DECREES AND JUDGMENTS UNDER SECTION 5 OF
THE CLAYTON ANTITRUST LAW

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The Sherman Antitrust Law† is to maintain free competition. It has been described by Chief Justice Hughes as a “charter of liberty.”

The Clayton Amendment, called the Clayton Act, confers upon injured parties, an action in treble damages resulting from the antitrust violations of those named as defendants. The statutory action must be brought in the district prescribed by Section 4 of the Clayton Act.

It may be brought prior to or after a civil or criminal proceeding instituted by the government against those charged with violation of the Sherman Act. If brought after the conclusion of a government suit, Section 5 of the Clayton Amendment is important. It provides:

“A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, This section shall not apply to consent judgments or decrees entered before any testimony has been taken. Provided further, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

“Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.”

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λ38 Stat. 731 (1914).
This Section appears in Title 15 U. S. C. Sec. 16.
In order to determine the meaning of Section 5 it is necessary to look to the Clayton Act and ascertain the intention of Congress.

When President Woodrow Wilson made his address to Congress on the subject of antitrust legislation on January 20, 1914, he said:

"I hope that we shall agree in giving private individuals who claim to have been injured by these processes the right to found their suits for redress upon the facts and judgments proved and entered in suits by the Government where the Government has upon its own initiative sued the combinations complained of and won its suit, and that the statute of limitations shall be suffered to run against such litigants only from the date of the conclusion of the Government's action. It is not fair that the private litigant should be obliged to set up and establish again the facts which the Government has proved."3

Several antitrust bills were introduced.
The majority report of the House Judiciary Committee states of this provision, with reference to making admissible as prima facie evidence the judgment in government cases:

"It is in keeping with a recommendation made by the President in his message to Congress on the general subject of trusts and monopolies."4

In the debate in the Senate, Senator Walsh made the following statement:

"If the United States shall proceed against any organization said to be a combination in violation of the Sherman Act, and eventually, after a judicial proceeding going through all the Courts, it shall be determined and decided that the organization is a combination in violation of the Sherman Act, that judgment stands and can be availed of by anybody who claims to have been damaged by reason of the existence of the combination. The party seeking to take advantage of it will not be obliged to travel again, step by step, over the entire field which the Government has been obliged to traverse in order to reach the judgment at which it arrived; but he will start in where the Government left off, the judgment being conclusive, establishing the facts and the law so far as it goes, and allowing him simply to establish and putting upon him the burden of establishing the actual damages which he has suffered. In other words, we give to the private individual the benefit which accrues by reason of the long litigation pursued by the Government in endeavoring to secure the judgment."5

No judgments were excepted from Section 5 (then Section 6) of the bill when originally introduced.6

Mr. Graham of Pennsylvania, in a minority report submitted with the bill made the following statement relative to then Section 6:

"In various proceedings taken by the Government under the Sherman Act,

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51 Cong. Rec. 13851 (1914).
6Id. at 9487.
parties have been persuaded to consent to decrees granting all the relief which the Government demanded. Such consent decrees have been accomplished, without the consumption of the time and expense involved in conducting prosecutions, all the relief which could be obtained by successful litigation. No hindrance should be put in the way of the Department of Justice in respect of these negotiations.

"If this proposal were enacted, it would deter any company from ever consenting to the entry of a decree in a Government suit under the antitrust laws; for such a decree would simply invite a flood of litigation that might bankrupt any company."

After the bill was reported from the Senate Committee, it was amended on the floor of the Senate to provide that judgments in criminal prosecutions as well as decrees in equity would be admissible in evidence. At the time of the first debate in the Senate and before the proviso with reference to making conclusive in private suits consent judgments or decrees was placed in the Section, the following discussion took place in the Senate:

"Mr. Hughes: There is this also to be said, that in a great many of those cases consent decrees were entered by agreement and arrangement between the Government and the parties who were charged with offenses, and it does not seem to me fair that the Government, which induced these men, in order to save it the expense and trouble and time of litigation, to consent to a decree, which the Government might not have been able to obtain by regular procedure, before the case was tried, before a judgment was had, should afterwards, when that decree has been obtained by their consent, change the law and put them in a position which leaves them absolutely no redress or no recourse of any kind. . . ."

Continuing in his statement to the Senate, Mr. Walsh said:

"We all know that the private individual is always at a disadvantage. He is never armed with the means at his command to cope with these great organizations; and that was the very reason why this act was passed . . . in order that the Government, with its great powers, might meet on something like equal terms the great aggregations of capital against which the statute was leveled."

When interpreting a statute a court may take judicial notice of legislative journals. The report of the Committee and statements by those in charge of the measure and other extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent.

Congress intended that an injured party should not be obliged to set

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851 Cong. Rec. 13897, 13898 (1914).
9Id. at 13851.
up and establish again as facts and law the violations of the antitrust, which the government has proved, but would start where the government left off. In other words to give to the injured party the benefit which accrued from the government’s litigation, Section 5 puts on the injured party the burden of establishing the damage which he sustained.13

Prior to the passage of Section 5 of the Clayton Act, a judgment of conviction in a criminal case under the Sherman Antitrust Act, in the absence of a statutory provision, was not admissible in evidence in a subsequent civil suit brought by an injured party against the same defendant.14 It is the well settled rule of evidence, that a judgment in a civil or criminal case is not admissible in an action between different parties in the absence of a statute making such judgment admissible.16 The reason for this rule is, primarily the parties are not the same.

The first proviso of Section 5 states:

"This section shall not apply to consent judgments or decrees entered before any testimony has been taken."

The second proviso applies

"to consent judgments or decrees rendered in criminal proceedings or suits in equity [then] now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken."

Obviously, the second proviso was temporary in character. But it serves as a guide to determine Congressional intent of the testimony reference in the first proviso.

Senator Nelson opposed the proviso clauses on the ground that persons indicted could plead guilty and avoid use of the judgment. He said:

"This, of course, it is argued, will be an inducement for them to come into court and plead guilty. . . . I have no doubt, if this becomes a law, they will feel like pleading guilty. . . .

"Mr. Norris: Does it mean that in the cases that are now pending the trusts may come in and plead guilty before they take all their testimony—that after this law is passed it will apply to them. . . .

"Mr. Norris: Exactly; but after the passage of this bill—assuming that it becomes a law—if some additional evidence is taken this exemption would not apply, as I understand it. Is that what it means?

"Mr. Nelson: If they do not plead guilty without taking further evidence, they do not get the benefit.

"Mr. Norris: In other words, as soon as this bill is enacted and becomes a law, in every case then pending it will be up to the defendants to decide whether they are going to consent to a judgment or whether they are going to take further

1351 Cong. Rec. 13851 (1914).
testimony; and if they take more testimony after the law is passed, then this proviso does not apply to them?

"Mr. Nelson: Yes, that is so."

"Mr. Borah: Then we are narrowed by the provisions of this section to one class of judgments alone, . . . and that is to judgments hereafter rendered when there is an actual contest or trial.

"Mr. Norris: Yes; I think so."  

The conclusion is inescapable that Congress intended that the exemption of the first proviso shall not apply to any consent judgment or decree entered where any evidence is taken or there has been any contest. In other words to earn the exemption, the defendant must make immediate and complete surrender.

Congress did not make any distinction between "testimony" and "evidence". In common expression, even in Courts, the words are synonymous; the Courts have rejected as "overtechnical" the claimed distinction. When used in a statute, "testimony" and "evidence" mean the same thing.

In the Bankruptcy Act, it was reasonable for Congress to make a distinction between the schedule, which may be presumably prepared at leisure and scrutinized by the bankrupt before he verifies it, and the testimony that he is to give when he submits to an examination—a proceeding more or less unfriendly and inquisitorial, as well as summary, in which it may be presumed that even an honest bankrupt might, through confusion or want of caution, be betrayed into making admissions that he would not deliberately make. There was no reason for any special meaning for the word "testimony" as used in the proviso of Section 5. As Senator Norris said: "The real effect of that proviso is to make the section inapplicable to cases in which consent judgments have been taken. . . ." It is apparent from a reading of Section 5 that the underlying purpose and object of the proviso was to hold out an inducement to defendants to make immediate complete surrender or to settle their cases with the government instead of contesting them and causing the government expense in prosecuting cases and taking the time of the government counsel and courts in litigation.

The only way that the object and purpose of the provisos of Section 5 can be carried out is to construe both provisos in accordance with their.

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15 Cong. Rec. 15939 (1914).
16Id. at 16046-16047.
18Hargrove v. State, 117 Ga. 706, 45 S. E. 58 (1903), involved interpretation, etc.
20Id. at 16046-16047.
21Id. at 16046-16047.
express language, that is that consent judgments or decrees in both criminal and civil suits are excluded from this section.

In construing the meaning of the first provision of Section 5 and in determining whether the word "consent" is used in a broad or narrow sense, we must look to the entire section so as to effectuate the whole legislative purpose. In Funk & Wagnalls New Standard Dictionary of the English Language (1926), the noun "consent" is defined as follows:

"1. A voluntary yielding of the will, judgment or inclination to what is proposed or desired by another, acquiescence: compliance.

"2. Harmony in opinion or sentiment: agreement; concord.

"3. LAW. A rational and voluntary concurrence in an act or contract.

"4. Harmonious correspondence or operation.

"5. A preconcerted purpose: conspiracy."

A consent decree is an agreement of the parties under the sanction of the court, interpreted as an agreement. A consent decree is not, in a strictly legal sense, a judicial sentence; but is in the nature of a solemn contract, and is in effect an admission by the parties that the decree is a just determination of their rights upon the real facts of the case, had such been proved. Such a decree is so binding as to be absolutely conclusive upon the consenting parties, and it cannot be amended or in any way varied without like consent. It cannot be attacked or impeached except by an original bill alleging fraud in securing the consent. The difference between a decree in common form and a consent decree is the difference between a consent to submit a case to the court for decision and a consent as to what the decision shall be. A consent decree is not appealable in the sense that no errors will be considered which were in law waived by the consent given. Therefore non-appealability is not only an incident to a consent decree, but one of the indicia of the nature of the decree entered.

In a civil action under the antitrust laws, a consent decree requires the consent of the government as well as of the defendant. When the government refuses to consent to a decree, it cannot be called a consent decree. It would be an anomalous situation if the court could force a consent decree upon one of the parties.

A decree in accordance with the court's opinion, finding and conclusion, is in all respects the judgment of the district court.

Where there is a consent as to what the decision shall be, the decree is a mere agreement of the parties, and must be interpreted as an agree-


2312 C. J. 520.


ment.26 Though it is under the sanction of the court, it is not the judgment of the court.27

If not a “consent decree”, it must be regarded as a decree embodying the then opinion of the district court, and made as such.

