terms of the statute are not broad enough to include a nonresident corporation with a resident agent operating his own duly licensed automobile. Wood v. Reilly & Co., 40 F. Supp. 507 (N. D. Ga. 1941).

The lack of personal jurisdiction over nonresident motorists who were involved in serious accidents has been a perplexing problem. Frequently the local citizen was compelled to go to a distant forum for the litigation growing out of such accidents. As a result of practical considerations, in many cases, recovery was virtually barred. To meet this problem, statutes providing for constructive or substituted service of process on nonresident motorists are now in force in nearly all the states. These statutes usually make the mere operation of a motor vehicle on the highway by a nonresident the equivalent of a formal appointment of a public officer as agent for receiving service of process. Culp, Process in Actions against Nonresident Motorists (1934) 32 Mich. L. Rev. 325 (lists 35 states); (1935) 20 Iowa L. Rev. 654 (collection of 33 statutes).

These statutes have been held constitutional as a valid exercise of the police power. Wuchter v. Pizzutti, 276 U. S. 13, 18 (1928); Hess v. Pavloski, 274 U. S. 352, 356 (1927); Restatement, Conflict of Laws (1934) § 84. Being in derogation of the common law, they must be strictly construed, and cannot be extended by implication to include persons not coming within their terms. Jermaine v. Graf, 225 Iowa 1063,

In view of the extension of these statutes to include nonresident corporations and individual nonresident principals with agents, a further extension to include nonresident corporations with resident agents would appear to be very slight. The same reason of public policy exists in either case and the hardships resulting would be counterbalanced. Scott, Jurisdiction over Nonresident Motorists (1926) 39 Harv. L. Rev. 563, 572. It would seem that if the agency were conceded, the agent's residence in the state and his ownership of the car would be immaterial in an action against the nonresident corporation.

However, the matter has been before the courts and, as in the instant case, with one exception, the statutes have been construed as not broad enough to include a nonresident corporation with a resident agent driving his own duly licensed automobile. Kirchner v. N. & W. Overall Co., supra; Wallace v. Smith, 238 App. Div. 599, 265 N. Y. Supp. 253 (1933); Josephson v. Siegel, 110 N. J. L. 374, 165 Atl. 869 (1933); Clesas v. Hurley Machine Co., 52 R. I. 69, 157 Atl. 426 (1931). Contra: Wynn v. Robinson, 216 N. C. 347, 4 S. E. (2d) 884 (1939). In so deciding the cases the courts have construed the statutes as envisaging the acceptance of highway privileges by a nonresident, thus contemplating the presence of the nonresident's automobile operated by or for him within the state as an essential prerequisite to the applicability of the statute. Kirchner v. N. & W. Overall Co., supra; Josephson v. Siegel, supra; Clesas v. Hurley Machine Co., supra. The New York court in Wallace v. Smith, supra, based its decision on an additional ground, saying: "A person or corporation which is neither the owner nor operator of a car may be called to some distant state to defend a personal injury action on the allegation that a person operating a car in that state was doing so as the agent of the person or corporation sought to be made defendant. To permit such practice would result in very great injustice." 238 App. Div. at 601, 265 N. Y. Supp. at 256. In Wynn v. Robinson, supra, involving a liberal statute similar to that in the instant case, the Supreme Court of North Carolina found the statute broad enough to include this situation but gave no satisfactory reasons for its decision.

In the instant case the court stated that the nonresident corporation accepts no rights
or privileges concerning motor vehicles, and uses, not the highways, but the rights and privileges granted to the resident and held such an indirect acceptance of the use of the highways does not result in the equivalent appointment of an agent for service of process.

Thus, it is seen, the present case follows rather closely the reasoning of the other courts which have decided the matter. Perhaps it is felt that the spirit of the New York and Michigan cases mentioned above is the proper one, namely, strict construction of these statutes leaving to the legislature any extension considered necessary.

PAUL R. DEAN

DIVORCE—Alimony and Custody of Children Awarded to Adulterous Wife

The plaintiff-husband instituted proceedings to obtain an absolute divorce on the ground of adultery. The complaint also prayed for custody of three minor children. The wife filed an answer denying the adultery and a cross-claim charging the husband with cruelty, desertion, and failure to support the children. The cross-claim prayed for an absolute divorce, alimony, custody of the children, and maintenance for their support. The wife also sought to recover the sum of $2,000 allegedly advanced by her for the purchase of the family home. The lower court found the husband's charges of adultery true and granted the husband an absolute divorce, but gave the wife custody of two of the three children, the custody of the nineteen-year-old son being awarded to his father. The court also ordered the husband to pay the wife $2,000 in cash and awarded the wife $50.00 a week for her support and that of the children assigned to her (to be increased to $75.00 in the event she ceased to occupy her husband's house free of rent), plus counsel fees totaling $1450. The husband appealed.

Held, under the provisions of D. C. Code (Supp. 1940) tit. 16, § 412, a court may, in its discretion, award custody of children to an unsuccessful defendant in a divorce suit and, may also award alimony and attorney's fees. In view of the circumstances of the husband's substantial income, and the wife's lack of means of support, the award of alimony or maintenance and attorney's fees is not precluded by the wife's adulterous conduct. Jaeffe v. Jaeffe (App. D C., Nov. 10, 1941).

In the District of Columbia, authorities agree that the custody of children is a matter for the court's discretion, even where adultery is involved. Suley v. Suley, 30 App. D C. 191 (1907); Wells v. Wells, 11 App. D. C. 392 (1897). As in other equity suits, if such discretion by the trial court exists, its exercise will not be disturbed on appeal unless there is evidence of manifest abuse. Wells v. Wells, supra.

It was observed in In re De Leon, 70 Cal. App. 1, 232 Pac. 738 (1925), "Notwithstanding the fact that the divorce may be granted against a party on the grounds of her adultery or cruelty, the court, having jurisdiction of the proceeding, has both the discretion and the jurisdiction to award the custody of a minor child to the offending party so long as the offense is not against the child."