Defendant’s admission of the truth of the factual charges, does not give rise to a judgment or decree by consent before any testimony has been taken. An agreed statement of facts, like any evidence offered at a trial, is subject to objections by either side on the ground of relevancy or materiality. The duty, sometimes waived, devolves upon the trial court to pass on every bit of the agreed facts offered as evidence.28

An express waiver, made in court, by the party or his attorney, conceding for the purposes of the trial the truth of some alleged fact, has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted; so that one party need offer no evidence to prove it and the other is not allowed to disprove it. This is what is commonly termed a solemn, i.e., ceremonial or formal—or judicial admission, or stipulation. It is, in truth, a substitute for evidence, in that it does away with the need for evidence.29

The vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it; i.e., the prohibition of any further dispute of the fact by him, and of any use of evidence to disprove or contradict it. A fact that is judicially admitted needs no evidence from the party benefiting by the admission.30 But his evidence, if he chooses to offer it, may even be excluded, first because it is now as immaterial to the issues as though the pleadings had marked it out of the controversy, next because it may be superfluous and merely cumber the trial.31

Judicial admissions are usually made by the parties, attorney or counsel. It is settled that the general authority to conduct the trial implies the authority to make such admissions.32

The power of the court to act in the disposition of a trial upon facts conceded by counsel, is as plain as its power to act upon any evidence produced. In the trial of a cause, the admissions of counsel as to matters to be proved, are constantly received and acted upon. They dispense with proof of facts for which witnesses would otherwise be called. Indeed, any fact bearing upon the issues involved, admitted by counsel, may

295 Wigmore, Evidence (2d ed. 1923) § 2588.
30Id. at § 2590.
31Id. at § 2591.
be the ground of the court’s procedure, equally as if established by the clearest proof.\textsuperscript{33}

Where a case is submitted on an agreed statement of facts, the facts as agreed, constitute in effect, and are the equivalent of the facts found by the court.\textsuperscript{34} Rule 52 of the Rules of Civil Procedure, like its predecessor Equity Rule 70½, requires finding of facts and conclusions of law, just the same.\textsuperscript{35}

Where a case is tried on an agreed statement of facts and no other evidence is taken, the trial court is not authorized to make additional findings except such as are proper inferences from the agreed facts, or such as the court may judicially notice.\textsuperscript{36}

Where a jury is waived and the cause is submitted on an agreed statement of facts, the only question is what judgment shall be entered upon the findings. If the trial court arrives at the wrong conclusion as to the legal effect of the findings and enters an erroneous judgment, the appellate court may upon reversal direct the entry of the proper judgment.\textsuperscript{37} The cause is tried by the court on the agreed statement of facts incorporated in the findings of the trial court.\textsuperscript{38} Findings of facts and conclusions are said by the United States Supreme Court to be “particularly important” in an antitrust case.\textsuperscript{39}

The judgment based on the agreed statement of facts is not a consent decree. It is the opinion of the court made as such after consideration of the bill, answer and evidence. It is in all respects that which the court adjudged upon the pleadings and evidence to be the proper decree.\textsuperscript{40} It is appealable in that it was not a consent as to what the decision should be.\textsuperscript{41} To such a judgment Congress did not give immunity under Section 5.

A judgment or decree from which an appeal is taken is not a final judgment or decree.\textsuperscript{42} The fact that the validity of the trial court’s ruling is dependent on the outcome of the appeal, impels the view that the trial court’s judgment or decree—whether it be by consent or the result of a contest—is to be superseded by the contested—litigated judgment or decree of the appellate court.\textsuperscript{43}

\textsuperscript{33} Oscanyan v. Winchester Arms Co., 103 U. S. 261 (1880).

\textsuperscript{34} 1 Chamberlayne, Evidence (1st ed. 1911) § 94.

\textsuperscript{35} Interstate Circuit, Inc. v. United States, 304 U. S. 55 (1938).

\textsuperscript{36} Big Diamond Co. v. United States, 51 F. (2d) 721 (C. C. A. 8th, 1931).

\textsuperscript{37} Northern Pac. Ry. v. Van Dusen Harrington Co., 34 F. (2d) 786 (D. Minn. 1929).

\textsuperscript{38} Ethyl Gasoline Corp. v. United States, 309 U. S. 436, 446 (1940).

\textsuperscript{39} Interstate Circuit, Inc. v. United States, 304 U. S. 55 (1938).

\textsuperscript{40} Parsons v. Stevens, 107 Me. 65, 74, 78 Atl. 347, 351 (1910).

\textsuperscript{41} Hodgson v. Vroom, 266 Fed. 267, 268 (C. C. A. 2d, 1920).


\textsuperscript{43} Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D. Minn. 1939).
If the judgment or decree were obtained by consent, its exemption under the first proviso of Section 5 is destroyed by the contested appeal. In criminal, as well as civil proceedings, the judgment or decree is final when it terminates the litigation on the merits and leaving nothing to be done, but to enforce by execution what has been determined.44

The terms "final judgment" "final decree" have been used in statutes and by the courts to mean a final disposition of the case in the sense that the judgment, or decree has become final by a failure to appeal or as a result of an appeal, so that the determination can not be revised or modified.45

The judgment entered upon the mandate of the last appellate court exercising jurisdiction, is, strictly speaking, the final judgment or decree.46 Congress intended to use the term "final judgment," or "decree" as the last pronouncement of the court. That intention is confirmed by the wording of the statute itself.

A defendant in an antitrust prosecution by the government cannot avoid liability merely by ceasing the unlawful practices charged. In view of the reparations for treble damages to an injured party, the government may insist on a determination of the issues raised by the bill and answer.47 Even if the unlawful practices have ceased, public policy has to be considered. Public policy requires a determination of a defendant's conduct "past or present." Unless a defendant indicates a willingness to have a judgment pro confesso entered against such defendant, the court cannot enter a final judgment against defendants over the government's objection.48 It should be observed that even in the event of default by all defendants, the court may conduct a hearing as it deems necessary and proper to determine the extent of the relief to be granted.49

United States v. Hartford-Empire, 49a presents ingenious—but unsuccessful—efforts of defendants to obtain consent decrees over the government's objection. That was a civil suit under the antitrust laws. There were a large number of defendants. The complaint charged violations of the antitrust laws. The prayer for relief was very extensive and requested that the various practices complained of be declared violations by the defendants and that they be permanently enjoined from

47United States v. Railway Employees Dep't, A. F. of L., 286 Fed. 228 (N. D. Ill. 1923).
48Frow v. De La Vega, 15 Wall. 552 (U. S. 1872).
engaging in such practices or any other practices tending toward a monopoly. Disintegration of corporations was also sought by the government. The defendants entered their answers in which they denied the violation of any of the antitrust laws. Certain defendants filed supplemental answers that they ceased the practices assailed in the government's complaint. Based on the bill of complaint, answer and supplemental answer, these defendants made motions which in effect requested the court to enter accompanying "consent" decrees which they claimed carried out the relief requested in the complaint against these defendants. These motions the government successfully opposed.

Defendants contended that the antitrust statutes do not contemplate or authorize a finding in the nature of a declaratory judgment as to the legality or illegality of any practice, past or present, and that it was such a finding that the government appeared to desire above everything else. With respect to this contention the government said that the difficulty of this argument of defendants is that it fails to take into account Rule 52(a) of the Rules of Civil Procedure. The language of Rule 52 is identical with the language in the old Equity Rule 70½. A decree will be set aside in the absence of findings of fact and conclusions of law.

Defendants further argued that any finding as to whether or not the assailed practices were illegal or constituted a violation of law could only be made as a basis for the granting of the injunctive relief authorized; that when the defendants consent, as they do, that the the injunction be granted, there is no occasion for any declaratory judgment in any way characterizing the alleged practices. Defendants went so far as to say that the court would be without jurisdiction to make such a finding. The government took the position that even if the requested decrees could be deemed confessions of judgment, public policy required denial of defendants' motion. Said the government:

"The defendants are attempting to confess judgment without incurring the risk of having such judgment constitute prima facie evidence within the meaning of Section 5 of the Clayton Act in any triple-damage action against them." In sustaining the government's objections to the defendants proposed consent decrees, District Judge Kloeb said:

"Since the Government has not and will not consent to these decrees, they

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50. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. . . ."


cannot properly be termed consent decrees, and the Court cannot force a consent decree upon one of the parties."

Claiming that the proposed decree covered every phase of injunctive relief requested in the government's complaint, defendants unsuccessfully maintained that the situation clearly fell within Rule 56(e) of the Rules of Civil Procedure in that there remained no genuine issue as to any material fact. But these defendants overlooked that part of the rule which states "the moving party is entitled to judgment as a matter of law." The consent judgments sought by defendants, would not be in their favor as moving parties, but in favor of the government—the non-moving party. While Rule 54(b) authorizes judgment at various stages, it requires a determination of the issues material to any claim. The government's complaint charged conspiracy. One conspirator may be bound by something that another conspirator says or does even though he may not know that that conspirator has said or done.

At various pre-trial conferences, certain moving defendants made "concessions and undertakings" which limited the issues so far as these defendants were concerned. They unsuccessfully argued that under Rule 16 of the Rules of Civil Procedure there should be entered the proposed consent decree, limited to the issues so far as they were concerned. The court denied the motion and said: "... it is not a consent decree but is a proposal to the Court by which the Court must prejudge and create a record without facts for, perchance, a reviewing court to peruse. ... The Court, as stated previously, does not believe that he has the right or authority, in a conspiracy case, to chop limbs off the tree in anticipation of what he thinks the testimony may be or fail to be, leaving the cambian layer under the bark of the tree so the life of the tree may continue to flow under the bark, without the supporting limbs." Thus the court disposed of the moving defendants' attempt to be eliminated as a defendant.

It should be noted that the brief of one group of defendants stated that the proposed consent decree was in the interest of avoiding the time and expense incident to a trial. This brief said:

"It is frankly admitted that the procedure ... is novel, ... certainly the broad, general powers of the court of equity are sufficient to provide a practical disposition of the issue of the case."

When Congress used the term "final judgment or decree" it referred to both criminal and civil proceedings by the government. The same language was made applicable to both types and classes of cases. In

53 Id. at 427.
54 Id. at 428, 429.
that the term "judgment or decree" in the first part of the act unmistakeably refers to both criminal and civil proceedings, it is reasonable to presume that, when Congress used the term "judgments or decrees" in the first proviso, it intended to use such words in the same manner and to the same effect as the words that had theretofore been employed.54 A construction that the term "judgments or decrees" as used in the first proviso merely refers to civil proceedings would be unwarranted in view of the use of such terms throughout the entire context of the act.55 In the absence of any limitation on the first proviso, there should be no difficulty in determining that Congress intended to refer to criminal and civil proceedings in excepting consent judgments or decrees entered before any testimony has been taken. The second proviso, having reference to prosecutions pending at the time of the exactment of the Section, in haec verba embraces both criminal and civil proceedings.