Under the common law, a delinquent wife, on account of whose conduct the husband obtained a divorce, was not entitled to alimony. Ecker v. Ecker, 22 Okla. 873, 98 Pac. 918 (1908). An English court in 1863 said: "There is no precedent to show that the Ecclesiastical Court ever granted alimony to a wife from whom her husband had procured a judicial separation for her cruelty and this court has no discretionary power to do so." Dart v. Dart, 11 W. & R. 551, 164 Eng. Rep. R. 1254 (1863). Shortly thereafter, however, in Prichard v. Prichard, 13 W. & R. 188, 164 Eng. Rep. R. 1378 (1864), the court held that a decree for judicial separation on the husband's showing
of the wife's cruelty, should make some provision for alimony. The court said that
if there was no judicial precedent for such a provision, the court should make one,
overruling Dart v. Dart, supra. The English Parliament, upon granting a divorce to
a husband for adultery of his wife, always required him to make a provision for her
out of his estate, "and for this most humane, moral, and just reason, that she may not
be driven, by want, to continue in a course of vice." Best, J. in Jee v. Thurlow, 4

It is the general rule of common law independent of statute, that permanent alimony
will not be awarded to a wife whose husband obtains a divorce for her marital
fault. Bates v. Bates, 245 U. S. 520 (1918). But this general rule has been productive
of so much hardship, and has so frequently left the wife a prey to prostitution,
that statutes have been enacted in England and in a number of states authorizing
the courts to make such an award of alimony in favor of a guilty wife wherever the
surrounding circumstances appear to justify such action. A circumstance of great
importance is the fact that, as in the principal case, the wife has made substantial
contributions to the husband's property, or that of the marital community.

Other circumstances which may be taken into consideration are, the amount of the
husband's property, the ability of each spouse to earn a living in the future, and the
husband's marital conduct in the past. Vigil v. Vigil, 49 Colo. 156, 111 Pac. 833
(1910); Davis v. Davis, 134 Ga. 804, 68 S. E. 594 (1910).

How mitigating circumstances have influenced the cases is most clearly shown in
states having statutes which prohibit any allowance to an adulterous wife. In Florida,
for example, the courts have held that they were not precluded from allowing the
wife an award equal to her interest in the business of her husband toward which she
had contributed materially in funds and industry through a period of years. In so
holding, however, the court expressly negatived any intention to make an award of

The statutes more customarily found do not prohibit an award of alimony to an
adulterous wife, but rather provide that alimony may, in the court's discretion, be
awarded to a wife, notwithstanding that the divorce is granted to the husband.
In this group belongs the statute in effect in the District of Columbia. The bare
result reached in the principal case is in accord with decisions in other jurisdictions
having similar statutes. Graves v. Graves, 108 Mass. 314 (1871); Lofvander v.
538, 29 S. W. 290 (1895); Miles v. Miles, 76 Pa. 357 (1874). But the generous
provision made for the wife in this case seems extreme in view of her fault. The
limits of discretion are not far beyond.

ROBERT P. O'REILLY

MUNICIPAL CORPORATIONS—City Estopped to Deny Validity of Division Line
Though Not Formally Authorized to Make It

The city of Baltimore acquired land fronting on the Patapsco river for a city
airport. To establish the rights of riparian owners in the waters of the river, the city's
chief engineer had a survey made by the harbor engineer, Hammond. Though never
formally adopted, the plan was assumed by the city officials to be valid. Sub-
sequently substantial improvements were made by the plaintiff company which
owned land adjoining that of the municipality. The improvements were made
according to and in reliance upon the lines so fixed and with express permission of the
Board of Estimates of the city. The municipality seeks to repudiate the validity of the
Hammond plan as having been made erroneously and without authority. In its stead the city offers a new plan under which it can encroach upon the riparian rights of plaintiff as acquired under the Hammond plan. Suit is brought to settle the boundary lines in the waters of the river. Held, that whether or not the city had the power to establish such line, it is nevertheless estopped from asserting that it did not fix the line claimed by the plaintiff on the ground that the plan was not authorized or ratified by city ordinance as required by Baltimore City Charter 1938, art. 1, §§ 6 (8), 105, 115 and art. 2, § 558; Md. Code Ann. (Bagby, 1939) §§ 46-48. Mayor and City Council of Baltimore v. Crown Cork & Seal Co., 112 F. (2d) 385 (C. C. A. 3d, 1941).

It is uniformly held that when a municipal corporation performs an act which it has the authority to do the doctrine of estoppel applies to it with the same force as against individuals. Union Depot Co. v. St. Louis, 76 Mo. 393, 396, 8 Mo. App. 412 (1882). Nor can the corporation be heard to say that it has neglected to observe some formality or regulation that should have been observed. Rose v. Mayor and City Council of Baltimore, 51 Md. 256, 34 Am. Rep. 307 (1879). But where the municipality in its governmental capacity acts wholly beyond its authority in the performance of an ultra vires act the doctrine does not apply. Wilson v. King's Lake Drainage and Levee Dist., 176 Mo. App. 470, 150 S. W. 931 (1913). For distinctions between ultra vires acts of municipal corporations which are necessarily void and those simply irregular, see McQuillen, Municipal Corporations (2d ed. 1928) § 1724. If no power is vested by law, no ultra vires act of the city or its officers or agents can be cured by estoppel. Edwards v. Kirkwood, 147 Mo. App. 599, 615, 126 S. W. 378 (1910). Nor can such acts be validated by ratification. Murray v. Omaha, 66 Neb. 279, 92 N. W. 299 (1902); Strong v. District of Columbia, 1 Mackey 265, 12 D. C. 265 (1881). Though it is true that the corporation cannot be estopped in its governmental capacity to deny the validity of a contract resulting from the ultra vires act of the municipality, an estoppel may work as to its proprietary rights. People v. Broadway Wharf Co., 31 Cal. 33, 159 Pac. 734 (1866). For in such instance the case is governed by the same rules of law as are applicable to ordinary business corporations. (1937) 2 Wash. L. Rev. 136. And it is well established that private corporations may be estopped to deny the validity of an ultra vires act. Mutual Life Ins. Co. of New York v. Stephens, 214 N. Y. 488, 108 N. E. 856 (1915). As to statutory provisions relating to the defense of ultra vires, see Stevens, Corporations (1936) 852-860.