In a criminal prosecution, a plea of guilty is not a consent judgment. It has been held that a plea of nolo contendere before any testimony has been taken in a criminal prosecution, is a consent judgment within the meaning of the first proviso of Section 5.56

Would a plea of nolo contendere after testimony has been taken in a criminal prosecution under the antitrust act come within the first proviso of Section 5? That proviso has reference only to consent judgments or decrees before any testimony has been taken. If Congress intended to designate judgment entered on a plea of nolo contendere after any testimony was taken, as a consent judgment, no such intent is indicated either in the Congressional discussion or in the Act. Congress apparently sought to induce prompt surrender to the government's demands by excluding consent judgments or decrees before any testimony has been taken. Surrender after "any testimony has been taken" would not give rise to a consent judgment or decree within the meaning of the first proviso. In such a case the government has been put to the trouble and expense which the immunity proviso sought to discourage and avoid. There is dicta from which the conclusion may be drawn that after any testimony has been taken, a plea of nolo contendere is not a consent judgment.57

A plea of nolo contendere before any testimony has been taken has been held to be a consent judgment under the first proviso.58 Strictly speaking there is no such thing as a consent judgment in a criminal

proceeding. One who enters a plea of guilty does not consent to the judgment that the court imposes. It is nevertheless a complete surrender to the prosecution. In some respects, a plea of *nolo contendere* is equivalent to a plea of guilty.\(^{69}\)

On a plea of *nolo contendere* the defendant is not estopped in a subsequent civil proceeding to deny the facts upon which the prosecution is based.\(^{60}\) It cannot be used in a civil action for the same act.\(^{61}\) A plea of *nolo contendere* is an admission of guilt only for the purposes of the prosecution.

A plea of *nolo contendere* which is still allowed in some jurisdictions is an implied confession of the crime charged. It is not an express confession of guilt as in a plea of guilty. If the plea is accepted, the defendant is bound by it, and may be sentenced.\(^{62}\) The difference between it and a plea of guilty appears simply to be that, while the latter is a confession binding defendant in other proceedings, the former has no effect beyond the particular case.\(^{63}\)

A judgment entered on a plea of *nolo contendere* does not constitute a judicial finding of any fact question.\(^{64}\) It does not establish the truth of the facts set forth in the indictment. It is not an adjudication by the court that the defendant has violated the antitrust laws as charged in the indictment.

In the *Twin Ports case* Judge Nordbye says: "In effect, Congress said to the law violaters, 'It is to your advantage to capitulate to our demands before any testimony is taken in any equity or criminal proceedings. If you fail, and a decree or judgment is entered against you, such decree or judgment will constitute prima facie proof to any or all private litigants who may have been injured by your unfair practices'."\(^{765}\)

The conclusion is logical, that any judgment or decree in a civil proceeding or a plea of *nolo contendere* in a criminal prosecution, after the opening of the government's case or the introduction of any evidence, would not be a consent judgment or decree carrying with it the immunities of the first proviso of Section 5.

Prior to the passage of the Clayton Act and during the twenty-four

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\(^{69}\)Hudson v. United States, 272 U. S. 451 (1926).


\(^{61}\)Hudson v. United States, 272 U. S. 451 (1926); Berlin v. United States, 14 F. (2d) 497 (C. C. A. 3d, 1926); State v. La Rose, 71 N. H. 435, 52 Atl. 943 (1902).

\(^{62}\)Commonwealth v. Ingersoll, 145 Mass. 381, 14 N. E. 449 (1888); Johnson v. Johnson, 78 N. J. Eq. 507, 80 Atl. 119 (1911); 12 Cyc. 354.

\(^{63}\)People v. Edison, 100 Colo. 574, 69 P. (2d) 246 (1937).

\(^{64}\)Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D. Minn. 1939).

\(^{65}\)Id. at 376.
years after the passage of the Sherman Act, the government disposed of fourteen cases in which pleas of *nolo contendere* had been filed, fourteen cases in which pleas of guilty were filed and seventeen cases in equity by consent decrees. This successful disposition of cases without the necessity of trials was undoubtedly the reason for the provisos in Section 5 of the Clayton Act as disclosed by the above discussions on the floor of the Senate and House. Moreover, the intention of Congress to encourage surrenders to the demands of the government and also compromises, and to encourage cooperation with the government in the enforcement of the antitrust laws has been carried out as shown by the disposition of cases since the passage of the Clayton Act. During the twenty-four years since the passage of the Clayton Act, twenty cases have been disposed of by pleas of *nolo contendere*, twenty-six cases by pleas of guilty, and ninety-one cases by consent decrees in equity.68

Some consent decrees close with the provision whereby the jurisdiction of the cause is retained for the purpose of taking such other action, or, adding at the foot, such other relief as may become necessary or appropriate for enforcement, and for the purpose of entertaining at any future time, any application which the parties may make thereto. Thus, by consent of the parties, power to modify the decree is reserved by its terms, and so goes hand in hand with the restraints of the consent decree. Where the consent is to a continuing decree of injunction, directed to events to come, it is subject always to adaptation as events may shape the need.67 The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.68 The result is the same whether the decree has been entered after litigation or consent.69 In either event, the court does not abdicate its power to revoke or modify its mandate, if satisfied, that what it has been doing, has been turned through changing circumstances, into an instrument of wrong. If the reservation of power were omitted from the consent decree, power would still exist by force of the principles inherent in the chancery jurisdiction of a court of equity. Third parties gain nothing from the fact that the consent decree was a contract, for they were not parties to the contract asserted.70 As a result of the change in

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*See Federal Antitrust Laws issued by the Dep't of Justice in January 1939, which contains a list of antitrust cases brought by the government.*

*Emergency Hospital v. Stevens, 146 Md. 159, 126 Atl. 101 (1924); Larson v. Minnesota N. W. Elec. Ry., 136 Minn. 423, 162 N. W. 523 (1917); Lowe v. Prospect Hill Cemetery, 75 Neb. 85, 106 N. W. 429 (1905); Ladner v. Siegel, 298 Pa. 487, 494, 495, 148 Atl. 699, 701 (1930).*

*Ladner v. Siegel, 298 Pa. 487, 148 Atl. 699 (1930).*

*American Press Ass'n v. United States, 245 Fed. 91 (C. C. A. 7th, 1917).*

the consent decree, a supplemental decree is entered. A supplemental decree, directed by the court over the objection of a party, can scarcely be called a consent decree.

In Local 167 v. United States, certain defendants in the local, having been found guilty in a prosecution under the antitrust laws, kept right on violating the law. The government realizing that the equitable arm of the law, by injunction, sometimes reaches further and clasps more strongly and firmly than the criminal arm, brought a civil suit to enjoin further violations of the law, including as defendants those who had been previously convicted. The Supreme Court struck out as false, sham and frivolous that part of the defendants’ answer which attempted to deny participation of the convicted defendants in the conspiracy of which they had been found guilty.

Under Section 5, a final judgment or decree in a prior suit or proceeding brought by the United States under the antitrust laws, is prima facie evidence, against the defendants, in an antitrust suit for treble damages, by any injured party against such defendants, as to all matters, respecting which said judgment or decree would be an estoppel as between the parties thereof. In a suit by an injured party, the court cannot substitute its conclusion of law upon the facts, for the judgment of the prior government suit or proceeding that defendants had violated the antitrust laws. Not only Section 5, but its legislative history, discloses a congressional intent that the final judgment in favor of the government was to save an injured party the trouble and expense of proving again the antitrust violations charged in the government suit. The Clayton Act is remedial legislation enacted by Congress after considerable debate.

President Wilson:

"It is not fair that the private litigant should be obliged to set up and establish again the facts which the Government has proved."

At the risk of repetition, reference is made to the discussion in the Senate. Said Senator Walsh:

"... the judgment being conclusive, establishing the facts and the law so far as it goes, and allowing him simply to establish and putting upon him the burden of establishing the actual damages which he has suffered. ...

"We all know that the private individual is always at a disadvantage. He is never armed with the means at his command to cope with these great organizations; and that was the very reason why this act was passed ... in order that the Government, with its great powers, might meet on something like

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72291 U. S. 293.
equal terms the great aggregations of capital against which the statute was leveled."75

As Section 5 (then Section 6) passed the House, the final judgment or decree in the government suit was conclusive. The Senate struck out the word "conclusive" and substituted "prima facie." With respect to the change, Mr. Webb, a member of the House Conference Committee, explained the change in part as follows:

"I doubt whether the courts would have held that the 'conclusive' provision was constitutional. On the other hand, I believe that the 'prima facie' effect of the judgment is as powerful before a jury as if you had said that it was 'conclusive.' A great many lawyers, and some of the best ones in the Government service, think that a provision making the judgment conclusive would have rendered the bill unconstitutional, but with the 'prima facie' provision it is constitutional and will be as effective as if we had left it 'conclusive'."76

The doctrine of res judicata is based on consideration of public policy, designed to put an end to litigation. Local 167 v. United States, supra, was clearly a case of res judicata. The same parties were involved. Ramsay v. Bill Posters, supra, did not involve the same parties except that the injured parties plaintiff had been exonerated, though named as defendants, in the government's prior case. Section 5 amplifies and extends the doctrine of res judicata. Based on considerations of public policy, it is designed in favor of third parties—injured parties—to put an end to litigating the violations of the antitrust laws adjudicated in the government's prior suit. In this legislation, Congress gives to the final judgment or decree in the government's prior suit, the dignity and weight of res judicata in a suit by an injured party based on an adjudicated practice of the defendant.

In a suit for treble damages under the Clayton Act, an injured party plaintiff must establish the conspiracy alleged, as provided by Section 5. Pleading allegations and references to the final judgment or decree in the government's prior suit, cannot be stricken from the complaint of an injured party plaintiff.77

Where the judgment or decree on which plaintiff relies is not final or is exempted by the provisos of Section 5, the injured party cannot rely on such a judgment or decree and the pleading reference will be stricken from the complaint.78

To determine the effect of the final judgment or decree in the government's prior suit, two questions must be answered: (1) was the

75 Id. at 16276.
76 Madison Treble Damage cases (decided Jan. 7, 1941, W. D. Wis.); Minneapolis v. Ethyl Co. (decided March 1941, S. D. N. Y.).
former judgment rendered on the same cause of action; (2) If not, was some other matter litigated in the former suit, determinative of a matter in controversy in the second suit. These questions must be answered by reference to the pleadings making the issue and examination of the record to determine the questions essential to the decision of the former controversy.79 The pleading reference to the government’s prior suit must show that the judgment or decree upon which the injured party plaintiff relies, is within the purview of the Act.80 Pleadings are to inform the court and the parties of the facts in issue that the court may declare the law and the parties know what to meet by their proof.81

PROCEDURE IN PATENT CASES UNDER THE NEW FEDERAL RULES*

JOHN W. WILLIS†

ONE of the most far-reaching revolutions in American law was brought about by the promulgation of the Federal Rules of Civil Procedure. It was a revolution that affected every lawyer who practised in the federal courts, for procedure touches everyone. Nor have the patent and copyright bar been free from its effects. To be sure, copyright cases were excepted from the Federal Rules to begin with, but the Supreme Court soon remedied this situation. Only in the Patent Office itself is the old procedure still followed.

Revolutions generally are followed by a considerable period of disorder and confusion while the populace orients itself to changed conditions. Federal practitioners and federal judges, however, have been remarkably quick to adapt themselves to the new procedure. Some old concepts have reasserted themselves; some decisions have failed to construe the new Rules in the spirit intended by their draftsmen. But on the whole, the new Rules have been construed in a liberal spirit; they have "worked"—and worked well.