It is in the field of tort that the distinction between the governmental and proprietary functions of the municipal corporation has its greatest importance. Sovereign immunity to suit arises where the municipal corporation acts in its governmental capacity as agent of the state. But for all purposes, whether it be tort, taxation, or the defense of estoppel for an ultra vires act, distinctions are of great practical value. Unfortunately the measure of importance is in direct proportion to the amount of confusion which marks the drawing of the distinctions. It has been said that “the distinctions between corporate and governmental functions have become so nearly obliterated as to become incapable of classification on any logical basis.” Adler v. Deegan, Tenement House Comm'r, 251 N. Y. 467, 505, 167 N. E. 705 (1929). There is no established rule for the determination of what belongs to one or the other class. City of Trenton v. State of New York, 262 U. S. 182 (1923). As to the unsatisfactory result of tests propounded to distinguish the functions, one from the other, see Seasongood, Objection to Governmental or Proprietary Test (1930) 22 Va. L. Rev. 910. As a result of this difficulty the proprietary title has been applied in many instances where the other might have been warranted. (1931) 20 Nat. Mun. Rev. 298. It has been suggested that the decision will ultimately depend on individual opinion as to what is the appropriate function of government. Doddridge, Distinction Between Governmental and Proprietary Functions of Municipal Corporations (1925) 23 Mich. L. Rev. 325.
There is a wealth of authority sustaining the point that a municipality maintains and operates an airport in its proprietary capacity. Mobile v. Latrique, 23 Ala. App. 479 127 So. 257 (1930); Blue v. City of Union, 159 Ore. 5, 75 P. (2d) 977 (1938). And the decisions of Maryland so hold. But see Stocker v. Nashville, 174 Tenn. 483, 126 S. W. (2d) 339 (1939). Cf. Note (1941) 30 GEORGETOWN LAW JOURNAL 198, 201-203. So too it has been ruled that wharves and piers are likewise held in the city's proprietary capacity. Baltimore v. Steam Packet Co., 164 Md. 284, 164 Atl. 878 (1933). As to these readily apparent proprietary functions there is little or no dispute. 

In the principal case the court in its construction of art. 1, § 6 (8) of the Baltimore City Charter found in the municipality the power to fix the divisional lines in the waters of the Patapsco river. It was admitted that the formalities as required by § 351 of the Baltimore City Code had not been complied with. The court however excused this irregularity, holding the facts sufficient to create an estoppel, which it further ruled, could not be avoided by the plea that the municipality had not exercised the powers conferred upon it in the proper fashion. But had the court, in construing the municipal code, denied the city in its governmental capacity any power to effect a divisional line it would nevertheless have had to find the municipality estopped to deny the validity of the Hammond plan, for it cannot be doubted that the city in its proprietary capacity had the power to make an agreement binding upon it and its neighbor as to the division of riparian rights between them.

JAMES R. HIGGINS

TAXATION—CHARITABLE TRUSTS—A Bequest to the Board of Temperance of the Methodist Episcopal Church is a Trust for the Advancement of Religion, and not Taxable

A bequest to the Board of Temperance, Prohibition and Public Morals of the Methodist Episcopal Church was subject to the Federal estate tax, the Commissioner and the Board of Tax Appeals both holding that the Board of Temperance "was not a corporation organized and operated exclusively for religion, education, or other purposes." Held, reversed; the bequest was deductible as a religious bequest because the Methodist Episcopal Church had considered the Board's activities as religious for over one hundred and fifty years, even though the purposes of the Board embraced "attempts to influence legislation to further its purpose." Girard Trust Co. v. Commissioner of Internal Revenue, 122 F. (2d) 108 (C. C. A. 3rd, 1941).

In the principal case the applicable statute, Revenue Act of 1926, § 303 (a) (3), exempts from the estate tax any bequest "to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . . no part of the net earning of which inures to the benefit of any private stockholder or individual." This Act was amended in 1934 by Section 406 of the Revenue Act of 1934 to include after the word individual the following: "and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." When the instant case was heard by the Board of Tax Appeals, the petitioners claimed that the 1926 Act, supra, was controlling, since the testatrix had died in 1933, but also contended that irrespective of this point the bequest to the Board of Temperance was deductible since it qualified under the statute as a corporation deserving of the deduction. The Commissioner maintained that the amendment was merely legislative approval of the interpretation given the Act. 

A political purpose may be charitable, In re Murphy's Estate, 7 Cal. (2d) 712, 62 P.
(2) 374 (1936), if the change in the law sought is not contrary to good morals and can be attained by lawful means. This, therefore, eliminates lobbying. If the purpose of the trust meets these requirements and is not against public policy, courts will uphold them as valid, refusing to consider the "wisdom of the plan or change." See (1937) 36 Mich. L. Rev. 140, 141; Bartlett, "Charitable Trusts to Effect Changes in the Law" (1928) 16 Cal. L. Rev. 478; Scott, Trusts (2nd ed. 1939) § 374.4. But, under the Federal estate tax, a trust can be charitable and still not qualify for exemption because of the bothersome word "exclusively" found in the statute. The purpose of the Board of Temperance and its relation to the Methodist Church is, therefore, important in analyzing the instant case.

According to the Discipline of the Methodist Episcopal Church, the purpose of the Board was... "to promote voluntary total abstinence from all intoxicants and narcotics, to promote observance and enforcement of all constitutional provisions and statutory enactments that suppress the liquor traffic and the traffic in narcotic drugs, to promote the speedy enactment of such legislation throughout the world." The activities of the Board included active participation in the presidential campaign of 1928; propaganda activities tended to influence legislation; and the editing of two monthly publications. Thus a substantial part of its work was not strictly religious as the word is commonly understood. The Board was not self-governing, but abided by the Articles of Discipline of the General Conference which governed the Methodist Church itself and each of its boards. This relationship is the real basis of the decision, as these Articles reveal the attitude of the church toward alcoholic drinks, namely "that those subject to the discipline of the Church shall continue to evidence their desire of salvation by avoiding evil, such as drunkenness, buying or selling spirituous liquors or drinking them, unless in cases of extreme necessity." Therefore, although a substantial part of the Board's activities was to influence legislation, still "the activities of the Board fell within the type which have been regarded as religious by the Methodist Church for a century and a half."

The principal case would seem to be in direct conflict with Slee v. Commissioner, 42 F. (2d) 184, (C. C. A. 2d, 1930), which arose under the Revenue Acts of 1924 and 1926 prior to the amendment of the 1926 Act. There a taxpayer made a gift to the American Birth Control League, which was incorporated to educate the public of facts of uncontrolled procreation and to seek aid and cooperation in lawful repeal and amendment of "state and Federal Statutes which deal with the prevention of conception." In addition a magazine was to be published containing reports and studies of uncontrolled procreation. Besides the purposes set forth in its charter, the league maintained a clinic, largely charitable, for married women only and published the result of cases to the medical profession. In refusing deduction of this gift, the court remarked that no doubt the league was carrying on charitable work, but that it was not operating exclusively for charitable purposes within the meaning of the revenue statute because one of the purposes was to agitate for a change in the law.

The Board of Tax Appeals followed this line of reasoning in the instant case when it said that a substantial part of the Board's organization was not exclusively for any purposes of the statute, including educational, and that "however commendable its purposes may be regarded... we think its activities were such as clearly to prevent its classification as a corporation organized and operated exclusively" for the purposes set forth in the statute.

This same interpretation of the word "exclusively" has been given in Leubuscher v. Commissioner, 54 F. (2d) 998, (C. C. A. 2d, 1932), and in Noyes v. Commissioner, 31 B. T. A. 121 (1934). It follows that in holding that this bequest to the Board of Temperance was deductible because it was religious, the court no doubt was influenced by a consideration of freedom of religious belief, because on the basis of previous
decisions the accepted interpretation of the the word “exclusively” would disqualify this bequest. It will be interesting to follow subsequent decisions on this point. The Board seems to have flaunted the clear words of an amendment expressly drawn to cover this situation.

JOHN A. KOTTE

TAXATION—Deductions for Dividends on “Short” Sales

The taxpayer carried with one brokerage firm several accounts. The two accounts involved were designated “regular” and “short.” At various times the taxpayer directed her broker to sell certain stocks and record the sale in her “short” account while at the same time she held in her “regular” account sufficient shares of the same stock to cover the sale. The sales in question were treated as “short” sales and the stock delivered to the purchaser was not taken from the taxpayer’s “regular” account. Dividends were declared upon the stock in question and by the custom of the trade the taxpayer as a “short” seller was obligated to pay the amount of the dividends. In computing her income tax for 1934 and 1935, the taxpayer deducted the amount paid in dividends on the stock in the “short” account from the amount received in dividends from the “long” stock. The Commissioner of Internal Revenue assessed a deficiency, claiming that the deductions were improper since the “regular” and “short” accounts, even though listing the same stocks, were separate accounts and could not be treated for taxation purposes as one account. Held, the sales listed in the “short” account were in fact “short” sales and the dividends paid could not be deducted from dividends received. Helvering v. Wilmington Trust Co., (C. C. A. 3d, Sept. 3, 1941).

In relation to stocks a “short” sale is a sale of stock which the seller does not possess at the time, but which by the future date agreed upon for its delivery to the purchaser under the terms of the contract, the seller must in some way have acquired for the purpose of such delivery. Boyle v. Heming, 121 Fed. 376 (C. C. W. D. Ky 1902); Baldwin v. Flagg, 36 N. J. Eq. 48 (1882). The whole object of such a sale is to remain short in the hope that the market price may fall—at which time the seller may secure an advantageous purchase of the stock. Knowlton v. Fitch, 52 N. Y. 288 (1873). “A ‘short’ sale may be briefly but comprehensively defined as a sale which creates a debt in terms of goods.” Meeke, Short Selling (1932) § 19.

A century ago in England a contract involving a “short” sale was deemed to be a wager and unenforceable at law on the part of the vendor. Bryan v. Lewis, Ry. & Mood. 386 (N. P. 1826). Such a doctrine does not now prevail either in England or this country. White v. Smith, 54 N. Y. 522 (1874); Knowlton v. Fitch, supra; Hibblewhite v. McMorine, 5 M. & W. 462 (Exch. 1839). A contract for the sale of stock or marketable securities differs from a sale of a specific chattel in that the delivery of any stock of the same description as that bargained for satisfies the requirements of such a contract and hence a contract of sale as applied to market securities cannot be an actual sale but a contract to deliver. Heseltine v. Siggers, 1 Exch. 856 (1848).

Although the transaction is commonly called a loan, all the incidents of ownership pass to the borrower (short seller) upon his receipt of the borrowed stock. Provost v. United States, 269 U. S. 443 (1925). In all essential respects it is not a loan and even less is it a sale. The obligation is not to return the identical shares borrowed but equivalent shares of the same stock. The lender on his part is bound to return the money deposit when the shares are delivered. Of prime importance in this case is the rule that the short seller must pay to the lender any dividends accruing upon the stock during the loan.
The taxpayer maintained the sale was not "short" but merely the completion of a transaction which began with a prior purchase. If so the dividends charged on the "short" stock could be deducted from the dividends received on the "long" stock. The Commissioner contended that the sale was intended to be "short" and the payment of dividends on such "short" sale was in the nature of capital expenditures which prevent any deductions until the taxpayer covers the transaction, at which time it would be permitted to add the dividends to the cost basis. This contention was previously sustained in Dupont v. Commissioner, 110 F. (2d) 641 (C. C. A. 3d, 1940), cert. denied, 311 U. S. 657 (1940); Dupont v. Commissioner, 98 F. (2d) 459 (C. C. A. 3d, 1938), cert. denied, 305 U. S. 631 (1938).