It is not the purpose of this article to analyze every decision on the new Rules which has happened to be rendered in a patent, copyright or trademark case. Many problems peculiar to this type of litigation, however, have arisen under the new Rules, which will be considered more or less in the sequence of the Rules themselves.

SERVICE OF PROCESS

Rule 4(d) has clarified the law as to the manner of making service on various types of parties. Of particular interest in patent practice are the provisions for service on individuals (Rule 4(d)(1)) and on corporations or associations (Rule 4(d)(3)). The statute providing for ser-

*This article is based in part on an address delivered before the Patent Law Association of Los Angeles.
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‡The new Rules, which became effective Sept. 16, 1938, were promulgated under the authority of 28 U. S. C. §§ 723b, 723c (1934). They have been published in 28 U. S. C. A. (Supp. 1940) following § 723c; in Federal Rules Service; in 82 L. Ed., App.; and elsewhere. For discussion of the Rules as applied to patent litigation, see *Proceedings of Washington Institute on Federal Rules* (1938) 131-167.
§Copyright Rule 1, as amended, effective Sept. 1, 1939.
vice upon a non-resident in a patent suit by serving his agent doing business in the district is kept in force by the provisions of Rule 4(e), which provides that "Whenever a statute of the United States . . . provides for service of a summons . . . upon a party not an inhabitant of or found within the district, service shall be made under the circumstances and in the manner prescribed by the statute," although the Advisory Committee note to Rule 4 cites the statute under Rule 4(d)(1), rather than Rule 4(e).

The scope of the process of a district court has been extended by Rule 4(f), which allows process to run throughout the state. Hitherto, process ran only in the district. The rule has in effect been held invalid by two courts, but this result, it seems safe to say, will not be upheld when the question reaches the appellate courts. However, Rule 4(f) has not made any particular change in patent suits, since under the venue statute the case must be brought in the district of defendant's residence. It has been held that Rule 4(f) is of no aid to a plaintiff if the venue is incorrect.9

PLEADING

While the new Rules have considerably de-emphasized the role played by pleadings in the judicial process, it is not apparent that any great change has been wrought in the practice in patent cases. In fact, no case has yet passed upon questions of pleading in patent cases under the new Rules. Rule 8 was really anticipated in its concept of "notice pleading" by the decision in Mumm v. Jacob E. Decker and Sons. The rule of the Mumm case was extended to copyright litigation even before the new

4See remarks by Mr. Nathan Heard, Proceedings of Washington Institute on Federal Rules (1938) 134.
5Robertson v. Railroad Labor Board, 268 U. S. 619 (1925); see Commentary, Validity of Service of Process Outside of District (1939) 2 Fed. Rules Serv. 4f.21.
9See generally Pike and Willis, Federal Discovery in Operation (1940) 7 U. OF Chi. L. REV. 297; Pike, Objections to Pleadings under the New Federal Rules of Civil Procedure (1937) 47 YALE L. J. 50.
Rules became effective in such cases, Judge Reeves holding that it was sufficient to allege that plaintiff was the owner of a registered label and that defendant had infringed it, and that allegations as to derivation of ownership and originality and copyrightability were not essential to the statement of a claim for relief.\(^{12}\)

A question which has not yet been squarely passed upon is whether the new Rules have impliedly repealed the statute\(^{13}\) providing that defendant in a patent infringement suit may plead the general issue and later file a notice as to various matters of defense which will be set up. Rule 8(c) provides that a defensive pleading must set forth affirmatively various specified matters “and any other matter constituting an avoidance or affirmative defense.” The Rules, of course, override any inconsistent statutory provisions.\(^{14}\) At the Washington Institute on Federal Rules, Mr. Nathan Heard gave as his opinion that the “notice” practice had been abolished and that defendant must set up in his answer any of these affirmative defenses.\(^{15}\)

One court, however, has assumed that the statute is still in force and consequently refused to order a bill of particulars of such matter.\(^{16}\) In some districts the practice has developed of filing the notice in the form of an amendment to the answer.\(^{17}\) From the point of view of expediting discovery and summary judgment, however, it would seem preferable to require the defendant to put the case at issue as soon as possible.

**BILLS OF PARTICULARS**

The motion for bill of particulars under Rule 12(e) has been the source of considerable trouble for the courts, both in patent and other types of litigation. The rule provides that a party may move for a more definite statement or a bill of particulars “of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial.” In the first decision under this Rule, however—which happened to be a patent case—the principle was laid down that “Since bills of particulars become part of the pleadings it is well to confine the disclosures to such matters as are necessary to apprise the defendant of the plaintiff’s claim so that it may file its answer and prepare for trial,” and that the party should generally resort to dis-

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\(^{13}Rev. Stat. § 4920 (1875), 35 U. S. C. § 69 (1934).\)

\(^{14}Enabling Act, 28 U. S. C. § 723b (1934).\)

\(^{15}Proceedings of Washington Institute on Federal Rules (1938) 135-136.\)


\(^{17}Information from J. Calvin Brown, Esq., of the Los Angeles Bar.\)
covery rather than move for particulars.\textsuperscript{18} This principle has been carried on in a great number of cases, until the phrase "to prepare for trial" has been practically read out of the Rule\textsuperscript{19}—although it may be doubted whether it was ever intended to have any broader scope than its correlative clause "to prepare his responsive pleading."\textsuperscript{20} Some of the patent decisions have gone along with this trend, holding that a complaint that complies with the requirements of the *Mum in case* should not be expanded under Rule 12 (e).\textsuperscript{21} It has been held, however, that more liberality should be observed in granting bills of particulars in patent cases than in other cases,\textsuperscript{22} and some decisions have ordered rather exhaustive bills. In one case plaintiff sued on eleven patents and defendant set up forty-three instances of prior knowledge and use against all of them. The court required him to specify which instances would be relied upon.\textsuperscript{23} In another case a defendant counterclaiming for a declaratory judgment that plaintiff's patent was invalid for prior publication, sale, and use, was required to identify the publication, give the date of the alleged sale and name and address of the seller, and the date of the alleged public use and the names and addresses of the persons making the use.\textsuperscript{24} A plaintiff has been required to specify and identify the particular models of defendant's product which were claimed to have infringed plaintiff's patent.\textsuperscript{25}

In a well-reasoned opinion Judge Leibell has ordered a bill of particulars as to what plaintiff asserts to be new and patentable in the patents sued on, as against the contention that this amounted to a construction of the patent.\textsuperscript{26} Plaintiff in a trade-mark case has been required to particularize


\textsuperscript{20}See Commentary, *Motion for Bill of Particulars "To Prepare for Trial"* (1940) 3 Fed. Rules Serv. 12e.23.


\textsuperscript{22}Ingenuities Corp. of America v. Metcalf Neckwear Co., 35 F. Supp. 575 (S. D. N. Y. 1940).


\textsuperscript{26}Selrite, Inc. v. Tropical Chair Co., Inc., 3 Fed. Rules Serv. 12e.241, Case 3 (S. D. N. Y. 1940).
as to the dates when and persons to whom defendant was alleged to have "passed off" its product as plaintiff's. In another trade-mark decision the plaintiff was ordered to give a bill of particulars as to whether he based his right on user or on succession to some other person.

In an interesting case in the Eastern District of Tennessee it was held that plaintiff would not be required to furnish a bill of particulars as to the nature of the infringement claimed, it appearing that defendant had been so secretive in its operations that neither the public nor the plaintiff could ascertain specifically the character of the devices used by defendant. The court stated that a pre-trial hearing would be held after the issues were closed, at which time plaintiff might state its position more definitely.

The familiar principle of "exchange of information" has been carried on under Rule 12(e). So a plaintiff has been required to file a statement of the date of invention of its patents before defendant was compelled to specify its defense of anticipation. Both parties have been required to exchange dates of invention of any patents which they would seek to carry back of the filing date.

Occasionally a party moving for a bill of particulars will include a request for the production of the devices involved. Technically, of course, such a motion should be made under Rule 34. In two cases, however, Judge Kalodner has regarded the motion as if made under the latter rule and ordered the production. This, of course, assumes that the materiality and relevancy of the particular devices is apparent, since a clear showing must be made on motion under Rule 34.

AMENDED AND SUPPLEMENTAL PLEADINGS

The new Rules are liberal in their provisions for amendment of pleads-
ings. No questions peculiar to patent cases have yet arisen in connection with amendments. There is a conflict, however, over one problem concerning supplemental pleadings. Under Rule 15(d) the court in its discretion may permit a party "to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." In three recent cases plaintiff in a patent infringement suit sought by supplemental pleading to bring in added claims for infringement of patents other than the one originally sued on. In *Cheney Co. v. Cunningham* and *Otis Elevator Co. v. 570 Building Corp.* the court allowed the pleading—even though in the *Otis case* judgment of validity and infringement had been entered and the case referred to a master for an accounting, and defendant asserted that the court would not have jurisdiction of it if a new action were commenced. In *Berssenbrugge v. Luce Mfg. Co.*, however, the court excluded the supplemental pleading. The precedents support the latter decision, since it has generally been held that a supplemental pleading may not bring new causes of action into the case, either as a substitute for the original claim or in addition thereto. It may be doubted, however, whether there is any good reason for this result. It should be noted that Rule 15(d) does not require the new matter to be "material to the case", as is true under many code provisions. And one of the main objectives of the new federal procedure is to allow and encourage all claims between the parties to be settled in one action. It has been held that a plaintiff may bring in additional claims by way of reply, and a counterclaimant may be permitted to plead newly-arising counterclaims by supplemental pleading (Rule 13(e)); to hold that a plaintiff may not, however, bring in additional claims by supplemental pleading—even in the discretion of the court—seems the height of formalism. The court can order separate trials (Rule 42(b)) and enter separate judgments (Rule 54(b)) if the new claim would unduly complicate the original issues. It seems safe to say, therefore, that the narrow view taken in the *Berssenbrugge case* will not be followed. And a recent copyright case has allowed

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40See Commentary, Stating New Claim in Supplemental Pleading (1940) 2 Fed. Rules Serv. 15d.11.
plaintiff to bring in allegations of infringement of other copyrights by supplemental pleading—although defendant conceded plaintiff’s right to do so, objecting only to the bringing in of the owners of the additional copyrights.\textsuperscript{43} Defendant in a trade-mark suit for declaratory judgment may serve a supplemental answer setting up the defense of \textit{res judicata} based on an adjudication of contempt handed down since the institution of the action.\textsuperscript{44}

PARTIES AND CLAIMS

The new Rules contain liberal provisions for the joinder of claims and parties. Claims may be joined without any limitation other than those imposed by the requirements of federal jurisdiction and venue, subject to the proviso that where there are multiple parties, the requirements of the Rules on joinder of parties must be met (Rule 18(a)). Parties may be joined where any right to relief—joint, several, or alternate—arising out of the same transaction and involving common questions of law or fact, is asserted (Rule 20(a)). While these Rules affect patent cases just as all other types of litigation, it is not apparent as yet that they will create any problems peculiar to patent litigation.

One interesting question which has arisen concerns itself with the proper incidence of the Rules on joinder of claims and joinder of parties. In \textit{Man-Sew Pinking Attachment Corp. v. Chandler Machine Co.},\textsuperscript{45} plaintiff joined claims for infringement against A, a manufacturer and seller, and B, a seller. This, of course, was proper, assuming that the claims arose out of the same series of transactions, since common questions of law or fact would clearly be presented. However, plaintiff also set forth a claim for unfair competition against A alone. On B’s objection the court held that the claims were misjoined because there was no common question between the infringement claim and the unfair competition claim. A similar ruling was made in another case in which plaintiff sued A, B and C on one note and A and B on a second note.\textsuperscript{46} The result of these holdings apparently is that if there are multiple parties and multiple claims, the “same transaction-common question” test must extend to all claims and all parties. It may be doubted, however, whether this result is correct, in view of the provision of Rule 20 (a) that “A plaintiff or defendant need not be interested in obtaining against all the relief demanded,” at least in the situation presented in the case of the notes. The latter case may perhaps be distinguished from the patent case on the ground that, if the two claims really were entirely distinct,

\textsuperscript{43}Society of European Stage Authors & Composers Inc. v. WCAU Broadcasting Co., 35 F. Supp. 460 (E. D. Pa. 1940).
\textsuperscript{44}F. W. Fitch Co. v. Camille Inc., 32 F. Supp. 838 (S. D. N. Y. 1940).
\textsuperscript{46}Federal Housing Administrator v. Christianson, 26 F. Supp. 419 (D. Conn. 1939).
as the court in that case said, the plaintiff would be put to no particular disadvantage in bringing two suits, whereas in the note case plaintiff would have to bring two suits on very similar facts—one against A, B and C on the first note, the other against A and B on the second.

A liberal interpretation has been given the Rules on joinder of parties in a copyright decision by Judge Kalodner. Plaintiff, Cross and Winge, Incorporated was the licensee of copyrights, owned by various persons, which had allegedly been infringed by defendant broadcasting company. The copyright owners being indispensable parties, it was held that all might join with Cross and Winge as parties plaintiff, the court saying that the new rules were intended to "allow joinder of interested parties liberally to the end that an unnecessary multiplicity of actions thus might be avoided." 47

A provision particularly interesting to patent practitioners is the clause in Rule 19 (a) providing that "When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in a proper case, an involuntary plaintiff." The concept of involuntary plaintiff is one which has grown up in patent cases. Under it a plaintiff such as an exclusive licensee may make the patent owner—who is an indispensable party to a suit for infringement—a party to the suit against its wishes. If the patent owner is within the jurisdiction and refuses to join as plaintiff, he can be joined as a defendant and the court will line him up in the character which he should assume. Suppose, however, the patent owner is out of the jurisdiction, so that he cannot be served with process? Here the doctrine of "involuntary plaintiff" comes to the rescue of the licensee. The patentee being obligated to allow the use of his name by an exclusive licensee, the court will imply a power of attorney to allow him to be joined as a plaintiff. 48 While notice must be given to the patentee, he need not be served with process within the jurisdiction as is ordinarily the case, nor has he any privileges as to venue.

The "involuntary plaintiff" concept properly applies only where there is some trust relationship between the parties. 49 So a joint owner of a


patent cannot make the other joint owner an involuntary plaintiff,\textsuperscript{50} nor, according to a recent decision, may he make him a defendant.\textsuperscript{51}

INTERVENTION

Prior to the new Federal Rules the courts, while recognizing a distinction between intervention as of right and intervention in the discretion of the court, were not particularly clear as to just what the basis for the distinction was.\textsuperscript{52} In general, however, it may be said that intervention was of right when the petitioner’s interest would be directly affected by the determination of the cause, and he was unable to protect his rights otherwise than by intervening.\textsuperscript{53} If the petitioner had some other means of redress, he had no absolute right to intervene,\textsuperscript{54} although the court could properly allow intervention where the ends of justice would be served thereby.\textsuperscript{55} So, for example, a manufacturer was commonly allowed to intervene in an infringement suit against his vendee, but as a matter of discretion, not of right.\textsuperscript{56}

Under Rule 24 the distinction between permissive intervention and intervention of right has been given more articulate form. Intervention is of right (1) when a statute so provides, or (2) “when the representation of the applicant’s interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action”, or (3) “when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof”. (Rule 24 (a)). Intervention is permissive (1) when a statute so provides, or (2) “when an applicant’s claim or defense and the main action have a question of law or fact in common.” (Rule 24(b)).

A question which has been the subject of considerable litigation in patent cases is whether an intervenor might be allowed to interpose a counterclaim not open to the original defendant—\textit{e. g.}, whether a manufacturer, intervening in an infringement action against his vendee, might counterclaim for infringement of his own patents or for unfair competi-

\textsuperscript{51}Gibbs v. Emerson Electric Mfg. Co., 29 F. Supp. 810 (W. D. Mo. 1939). However, plaintiff was allowed to amend to set up an assignment of the co-owner’s rights. 31 F. Supp. 983 (W. D. Mo. 1940).
\textsuperscript{53}See Richfield Oil Co. v. Western Machinery Co., 279 Fed. 852 (C. C. A. 9th, 1922), cert. denied, 260 U. S. 723 (1922).
\textsuperscript{54}Jenkins Petroleum Process Co. v. Credit Alliance Corp., 83 F. (2d) 532 (C. C. A. 10th, 1936).
\textsuperscript{55}United States v. 397 Cases of Salad Oil, 16 F. Supp. 387 (D. N. J. 1936).
\textsuperscript{56}Demulso Corp. v. Tretolite Co., 74 F. (2d) 805 (C. C. A. 10th, 1934).
tion in spreading charges of infringement. The question was generally answered in the negative, and this rule was crystallized by the Supreme Court in the 1935 case of Chandler & Price Co. v. Brandtjen & Kluge. The reasons given by the Supreme Court were that intervention was "limited to the field of litigation open to the original parties", and that former Equity Rule 30, relating to counterclaims, did not mean to permit an intervening defendant to counterclaim. If the latter reasons were valid, the intervenor could not set up even a counterclaim open to the original defendant, although earlier cases had intimated that this would be proper. While the "subordination" requirement of Equity Rule 37 was not expressly posited as a reason for disallowing intervention, and indeed was expressly held not in itself a bar in the only case discussing that point, it probably had some psychological bearing on the result reached.

In the only patent case on the point since the new Rules, it was contended that the rule of the Chandler & Price case had been done away with and that an intervening manufacturer might properly set up a counterclaim for infringement of his own patents. The court, however, summarily rejected the argument. This disposition of the matter seems incorrect. It is clear that the more technical ground of the decision in the Chandler & Price case—that an intervening defendant could never counterclaim—is no longer sound, since Rule 13 on counterclaims is not restricted even to defendants. Also, the subordination requirement has not been carried over into Rule 24. More persuasive, however, is the

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... intervention shall be in subordination to, and in recognition of, the property of the main proceeding." Equity Rule 37.


general policy of the new Rules toward settling all controversies in one proceeding, so far as practicable.65 Largely upon this ground another judge has allowed an intervenor in a case not involving patents to file a counterclaim arising out of the same transaction.66

If the intervention is of right, it has been contended that the intervenor should have all the rights of an original defendant, including the right to counterclaim.67 In the usual case of the intervening manufacturer, of course, the intervention is permissive. If the counterclaim is one arising out of the same transaction or occurrence, it might be held that the intervenor was required to set it up under Rule 13(a).68 While several of the older cases did involve counterclaims arising from the same set of facts, the Chandler & Price case did not, and the other cases may well be reconsidered under the new Rules.

COUNTERCLAIMS

The discussion just concluded leads naturally into the question of counterclaims in general. Rule 13 has considerably liberalized the practice in this respect. The right to counterclaim is not limited to defendants, but is extended to any party against whom a claim is asserted,69 and there is practically no restriction on the type of counterclaim which may be set up at the pleader’s option (Rule 13(b)); even after-acquired claims may be brought in by supplemental pleading in the discretion of the court (Rule 13(e)). A counterclaim arising out of the same transaction or occurrence as the main claim must be set up or action upon it is barred (Rule 13(a)); no independent grounds of federal jurisdiction are required as to such a counterclaim.70

Perhaps the greatest amount of procedural litigation in patent cases has arisen out of the familiar practice of including in the answer to a complaint charging infringement, a counterclaim for a declaratory judgment that the plaintiff’s patent is invalid or has not been infringed.71

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65 Cf. Rules 13, 14, 18, 20, 42; and cf. Rule 24(b).
67 Levi and Moore, supra note 51, at 920.
68 A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.” Rule 13(a).
69 supra note 64.
When this practice first developed—shortly after the passage of the Federal Declaratory Judgment Act of 1934—there was a very good reason for it, at least in the eyes of the defendants' attorneys. At that time the plaintiff was free to dismiss his case at any time before judgment, and a defendant might be, and often was, harassed by the repeated bringing of suits which were dismissed before an adjudication could be had. By including a counterclaim in the answer defendant could force plaintiff to go to trial, since dismissal was not a matter of right where a counterclaim was involved. A number of decisions prior to the new Rules allowed such a counterclaim largely on the ground that it afforded a desirable curb on the plaintiff's otherwise unlimited power to dismiss. One decision, however, struck out the counterclaim, holding that under the California law (applicable by the virtue of the Conformity Act, the case being on the law side) the counterclaim must diminish or defeat the plaintiff's recovery; that a counterclaim which merely set forth matters defeating plaintiff's claim was defensive and sham; and that plaintiff had a substantial right to dismiss his complaint, which it would not be due process to permit defendant to control in this fashion.

Under Rule 41(a) a plaintiff, after defendant has answered, may dismiss his case only with the permission of the court. The chief reason for the counterclaim being gone, Judge Hincks held in an early case that "A counterclaim which serves but to restate the controversy initiated by the complaint is wholly redundant and should be stricken." An earlier decision, overlooking Rule 41(a), had allowed such a counterclaim on the

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77 Cf. Rule 13c: "A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party."
authority of the *Meinecke case*. A third decision, citing the two earlier cases, allowed the counterclaim on the ground that Rule 41(a) did not prevent a dismissal solely on the ground of noninfringement, leaving the issue of invalidity unsettled in the absence of a counterclaim. Then in *Leach v. Ross Heater & Mfg. Co.* an action commenced before the effective date of the new Rules, the Second Circuit Court of Appeals reversed the lower court's action in dismissing both complaint and counterclaim on plaintiff's motion, stating that "While we place our decision on the former practice, we are not to be taken as suggesting that the result would be the other way under the new rules." Judge Charles E. Clark, concurring, was of the opinion that Rule 41(a) was applicable and would bar plaintiff's voluntary dismissal. In a footnote he added that "In case where the counterclaim is wholly redundant the course of striking it is not out of place, but it would seem often, if not usually, desirable to defer a ruling until the trial ... when it can be more clearly seen whether affirmative relief is needed by a defendant." This suggestion—which seems the solution to the whole problem, since it will do no harm to keep the counterclaim in the case until trial—has been followed in a decision by Judge Nevin of the Southern District of Ohio. The same result was reached in another case in which apparently no objection was made to the counterclaim until after trial had been had on the issues raised by the complaint and answer. Since complete relief could be had without considering the counterclaim, it was stricken.