The advantage of selling short while owning "long" stock which might be delivered against the sale, is that it avoids the realization of profits and thus postpones the tax. Prior to June, 1932, there was the additional advantage of being able to use the special rate at which capital gains were then taxed, by the taxpayer's covering the short sale with stock that had been held for more than two years. In 1932, however, the Revenue Act was amended so as to treat gains and losses from short sales as ordinary gains and losses and taxable at the same rate as ordinary income.

Whether the sale in question was the completion of a purchase or a "short" sale is a question of objective intent according to the Dupont cases, supra. The evidence shows that the taxpayer treated the sales as "short" because the transactions were so entered upon her books. Gains or losses were not reported at the moment of sale as would be done if it had not been a "short" sale. Instead the profit and loss entry was not made until the covering transaction was completed. The certificates of stock delivered to the purchaser could not be identified as shares belonging to the taxpayer. After the completion of the sale the proceeds were not made immediately available to the taxpayer, which is a practice consistent with "short" selling, but not with the completion of a purchase.

Most attempts by the taxpayer to reap double benefits from a dual identity are short lived. Cf. Superior Coal Co. v. Dep't of Finance, 36 N. E. (2d) 354 (Ill. 1941), (1941) 30 Georgetown Law Journal 90 (parent corporation cannot disregard separate entity of subsidiary to avoid sales tax).

EUGENE E. KLECAN, JR.

TORTS—Conspiracy to Drive Another Out of Business by Means of a Boycott
Non-Tortious if Individual Acts Not Illegal

Plaintiff and each of the two defendants operated stores in a small town and were supplied by the same packing and baking houses. Upon being informed that if they continued to sell to the plaintiff, the defendants would cease to buy from them, the salesmen of these houses refused to sell to the plaintiff, who was forced out of business. In a tort action for conspiracy to boycott and destroy the plaintiff's business, held, since the acts of the defendants as individuals are legal, no agreement to commit them can be a tortious conspiracy. Plaintiff failing to show intimidation, coercion or fraud, judgment was entered for the defendant after introduction of plaintiff's evidence. McNeill v. Hall, 16 S. E. (2d) 456 (N. C. 1941).

Although the question has been passed on many times since first squarely presented in Mogul Steamship Co. v. McGregor, [1892] A. C. 25, there is no unanimity among courts as to whether an act, lawful when done by an individual, becomes actionable when done by a combination. It has been held that a conspiracy cannot be the basis of a civil action unless something is done which, were the conspiracy not present, would give a cause of action. Clark v. Sloan, 169 Okla. 347, 37 P. (2d) 263 (1934).
Moreover, a number of decisions state that mere numbers cannot change the character of an act from lawful to unlawful. *City of Boston v. Simmons*, 150 Mass. 461, 23 N. E. 210 (1890). This is apparently the law in North Carolina, *State v. Martin*, 191 N. C. 404, 132 S. E. 16 (1926), and is an important basis for the decision in the instant case. However, the preferable and probably prevailing view is that where an act done by an individual, though injurious to another, is not actionable because justified by individual rights, yet the same act becomes actionable when done by a combination of persons actuated by an illegal purpose and lacking individual justification. *Stearns Lumber Co. v. Howlett*, 260 Mass. 45, 157 N. E. 82 (1927). McKay, *The Effect of Motive on the Character of Acts in Conspiracy Cases* (1936) 27 PA. BAR. ASS'N Q. 371. A court's choice of sides in this controversy can be vital in a case such as the instant one where a boycott is involved. *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119 (1893); *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345 (1893). If the means of interference or the means by which a boycott is carried into effect are unlawful, an action will lie everywhere. *Truax v. Corrigan*, 257 U. S. 312 (1921); *Allen v. Flood*, [1898] A. C. 1. A boycott is *prima facie* unlawful and an action will lie in favor of the one against whom it is directed unless it is justified. *United States v. American Livestock Commission*, 279 U. S. 435; *Fashion Originators' Guild of America v. Federal Trade Commission*, 311 U. S. 641 (1941); *Restatement, Torts* (1934) § 765. But it can be justified. *Millinery Creators' Guild v. Federal Trade Commission*, 109 F. (2d) 175 (C. C. A. 2d, 1940). Lawful competition or the advancement of a trade interest may be justification of a boycott consisting of a voluntary agreement to refrain from dealing with certain persons. *John D. Park & Sons Co. v. National Wholesale Druggists' Ass'n*, 175 N. Y. 1, 67 N. E. 136 (1903); *Restatement, Torts* (1934) § 768. So, one may refuse to sell to persons who are not wholesalers, *Mennen v. Federal Trade Commission*, 288 Fed. 774 (C. C. A. 2d, 1923); or to buy from wholesalers who sell directly to consumers, *Bohn Mfg. Co. v. Hollis*, supra; or to sell to competitors, *Federal Trade Commission v. Raymond Bros.-Clark Co.*, 263 U. S. 565 (1923). Prevention of trade abuses may be justification. *Appalachian Coals, Inc. v. United States*, 288 U. S. 344 (1933). But boycotts which have as their purpose price-fixing, the exclusion from the market of any who supply it, or any purpose in violation of public policy, are never justifiable. *United States v. Socoxy-Vacuum Oil Co.*, 310 U. S. 150 (1940).

A combined refusal or threatened refusal to deal with a person as a means of preventing him from dealing with the intended victim of the boycott—the instant case—has been held actionable and not actionable, the decision usually depending on the particular facts. *Montgomery Ward v. South Dakota Retail & Hardware Dealers' Ass'n*, 150 Fed. 413 (C. C. D. S. D. 1907). It was held actionable in *Fruck v. Farmers' Elevator Co.*, 142 Iowa 621, 121 N. W. 53 (1909), where persuasion became indistinguishable from coercion; in *Bailey v. Association of Master Plumbers*, 103 Tenn. 99, 52 S. W. 853 (1899), where restraint of trade was the basis of decision; in *Jackson v. Stanfield*, supra, where the court held the combination illegal *per se* and refused to consider the alleged justification; and in *Fashion Originators' Guild of America v. Federal Trade Commission*, supra, where the alleged justification of removal of trade abuses was not proved. Equity has likewise given relief in similar situations by restraining interference with another's business by means of unfair competition, *International News Service v. Associated Press*, 248 U. S. 215 (1918); by a combination involving a boycott, *Hawarden v. Youghiogheny & Lehigh Coal Co.*, 111 Wis. 545, 87 N. W. 472 (1901); and by restraint of trade, *Wm. Filene's Sons Co. v. Fashion Originators' Guild of America*, 90 F. (2d) 556 (C. C. A. 1st, 1937); *Walsh, Equity* (1930) § 47. Indeed, in the instant case where the plaintiff was driven out of business and in similar situations where the interference does irreparable damage, the equitable...
remedy may be superior, damages alone being inadequate. Walsh, op. cit. supra, § 44.

On similar sets of facts courts have held that no action lies and that equity will not restrain where one of the purposes of the combination which employs the boycott is the advancement of the members’ businesses and where no violence, coercion or fraud is shown. Montgomery Ward v. South Dakota Retail & Hardware Dealers’ Ass’n, supra; Macauley v. Tierney, 19 R. I. 255, 61 Am. St. Rep. 770 (1895); Cote v. Murphy, 159 Pa. 420, 28 Atl. 190 (1894).

In the instant case, defendants committed no fraud or violence. It is doubtful that their verbal persuasion of the salesmen could be termed coercive, unless on the basis of the mere existence of the combination as moral coercion. Perkins v. Pendleton, 90 Me. 166, 38 Atl. 96 (1897). Defendants told the salesmen to deal with whom they pleased, but if they sold to the plaintiff, the defendants would buy elsewhere. Undoubtedly the act of each defendant, had he acted as an individual, would have been lawful. To apply this minor premise to the major that if the acts are not illegal no agreement to commit them can be an illegal conspiracy, is to make a logically unassailable case. This the court does. But if the more generally accepted principle that an act which is lawful when done by an individual may become unlawful when done by a combination, were applied, a quite different procedure might have been adopted. Doubtless no summary judgment would have been entered in favor of the defendants who would at least have been required to put in evidence some justification of their prima facie illegal boycott. Fashion Originators’ Guild of America v. Federal Trade Commission, supra. Legal justification might have been shown and the same result reached. Millinery Creators’ Guild v. Federal Trade Commission, supra. However, the defendants not being required to put in any evidence, it is impossible to weigh their possible justification. The decision apparently represents the common law attitude, rather than the modern trend of decisions on similar facts. Walsh, Equity (1930) § 47. Compare Mogul Steamship Co. v. McGregor, supra, with Fashion Originators’ Guild of America v. Federal Trade Commission, supra; Note (1935) Brooklyn L. Rev. 448. The present requirement by an apparent majority of courts of strict legal justification of any interference with another’s business or livelihood seems appropriate in an economy in which there survives only remnants of the laissez-faire doctrine.

JOHN H. EVANS, JR.
BOOK REVIEWS


Add ten cases¹ and take away seven;² include a bibliography of available literature on future interests of general and local importance, and classify the latter by States; enrich the footnote material, especially with respect to references to the Restatement; intercalate two penetrating little essays by the author, one on “The Use and Abuse of Testamentary Trusts”;³ and the other on “The Drafting of Powers of Appointment”⁴ insert a great many more problem cases; set out a particularly refreshing and thought provoking letter by a civilian taking issue with Professor Leach’s dictum that “the Rule against Perpetuities grew up in the finest tradition of the English common law”;⁵ and, in a nutshell, you have the essential differences between the second and first editions of this deservedly popular casebook.

No change has been made in the organization or development of material; but the emphasis upon draughtsmanship, rather than advocacy, or remedies, or appellate court judging is even more marked than in the first edition. And the new cases, most of them decided since the first edition was published, accentuate the tang of modernity characterizing the earlier book. Also, by cross-referencing much more frequently than in the first edition a closer-knit, better articulated book is produced in which the unitary nature of the subject is underscored.

Happily, the new edition retains the buoyant, almost jovial, flavor of the older book. Barbed witticism and good natured satire again highlight the anachronisms and downright asinities which are still all too prevalent in the law of future interests despite the comparatively

†Professor of Law in the Harvard University Law School.


²Maddison v. Chapman, 4 K. & J. 709, 719 (1858); Wilkinson v. Duncan, 30 Beav. 111 (N. Y. 1861); Rous v. Jackson, 29 Ch. Div. 521 (1885); In re Parkin, [1892] 3 Ch. 510; In re Shallcross's Estate, 200 Pa. 122, 49 Atl. 936 (1901); Farmers Loan & Trust Co. v. Mortimer, 219 N. Y. 290, 114 N. E. 389 (1916); Matter of Lawrence, 238 N. Y. 116, 144 N. E. 361 (1924).

³P. 238.

⁴P. 734.

⁵P. 736.
recent trend from formalism to common sense. "Human interest" items in Professor Leach's inimitable manner again give background, color, and reality to the cases. Practical suggestions in draughtsmanship, invaluable in themselves, again combine with other incisively written comments by the author to emphasize the function and social significance of the legal devices examined. And, again, introductory notes to various sections of the book supply frames of reference which it would be profligate of time to develop by cases.

Of course, a casebook at best is custom built only for its editor. Others almost inevitably will find certain aspects of the book not entirely to their liking. Thus, it seems to me unfortunate that in revising the first edition Professor Leach failed to give separate consideration to the New York Rule against Perpetuities.