Of course, if the counterclaim raises issues not raised by the complaint and answer, it should be allowed, assuming that it states a claim and that the requirements of jurisdiction and venue are met. In fact, the *Leach case* has been explained by Judge Hincks on just this ground. Pointing out that the counterclaim in that case alleged that the plaintiff-patentee was injuring the defendant by circularizing his customers, Judge Hincks held that a counterclaim which alleged only that plaintiff had notified defendant of the claim of infringement was "a wholly redundant flourish appended to the answer." A counterclaim for declaratory judgment has been held proper even though plaintiff had dismissed the

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*104 F. (2d) 88, 92 (C. C. A. 2d, 1939).*

*Id. at 92.*

*O'Leary v. Liggett Drug Co., 3 Fed. Rules Serv. 13.4, Case 2 (S. D. Ohio 1940).*

*Lambert v. Dempster Bros., Inc., 34 F. Supp. 610 (E. D. Tenn. 1940).*

*Cf. note 84 supra.*

*Scruggs v. Casco Corp., 32 F. Supp. 625, 626 (D. Conn. 1940).*
claim of infringement. In the converse case, a counterclaim for damages for infringement has been allowed in a suit for a declaratory judgment. In fact, it would appear that the counterclaim in the latter case was a “compulsory” one under Rule 13(a)—i. e., if plaintiff did not bring it he would be barred thereafter from bringing suit.

If the counterclaim for declaratory judgment involves persons not already parties to the suit, it should ordinarily be allowed if the parties can be brought before the court as provided in Rule 13(h). Without the presence of indispensable parties it is, of course, not maintainable. Thus in American Signal Corp. v. International Roll-Call Systems, Inc., defendant counterclaimed for a declaratory judgment that the title to the patent sued on was in another, not a party to the suit. While recognizing that lack of title in plaintiff was a good defense to the suit, Judge Dobie pointed out that it was another thing to ask an affirmative decree that title was in some other person, and that the latter would be an indispensable party, without whose presence as a party no relief could be granted. In another case, plaintiff sought to dismiss its complaint on the ground that it had discovered that it had assigned the patent and was a mere non-exclusive licensee without capacity to sue for infringement. Defendant resisted dismissal on the ground that it had interposed a counterclaim for declaratory judgment of invalidity. The trial court dismissed both complaint and counterclaim. The Second Circuit Court of Appeals affirmed, holding that the patent owner was an indispensable party and could not be brought into the case, since it was not a resident of the district in which suit was brought. Of course, improper venue can not be raised by anyone but the party affected, but the patent owner apparently objected to the proposed joinder.

Defendant in a suit for infringement may counterclaim for damages for violation of the antitrust laws or for unfair competition; in fact, if
the counterclaim arises out of the transaction set forth in the complaint it must be pleaded, or its assertion in a separate action will be barred.\textsuperscript{95} No diversity of citizenship is required for a counterclaim for unfair competition arising out of the same transaction.\textsuperscript{96} In a recent decision the Ninth Circuit Court of Appeals held appealable the refusal of the district court to entertain an amended answer and counterclaim praying for an injunction against violation of the antitrust laws, relying on Section 129 of the Judicial Code (28 U.S.C. §227), the Supreme Court’s decision in \textit{General Electric Co. v. Marvel Rare Metals Co.}\textsuperscript{97} and its own prior decision in \textit{In-A-Floor Safe Co. v. Diebold Safe & Lock Co.}\textsuperscript{98} Judge Mathews dissented on the ground that refusing leave to file an amendment to a counterclaim was not the same thing as dismissing a counterclaim after hearing, as was done in the \textit{General Electric case}.

A counterclaim for damages for malicious prosecution or unfair competition, based upon the acts of plaintiff in bringing the action, has been dismissed upon the theory that defendant has no claim against the plaintiff unless and until plaintiff fails in his suit.\textsuperscript{99}

\textbf{DISCOVERY}

Without doubt the most important feature of the new federal procedure from the standpoint of the practicing lawyer—both in patent litigation and in other types of cases—is the extremely broad deposition-discovery procedure provided for in Rules 26 to 37. The general aspects of these Rules have been elsewhere considered at some length by Mr. Pike and the present writer.\textsuperscript{100} It is sufficient to say here that they provide the broadest and most thorough-going discovery ever made available. The basic theory is that each party shall have full and equal access to the facts before trial, thereby encouraging settlements, making more effective the trial-preparation of the parties and expediting the disposition of such cases as go to trial. Old limitations against inquiry into the other party’s case, against “fishing expeditions,” against discovery of matters within the discoverer’s own knowledge, against discovery of names of witnesses, have been largely done away with. At the same time, it has been realized that an unlimited right of access to all facts before trial may be abused. Hence there is provision for limitation of the scope of inquiry on motion

\begin{footnotes}
\item[Hancock Oil Co. v. Universal Oil Products Co., 115 F. (2d) 45 (C. C. A. 9th, 1940).]
\item[\textit{Supra} note 94.]
\item[\textsuperscript{287} U. S. 430 (1932).]
\item[\textsuperscript{91} F. (2d) 431 (C. C. A. 9th, 1937).]
\item[Pike and Willis, \textit{The New Federal Deposition-Discovery Procedure} (1938) 38 Col. L. Rev. 1179, 1436; \textit{Federal Discovery in Operation} (1940) 7 U. of Chi. L. Rev. 297.]
\end{footnotes}
of the party or witness, although the courts have been sparing in their exercise of this censorship.101

When the Federal Rules were still new and untested, considerable trepidation was felt by the patent bar lest the greatly expanded scope of discovery work havoc in their practice.102 As far as may be gathered from the reported decisions, however, no serious results have occurred. The rules have been used quite extensively in patent litigation.

Interestingly enough, the first decision under the discovery rules was rendered in a patent case. Just two weeks after the Rules became effective, Judge Ford of the District Court of Massachusetts in a patent infringement suit stated that "To keep in step with the purpose and spirit underlying the adoption of these rules it is better that liberality rather than restriction of interpretation be the guiding principle," and held that interrogatories to parties under Rule 33—unlike those under old Equity Rule 58—need not be limited to "ultimate facts"; that the interrogating party might inquire as to matters within his own knowledge and as to facts relating to the adverse party's case, and that discovery of names of witnesses was no longer forbidden.103

Inquiry into the other party's case is clearly allowed by Rule 26(b) (scope of examination by deposition), which provides for inquiry as to "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or the claim or defense of any other party...."

It has been held that where defendant in a patent suit pleads failure by plaintiff to comply with the statutes and the rules of the Patent Office, that the description in the patent is defective and that the claims are vague and indefinite and excessive in scope, plaintiff may compel defendant to specify its position by interrogatories under Rule 33, the court saying that "It seems reasonable... to expect that patent causes, as well as other forms of equity suits, should yield as far as possible to the objectives of a simplified civil procedure."104

While discovery of facts within the discoverer's knowledge is not expressly referred to in the Rules, it seems only reasonable that it should be allowed if otherwise relevant. The practice before the new Rules

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101 See Pike and Willis, Federal Discovery in Operation (1940) 7 U. OF CHL. L. REV. 297, 301, 302.
102 See Remarks of Mr. Nathan Heard, Proceedings in Operation of Washington Institute on Federal Rules (1938) 133-134, 137-143.
denied it. But one of the recognized objects of the new procedure is the shortening and simplifying of trials and records, and Rule 36 (request to admit facts) shows that it is no longer a heresy to attempt to obtain admissions of the adverse party in order to spare oneself the difficulty otherwise involved in proving a fact. Knowing a fact and being able to prove it at trial are not at all synonymous. This position has been adopted in the decision by Judge Ford referred to above and in several later decisions. Another decision has allowed an interrogatory as against the contention that the Patent Office trade-mark registrations would answer the question, Judge Hincks saying that "I see no reason why the plaintiff should not give a direct answer and thus obviate the need to encumber the record with documents from the Patent Office." Two other patent cases, however, have denied discovery of facts within the discoveror's knowledge.

A great many patent decisions have passed on the question of discovery as to matters of "opinion". Most of them have held flatly that discovery as to matters of opinion will not be allowed, until by mere weight the rule shows a tendency to become a shibboleth as unbending as some of the old restrictions which impeded discovery before the new rules. One or two cases have taken a more rational attitude. Thus in Pierce v. Submarine Signal Co. the court said

"If the answer to interrogatory 1 (b) brings a denial that the defendant manufactures the so-called Dorsey Fathometer, there can be no harm done to the defendant by compelling it to answer interrogatory 5 by disclosing the blueprints, drawings and description of the apparatus that it does make which the defendant considers to be most nearly like the Dorsey Fathometer. If in fact it is an instrument that the plaintiff contends infringes his patent, then the parties are sooner at issue. If in fact it nowise could be contended to be an infringement of the plaintiff's patent rights, no harm has come to the defendant, and the matter will probably be at an end."

And in Schwartz v. Howard Hosiery Co. defendant asked plaintiff whether the drawing forming part of the patent in suit correctly illustrated the fabric described and claimed as plaintiff's invention. "Obvious-

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ly”, Judge Kirkpatrick said, “one of the purposes of Rule 33 is to obtain admissions and thus limit the subjects of controversy at the trial and avoid unnecessary testimony, and waste of time in preparation. . . Such a question seems to me to be a perfectly proper effort to limit the testimony at the trial.” In another case Judge Campbell stated that “there is a clear distinction between requiring a defendant to give an opinion and requiring it to point out in particular to what defect or act the defense is directed.”112 While it may be that in the cases which have disallowed interrogatories calling for a “construction” of the patents in suit113 or a comparison of particular devices with patent claims114 an answer would have been of no substantial value,115 it would be unfortunate if a wooden rule were to be developed forbidding interrogatories as to matters of opinion regardless of whether or not an answer might expedite the litigation.

Escape from the limitations imposed on interrogatories as to matters of opinion may possibly be found in Rule 36, which provides for service upon the adverse party of a notice to admit specified facts. Failure to answer constitutes an admission of the truth of the facts. While the rule itself refers to “relevant matters of fact”, the principle of the Pierce and Schwartz cases116 would seem to apply even more strongly to this procedure, whose avowed purpose is the obtaining of admissions. The question has not yet been passed upon, but at least one decision in a non-patent case has approved a notice to admit which contained many requests for matters of opinion.117 Rule 36 has been given effective application in at least two patent cases. In one case plaintiff was called upon to admit the dates of publication of certain prior art references, photostatic copies of which were attached to the request.118 In another, plaintiff “apparently dissected the defendant’s answers to its interrogatories and drew a specific

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116Supra notes 110, 111.
request directed to each separate fact contained in them, adding several new requests, each limited to a single fact closely related to some step or feature of the process which the defendant is carrying on in its plant." Although the requests seemed to embody "some pretty finely drawn verbal distinctions," Judge Kalodner held that they were "generally adapted to bring out with clarity and precision every detail of the defendant's process."\(^{119}\)

Of course there must be some limitation on the extent to which a party will be allowed to inquire into his adversary's affairs, particularly in patent litigation with its secret processes and trade secrets. Rule 30(b) consequently provides various remedies to "protect the party or witness from annoyance, embarrassment, or oppression". Particularly relevant in patent cases are the provisions that the court may order "that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court." The principle of exchange of information is of course well established in patent cases, and has been applied under the new Rules in ruling on requests for bills of particulars\(^ {120}\) and on interrogatories under Rule 33.\(^ {121}\) Two decisions by Judge Duffy, however, have refused to require simultaneous disclosure of dates, the court brushing aside as without merit the contention that otherwise one party might practice a fraud upon the other.\(^ {122}\) Since the chief purpose of the Rule is to avoid the opportunity for fraud or charges of fraud, however, this position seems unjustified—especially since simultaneous disclosure can do no particular harm.

The discovery of secret processes has been passed upon in only one or two cases. In *DuPont DeNemours & Co. v. Byrnes*\(^ {123}\) the court sustained an objection to an interrogatory which the discoveree claimed would necessitate the disclosure of secret processes, but with leave to renew the interrogatory "if, after the interrogatories answered and required to be answered, Byrnes still feels the information is essential." In *Floridin Co. v. Attapulgus Clay Co.*\(^ {124}\) the discovery and inspection of documents containing information as to secret processes was denied, although much of the material was irrelevant as well.

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\(^ {120}\)See supra, p. 352.


\(^ {124}\)1 F. R. D. 34 (S. D. N. Y. 1939).

\(^ {124}\)26 F. Supp. 968 (D. Del. 1939).
Privileged matter may not be inquired into over objection.\(^{125}\) In *Pollen v. Ford Instrument Co.*\(^{126}\) a motion for inspection of drawings of apparatus manufactured by defendant was denied on a showing that the apparatus was made under a Navy Department order of secrecy and that disclosure was opposed by the Secretary of the Navy as detrimental to the national defense.

One of the most troublesome problems arising under the new discovery rules relates to whether a party may inquire into evidence or other material acquired by his opponent after the facts giving rise to suit or after the institution of the action.\(^{127}\) While most of the decisions have been handed down in personal injury actions, the question has also come up in patent litigation. It has been held that a party may not require production under Rule 34 of drawings of certain apparatus used by defendant, the court saying: "This relates to defendant’s partially completed program in preparation for its defense in this suit. The new Rules of Civil Procedure were not intended to permit a party to pry into the details of the other party’s preparation for trial."\(^{128}\) Another case forbid bade interrogatories as to evidentiary matter obtained by plaintiffs since the commencement of the action, although the court based this result chiefly on the assumption that evidentiary matters might not be inquired into by interrogatories under Rule 33\(^{129}\)—a position not taken by the other cases.\(^{130}\)

One of the restrictions which the new Rules have done away with is that against discovery of names of witnesses.\(^{131}\) Rule 26(b) provides that the scope of examination by deposition may include “the identity and location of persons having knowledge of relevant facts.” Plaintiff in a patent suit may inquire into the identity and location of persons having knowledge of drawings submitted for approval by defendant in connection with certain work during the course of which the alleged infringement occurred.\(^{132}\) It has been held, too, that the scope of inquiry under Rule 33 is as broad as under Rule 26(b) and includes inquiry as to

\(^{125}\) Rules 26(b), 34; see Pike and Willis, *Federal Discovery in Operation* (1940) 7 U. of Chi. L. Rev. 297, 315.

\(^{126}\) 26 F. Supp. 583 (E. D. N. Y. 1939).


names of witnesses. One decision under Rule 33, however, has limited an interrogatory by defendant seeking “the identity and address of all persons having knowledge of facts relevant to the allegations” of unfair competition, requiring only the names of defendant’s customers who were allegedly induced to commit the alleged unfair competition. An interrogatory asking for the names and addresses of the witnesses upon whose testimony plaintiff would rely in support of certain allegations was similarly limited. The cases are in some conflict as to whether names of witnesses may be procured by a motion for bill of particulars. In Teller v. Montgomery Ward & Co., Judge Kalodner held proper a request for a bill of particulars as to persons having knowledge of alleged prior use or invention, pointing out that the request was not for names of witnesses as such and that the information could be obtained by discovery. In Sure-Fit Products Co. v. Med-Vogue Corp., however, the same judge held improper a request for identification of persons to whom plaintiff was alleged to have made false representations concerning defendant’s acts.

Discovery of course is limited by the requirement that the subject-matter of inquiry be “relevant” to the issues, although the test of relevancy is considerably broader than at the trial. Plaintiff may not inquire into defendant’s activities since the filing of the complaint, since such matters are not relevant. Inquiry also should be limited to the particular claims in suit. Inquiry as to all products made by a party is too broad, but should be limited to those related to the patents in suit. A clearer showing of relevancy is required as to discovery and inspection of documents and things under Rule 34. A general inspection of all records of the opposing party on the chance that they may contain material evidence is not permissible. Interesting on the question of relevancy are the two decisions in Floridin Co. v. Attapulgus Clay Co. In an action for infringement, defendant set up prior invention by one Fuller. Plaintiff requested

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defendant to produce an application filed by Fuller. The application was not relevant, since filed after the application for plaintiff's patent. However, the court felt that it might have some bearing on Fuller's credibility and ordered defendant to turn it over to plaintiff's counsel so that the latter might point out to the court any passages he felt material, he being cautioned not to reveal the contents of the document to his client or any other person.\(^{142}\) Later, however, the defendant abandoned the defense based on the Fuller invention and the court ordered the documents returned as no longer having any bearing on the case.\(^{143}\)

Several patent cases have presented the question whether discovery may be allowed for the purpose of ascertaining whether another person was participating in the case to such a degree that the judgment would bind him. In \textit{Lip Lure, Inc. v. Bloomingdale Bros., Inc.},\(^{144}\) the court denied discovery of documents bearing on maintenance of the defense of the suit by one not a party, saying that such matters were not relevant to the instant suit. However, defendant may obtain discovery of documents showing the participation by plaintiff in prior litigation, nominally between defendant and other companies.\(^{145}\) Similarly, a plaintiff relying on \textit{res judicata} may examine defendant on the issues of privity between defendant and the adverse party to a prior action by plaintiff.\(^{146}\)

A number of patent suits have held discovery as to matters of damages to be improper before the determination of liability.\(^{147}\) This was once the law,\(^{148}\) but the restriction seems out of tune with the objectives of the new procedure. As has been said by Judge Rice in an excellent opinion allowing discovery as to matters of account before determination of the right to an accounting, the Rules were intended to facilitate preparation on all phases of the case, and piecemeal discovery would block a speedy determination of the litigation.\(^{149}\)

\(^{142}\)Supra note 141.
\(^{143}\)30 F. Supp. 138 (D. Del. 1939).
\(^{144}\)27 F. Supp. 811 (S. D. N. Y. 1939).
A broad procedure for the discovery of tangible objects is provided in Rule 34. The old equity rules made no reference to discovery of non-documentary evidence, although it was recognized that the courts had inherent power to compel it.\textsuperscript{150} This Rule should be especially useful in patent litigation. As yet, however, no instance of such use has found its way into the reported decisions.

\textbf{TRIAL BY JURY}

With the union or merger of law and equity by the new Rules, many patent practitioners were fearful lest juries be forced upon them in the traditionally equitable action for injunction and accounting.\textsuperscript{151} So far, however, no such results have occurred. It has been clearly recognized that the new Rules have abolished only the procedural distinctions between law and equity; that “what was, before the adoption of the new rules, an action at law is a jury action, and what was a suit in equity falls into the category of a non-jury action.”\textsuperscript{152} Hence, if the plaintiff sues under Rev. Stat. 4919\textsuperscript{153} to recover damages for infringement, the parties are entitled to a jury trial; if the proceeding is for an injunction and incidental damages under Rev. Stat. 4921,\textsuperscript{154} no jury can be had as of right, although under Rule 39(c) the court may submit the case to an advisory jury or the parties may stipulate for a jury.

Somewhat at variance with the above reasoning is the decision in \textit{Scovill Mfg. Co. v. United States Electric Mfg. Co.},\textsuperscript{155} a trade-mark case. Plaintiff sued for an injunction against infringement and for an accounting. The court held that there was no right to an injunction, since defendant had ceased the offending conduct and did not threaten to renew it. However, the court held, under the union of law and equity there was no necessity for dismissal of the case, but the court might retain jurisdiction of the case for the purpose of awarding an accounting and damages, and no jury would be required. Under the previous rule, the court in a trade-mark injunction case could not retain jurisdiction to grant an accounting and damages if the right to an injunction fell.\textsuperscript{156} Consequently, plaintiff would have had to bring a second suit on the


\textsuperscript{151}\textit{Proceedings of Cleveland Institute on Federal Rules} (1938) 228-230, 326-327.


\textsuperscript{153}35 U. S. C. § 67 (1934).

\textsuperscript{154}35 U. S. C. § 70 (1934).

\textsuperscript{155}31 F. Supp. 115 (S. D. N. Y. 1940).

law side, in which of course both parties would have a right to jury trial. The result of the Scovill case, then, is to deprive the parties of a right to jury trial which they had before the new Rules—a result contrary to the injunction of Rule 38(a) that "The right of trial by jury as declared by the Seventh Amendment to the Constitution . . . shall be preserved to the parties inviolate."

DISMISSELS

Reference has already been made to the reform effected in patent practice by Rule 41(a), under which a plaintiff may dismiss his case, after issue is joined, only upon the order of the court and on such terms as the court may impose. In one patent case the court denied a voluntary dismissal under this rule where defendant had gone to considerable expense in preparing for trial. In another case plaintiff at the start of trial moved to dismiss with prejudice as to one patent. The court required plaintiff to reimburse defendant for costs incurred in serving process and obtaining the attendance of witnesses, provided that the costs were attributable only to the dismissed claim.