Also, I had hoped, in vain, as it turns out, that the new edition would include more material on virtual representation, partition, and protection of interests than was set out in the earlier book. But these are relatively unimportant matters. The important thing is that the present edition is an even better teaching vehicle than the earlier book. As presented by Professor Leach, future interests is not a dry, dreary exercise in legal calculus pungent with the musty stench of decadence. Rather it is live, human, vital — and to make it so is the accomplishment of genius.

JOHN RITCHIE, III*


The law of contempts by publication offers a rewarding field for research and discussion. Analysis of the historical development and present status of existing rules would be of interest and, possibly, of value. Few can doubt that the prevalence of trial by newspaper in the United States is a serious evil. The reasons why it is not more successfully checked, and the problems presented by the devices available for its suppression would make an interesting study. It is not easy to isolate objectionable features and suggest a remedy which will not endanger the full dissemination of information about the conduct of courts and the free criticism of them which a healthy system requires. Arguments based upon simple analogy to the relatively satisfactory English handling of the situation will not suffice unaccompanied by careful consideration of the manifold differences in the American temperament and social organization which exert relevant pressures upon our courts.

*Professor of Law in the University of Virginia Department of Law.
†Member of the Bar of the Supreme Court of the United States, the State of Massachusetts, and the State of New York.
Viewed in the light of these possibilities, the present volume is of merit chiefly as an indication that its author's sentiments do him credit. He is against trial by newspaper and in favor of wisdom and restraint on the part of the judges. He has collected a large number of cases which may afford a sufficient basis for informed conclusions. I have not attempted to ascertain whether the available case material is completely covered. But absence of uniformity, incompleteness, and occasional inaccuracy of citation lead me to question the wisdom of too great reliance on this compilation. Further inadequacies of form comprise the fact that the writer's style is an unfortunate combination of journalese and legalese, idioms the relative unloveliness of which is difficult to assess. And there are grammatical errors of a type one does not expect from the holder of three university degrees.

In substance the book is diffused, repetitious, disorganized, and shallow. The first two sections dealing with American and English decisions comprise some 114 pages of helter-skelter abstracts together with scattered quotations, historical allusions, and conclusions for which the case material provides no apparent basis. The remaining 67 pages are given over to a "critique" which consists of further assertions, quotations, and references back to, or repetitions of, the material in the first two sections. The analytical organization and exposition compare unfavorably with the poorer efforts of the commercial digests.

In conclusion, I cannot withhold one futile protest against a long-nurtured private annoyance which this volume serves to aggravate. The legal profession is scandalously victimized by private and commercial publishers who annually flood the market with myriad expensive books the substantive content of which would do scant credit to a first-year case-note. I suppose that so long as the profession remains gullible enough to provide a profit on these items, reform on the part of commercial publishers is too much to expect. And it seems probable that those whose egos are enhanced by private publication are still less likely to mend their ways. But when a 212-page effusion like this appears in a second edition (500 copies—first edition 1000 copies) priced at $10.00, my gorge rises to a point which causes me to doubt that freedom of the press is a blessing unalloyed. Unmitigated savagery on the part of reviewers offers the only hope for reform, and that a slim one indeed.

THOMAS M. COOLEY, II*

---

*Instructor in Law, Western Reserve University School of Law.
CASES AND MATERIALS ON PROPERTY SECURITY—by George E. Osborne.†

The title of Professor Osborne's new casebook suggests a limitation on its availability for use in the curricula of many modern law schools. Expressly confined in its scope to legal issues arising out of the use of property as a base of credit, it is in marked contrast with certain other collections of teaching materials in the security field which take all forms of security—personal as well as property—to be their province. It is not, of course, to be concluded that this contrast necessarily is an invidious one so far as the book under review is concerned, for the reason that the editor's effort ought, and is, to be evaluated in the light of the specific objective which he has set himself. It does, however, raise questions as to the desirability of segregating in a curriculum varying manifestations of the credit-security concept, and of the consequent adaptability of the book to a curriculum formulated by those who would have the student examine the manifold outward aspects of that concept within the unifying and correlating disciplines supplied by a single course.

With no signs to be discerned of any abatement—or even lessening of the rate of increase—of the demands of the public law courses on those all-powerful spirits who have in their disposition curriculum time allotments, it is hardly to be supposed that the trend toward telescoping courses will be reversed. And, indeed, there are many who hope that that trend will be accentuated rather than diminished in many fields—and this from no deference whatsoever to public law. The subject of Security has seemed to present an ideal area in which to stimulate and encourage this development.

Starting from the base-line of a transaction among men involving the extension of credit, and from the further hard fact that the man in control, the prospective creditor, will not permit the deal to proceed to consummation unless and until some assurance is forthcoming of ultimate payment, the fundamental idea of Security grows and gathers substance. The forms it assumes may vary within a wide range from the personal security represented by the signature of a guarantor to the property security embodied in a trust deed of real estate or the pledge of a diamond ring. The resolution in courts of law of disputes arising between the parties to these transactions is facilitated by an analysis which penetrates the trappings of form and explores the considerations residing in the underlying idea. Presumably, it is the function of a law school to enable its students to make such an analysis in any type of security transaction, and it seems that that function may best be discharged by

†Professor of Law, Stanford University Law School.
a combination rather than a separation of courses concerned with the credit-security principle; thus, the inclusion by Professors Hanna and Sturges in their respective case books of materials relating to the personal type of security traditionally contained in a separate suretyship course, together with cases dealing with real estate mortgages on the one hand, and chattel mortgages and other forms of personal property security on the other. In truth, this degree of synthesis falls far short of satisfying the requirements of a really well-rounded commercial law course which would be sufficiently selective from several sources, such as Sales, Suretyship, Mortgages, Bills and Notes, Vendor and Purchaser, Personal Property, and others, as to afford a meaningful picture of business and the credit mechanism in action.

To one of this pedagogical persuasion, therefore, Professor Osborne's casebook may have something less than an ardent appeal. But for another not so hopeful of the values to be realized from such a synthesis or perhaps not so comfortable outside the conventional bounds of these courses as they have heretofore customarily been given, the book will come as a thoroughly competent and complete collection of cases within the subject limits stated in the title. That it is a collection of cases and nothing more (apart from a few pages of text material describing the historical development of the real estate mortgage) may be a source of regret to those who find extra-case material helpful in developing the principles of Security. Outside of some references to and re-printings of certain provisions of the various Uniform Acts in this field, there is little use of statutes; and an omission of greater consequence is that of forms currently in use as security documents. Although forms are dull reading at best and the effort involved in centering the student's attention thereon is considerable, they do provide the opportunity for making a succession of cases come to life, and thereby serve to illustrate forcefully the point that law is studied for the purpose of preparing for a lifetime of good, unspectacular but vital legal draftsmanship. In addition, forms give more than a mere inkling of the actual framework of business upon which security transactions are fashioned. Mr. Osborne has, however, collected all of the periodical literature bearing on the problems of property security and keyed the references to the cases as those problems are successively presented in the book, and the user possessed of a little interest and diligence will have no trouble in finding background materials. A valuable and convenient bibliography of these references, arranged alphabetically by authors, is included in the book.

If the relative numbers of pages devoted respectively to real estate security and to personal property security are a conscious criterion, Professor Osborne appears to regard the former as continuing to be the more significant and worthy of the more detailed study. He devotes 780
pages to the mortgage of land, and 242 to the four best-known devices for the use of personalty as security; namely, pledges, chattel mortgages, conditional sales, and trust receipts. Because of the ancient lineage of the real estate mortgage and the countless problems that have arisen in the course of that long and turbulent life, and even more fundamentally because men are still devoted to land as the primal form of property ownership, it is probably true that this division of space is not unduly overbalanced on the side of the subject of land security.

But one is tempted to suspect that the complexities of form and the niceties of legal doctrine furnished by the wealth of cases available in the real estate field often prove to be too much of an attraction for the legal scholar who is assembling a collection of security problems, and that, accordingly, personal property security may not be given the attention to which its use in the workaday world would entitle it. The growth of instalment selling with a consumer's credit secured by the article sold, financing in the automobile field, borrowing on the credit of corporate securities—all these and many related transactions have become so prevalent that many a law student of today will find himself bombarded with legal problems growing out of them as soon as he enters practice, and it is not unlikely that they may claim more of his time than matters pertaining to realty. One has only to think of the uniformly land-propertyless character of the average city-dweller and his almost constant pre-occupation with his payments on his car to appreciate that this may be so. Similarly, the problem of dealer financing, of getting goods from producer to wholesaler, of lending against inventories or stocks of raw materials in order to keep both mercantile and industrial establishments functioning efficiently—all these are grist for the mill of the modern lawyer and require his best efforts. Should, therefore, the concession be made so readily that a course on property security is to be devoted so largely to the consideration of the one form at the expense of the other? Should, in short, the weighting be three and one-quarter times in favor of real estate?

The presentation by Professor Osborne of his materials is along conventional and familiar lines in manner as well as in emphasis. The discussion of real estate security is segregated in Part I from the personal property cases collected in Part II. The development of the law of real estate mortgages in Part I is essentially historical in nature, and the subdivisions march in orderly and roughly chronological progression from an examination of the theoretical concept of a mortgage and the formalities requisite to a valid execution down to the law of foreclosure. It is an historical treatment which does not err on the side of Littleton and the Year Books, however, because Professor Osborne has recognized that history is not something that is confined to yesterday but is also
going on today; and he has done an excellent job in keeping his real estate mortgage law up-to-date. This is reflected in the ample scope of his examination of problems created or accentuated by the depression years, such as receiverships in aid of foreclosure and the seizure of income as a part thereof, mortgage moratoria and legislative or judicial limitations on methods of foreclosure, and priorities as between land mortgages and liens on annexed chattels. Some attention has also been given to the peculiar question raised by the usual corporate trust indenture, as well as to reorganization effected through mortgage foreclosure. Professor Osborne's commendable exertions in this particular of bringing his compilation abreast of the times are only one indication of the thoroughness with which he has done his job in the land mortgage area.

Part II is concerned with the creation of liens on personal property and is a comparative study of the four principal methods of effecting such liens. In the editor's words: "Regardless of whether the principal case on the selected problem is one involving a chattel mortgage or a conditional sale, etc. (pledges and trust receipts), an attempt has been made, either in footnote material or additional principal cases, to show the results reached in the same type of transaction when the other security devices are, or could be, used." A roughly equal division of the subject-matter of Part II has been made between four chapters dealing respectively with conceptual distinctions, liens on future goods and fluctuating stocks, controversies between immediate parties, and controversies involving third parties.

As in the real estate section, this arrangement tends to be conventionally legalistic, well adapted to teaching in terms of narrow legal issues alone but lacking in the broad sweep of business background so conducive to the general understanding provided by an organization worked out with relation to the problems peculiar to a particular field of activity or to a particular commercial relationship. In this connection reference might be made to Hanna's chapter on the problems of agricultural finance as an instance of the former, and to Sturges' chapter on dealers' financing as an example of the latter. Part II is especially hampered by the failure to use specimen forms and the omission of any explanatory material sketching the context of commercial custom in which the litigated case is set. But also as in the prior section of the book, Professor Osborne has made an interesting and well-rounded selection of recent cases in the personal property security field. The fact that history does not lay its weighty hand so heavily on this subject as in the case of land mortgages operates to eliminate the dullness inevitably attendant upon a purely historically descriptive approach.

In sum, Professor Osborne has executed a difficult task with surpassing success. Certainly there can be little criticism of the manner of
its execution, assuming the validity of his views on certain basic principles. If he has chosen to reject the claims of the functionalists in their broadest application and, instead, has preferred more or less to align himself with those who feel that legal principles carry over from situation to situation regardless of the activity or persons involved, that choice—about which no one can be dogmatic—defines the standard by which his work is to be appraised. And by that standard the book is not to be found wanting.

CARL MCGOWAN*

*Assistant Professor of Law, Northwestern University School of Law.