Another interesting provision of Rule 41(a), aimed at the evil of bringing repeated suits on the same claim to the harassment of the defendant, is the proviso that "a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim". The validity of this clause as a regulation of "procedure" has apparently not been questioned. In the only patent case passing on this provision of Rule 41(a) it has been held that two dismissals prior to the effective date of the Rules would not bar a third action thereafter, but that one dismissal before the effective date and one thereafter would constitute a bar. The question has been raised as to whether under this Rule two dismissals would bar a third action based on acts of infringement occurring thereafter. It might be contended that in such a case the "claim" was not the same. When asked this question at the Washington Institute on Federal Rules, Col. William S. Hodges gave as his opinion that the plaintiff would probably be bound as to the validity of the patent, but could contest the question

158 Supra p. 359. See also (1940) 29 Georgetown Law Journal 385.
of infringement.\textsuperscript{163}

Under Rule 41(b) an involuntary dismissal for failure to prove a case (nonsuit) is with prejudice unless the court otherwise orders. It has been held that a dismissal of a patent case for failure to prove infringement should be with prejudice.\textsuperscript{164}

\textbf{SUMMARY JUDGMENT}

Rule 56 furnishes probably the broadest summary judgment procedure that has ever been made available. In terms the Rule is applicable to any action—legal, equitable, declaratory, etc. Something of a rule has been developed, however, that summary judgment will not be granted in patent cases. In the first case under the new Rules, Judge Coxe said that "The issues involve the validity and alleged infringement of two unadjudicated patents, and such questions can only be adequately determined after a trial."\textsuperscript{165} Most of the cases, however, while denying summary judgment, have done so on the ground that on the facts shown by affidavit an issue of fact really existed—usually as to the question of infringement—which required a trial.\textsuperscript{166} One decision has denied a motion for summary judgment on the ground that, as the motion went only to certain claims of the patents in suit, a trial would be necessary in any event.\textsuperscript{167} Where the question is chiefly one of comparison the case may be disposed of by summary judgment. Thus in \textit{Gasifier Mfg. Co. v. Ford Motor Co.}\textsuperscript{168} the parties were in agreement on all points except equivalency of the two devices, and the court by examining them was able to determine the question. In a companion case, however, the court refused to grant summary judgment on blue-prints alone. Judgment has similarly been granted in two cases involving design patents, where the court was able to compare the objects in dispute.\textsuperscript{169} The Seventh Circuit Court of Appeals has commended the use of summary

\textsuperscript{163}Proceedings of Washington Institute (1938) 165.
\textsuperscript{164}Buetterer v. Hansen, 1 F. R. D. 59 (D. Md. 1939).
\textsuperscript{168}1 F. R. D. 10 (E. D. Mo. 1939).
judgment procedure in preference to the motion to dismiss where it is contended that plaintiff's patent is void on its face.\textsuperscript{170}

Summary judgment is proper in copyright cases, according to a recent decision of the Second Circuit Court of Appeals.\textsuperscript{171} It has been denied in the only trade-mark case on point, the court saying that the usual rule against summary judgment in patent cases should be equally applicable.\textsuperscript{172} However, the court went on to find that there were issues of fact requiring trial.

\textsuperscript{171}Houghton Mifflin Co. v. Stackpole Sons, Inc., 113 F. (2d) 627 (C. C. A. 7th, 1939). (The court reversed the case as to one issue of fact which was in dispute).
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ADMINISTRATIVE LAW

THE BALANCE OF AUTHORITY BETWEEN COMMITTEE AND ADMINISTRATOR
UNDER THE FAIR LABOR STANDARDS ACT

The constitutionality of the Fair Labor Standards Act\(^1\) having been settled\(^2\) it was to be assumed that attacks upon it would come from some new angle. Following the usual pattern,\(^8\) litigants are now generally scrutinizing the details of administrative procedure provided by the Act, and the Circuit Courts of Appeal are being called upon to determine their validity.

Two recent decisions of the United States Court of Appeals for the District of Columbia have examined the nature of the relationship existing between the industry committee and the Administrator of the Wage and Hour Division. *Andree and Seedman Inc. et al. v. Administrator of the Wage and Hour Division*,\(^4\) held that all branches of an industry need not be represented on the committee, and *Southern Garment Manufacturers v. Administrator of the Wage and Hour Division*,\(^5\) held that the Administrator could, under certain conditions, reject in part the committee’s recommendations.

The Fair Labor Standards Act requires the Administrator to appoint an industry committee\(^6\) which shall fairly represent the employers, employees and the public.\(^7\) The committee is to investigate conditions in the industry and recommend specific classifications and wage orders.\(^8\) To avoid the possibility of law-making by private groups\(^9\) the Administrator passes an independent judgment upon the findings of the committee.\(^10\) The Administrator may disapprove the committee’s recommendations and refer the matter back to the same or another committee for further consideration.

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\(^2\)United States v. Darby, 312 U. S. 100 (1941).
\(^3\)Morgan v. United States, 298 U. S. 468 (1935) (where the delegation by the Secretary of Agriculture of his duty to preside at hearings under the Packers and Stockyards Act was attacked); Arrow Distilleries, Inc. v. Alexander, Administrator, 109 F. (2d) 397 (C. C. A. 7th, 1939); cert. den. 311 U. S. 613 (1940) (delegation of duty to “a hearing officer” attacked); see Proctor & Gamble Co. v. United States, 225 U. S. 282 (1911); Interstate Commerce Commission v. Union Pacific Railroad Co., 222 U. S. 541 (1911); St. Joseph Stock Yards Company v. United States, 298 U. S. 38 (1935) (all attacking reasonableness of classifications by administrative bodies).
\(^7\)Id. § 5 (b).
\(^8\)Id. §§ 6 (a) (4) and 8 (c).
The Administrator apparently has complete control over the jurisdiction of the committee and may, at his discretion, make that jurisdiction either broad or narrow, depending upon which in his judgment, will be more efficient and expeditious.\textsuperscript{11} However, it is the function of the committees to investigate conditions in the industry and recommend the highest minimum wage rates for the industry (not in excess of forty cents an hour) which will not substantially curtail employment and such reasonable classifications within the industry as it finds necessary for the purpose of fixing the wage rate.\textsuperscript{12}

When the committee has filed its report and recommendations, the Administrator is required to give interested parties due notice and an opportunity to be heard for or against the recommended wage rates.\textsuperscript{13} If he then finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing and will carry out the purposes of the Act, he is directed to approve the recommendations of the committee and carry them into effect.\textsuperscript{14}

A serious problem therefore in the administration of the Act is the balance of authority between the committee and the Administrator. It was recognized early that while the committee proposes the Administrator disposes.\textsuperscript{15} It was also pointed out that through his large indirect powers in the selection of committee members, normal informal contact between his staff and the committeemen, and the exercise of his power to reject recommendations and appoint new committees until the recommendations brought in were satisfactory to him, he might in fact have a strong voice in proposing as well.\textsuperscript{16}

It is this balance which was so important in the \textit{Southern Garment Co. case}.\textsuperscript{17} To evaluate the case it is important to consider the details of its history.

At the request of the Administrator a large group of representatives of labor and industry met in a preliminary conference to discuss the appointment of a committee for the apparel industry. Approximately 150 trade associations and trade union representatives participated in the conferences which took place October 18, 19 and 20, 1938. After consideration of the resolutions adopted during the conference, the Administrator appointed a single committee for the entire apparel industry consisting of 16 representatives of the employees, 16 representa-

\textsuperscript{11} \textit{Id.} \S 3 (n).
\textsuperscript{12} \textit{Id.} \S 8 (b).
\textsuperscript{13} \textit{Id.} \S 8 (d) and (g).
\textsuperscript{14} \textit{Id.} \S 8 (d).
\textsuperscript{15} Dickinson, \textit{The Organization and Functioning of Industry Committees} (1939) 6 Law & Contemp. Prob. 353.
\textsuperscript{16} \textit{Ibid.}
\textsuperscript{17} 122 F. (2d) 622, 625 (App. D. C. 1941).
tives of the employers and 16 representatives of the public. This committee was convened and held its first meeting January 31, 1939. There were various subcommittees for men's clothing, women's clothing, utility or work clothing and miscellaneous clothing groups, all formed for the purpose of investigating and recommending minimum wage rates. The final report of the committee consisted of 112 pages with an appendix of 40 additional pages. The hearing before the Administrator's representative began on November 13, 1939, and continued through June 10, 1940. Almost 150 witnesses were heard. Approximately 6,000 pages of testimony were taken and 16 volumes of exhibits were received. The Administrator received briefs from approximately 20 trade unions, trade associations and individual manufacturers. There were three days of oral argument at which a subordinate of the Administrator presided, the transcript of which covers 375 pages. The findings and opinion of the Administrator are contained in 368 mimeographed pages. Thus it may be seen that the committee's work was extensive, complicated, and exhaustive. As a result of its labors 29 recommendations were made by the committee. Of these, the Administrator approved 27 and rejected two, one classifying the single pants industry in two divisions with separate wage orders, the other classifying the manufacture of embroidery as part of the apparel industry. Suit was brought by the Southern Garment Company, Inc., protesting, inter alia, the Administrator's partial rejection of the committee's report and the classifications.

Can the Administrator, under Section 8 (d) accept only part of the committee's recommendations and reject the rest?

There is evident in the statute an intent by the Congress to create a balance between the committee and the Administrator. The committee, as has been said, is to study the entire industry under the scope of its jurisdiction in making its recommendations. The committee might not

18Ibid.

19The other grounds for protest were first, the delegation by the Administrator to a subordinate of the duty to hold the hearing upon the recommendations of the committee, and second, the fairness of the hearing itself. The court found specific authority for the delegation of duty in the provision of the Act which reads "... the Administrator ... or his duly authorized representative may exercise any or all of his powers in any place," 52 STAT. 1060, 29 U. S. C. §§ 201-203 (Supp. 1938) § 9. The second objection was based upon the appearance of the Industry Committee at the hearing to advocate approval of its own report, the appearance of Wage and Hour Division employees on behalf of the Administrator and approving the Committee's recommendations, and the denial of petitioner's motion to adjourn to a southern city. The court found that the first two points had been decided in Opp Cotton Mills, Inc. v. Administrator Wage and Hour Division, 312 U. S. 126 (1941), and that refusal to adjourn to a southern city was a sound exercise of the Administrator's discretion.

choose to recommend two different wage scales for different groups if both were not to be adopted. These recommendations, therefore, are based upon the interrelationships of the various parts of the industry. In many instances partial rejection would throw the committee’s entire scheme for the industry into disorder. Further, does not such action by the Administrator destroy the balance contemplated by the Act? While these questions are not directly answered by the court in this case, there is some indication of what to expect should it have to decide them.

In rejecting the committee’s recommendation that the manufacture of single pants be divided into two classifications and retaining a single division, the Administrator retained the two definitions and wage orders. The court, therefore, easily disposed of the petitioners objection in this regard by finding that the committee’s recommendations were in fact carried out; hence petitioners’ objection here was purely formalistic.

The court found the question of the rejection of the wage order for the embroidery industry to be more difficult of resolution. The Administrator found, after the recommendations of the committee had been received, that the embroidery business was not part of the apparel industry but was a separate industry in itself. The court went out of its way to decide this point since the petitioners were not engaged in the manufacture of embroidery and there was, therefore, some question as to whether there was a sufficient adversary interest to support the objection. This point was raised by the defendant, but the court felt because the question was so important, and the life of the Act so short,\(^3\) that it ought to be decided.\(^4\)

Had the Administrator chosen to use the more cumbersome method of appointing 29 separate committees, and had he rejected the recommendations of two such committees there could have been no objection.\(^5\) A practical consideration arises then. Should the administration of the Act be hamstrung by interpreting the statute to require less efficient and less satisfactory procedure? This question is answered by the court’s statement that it is not interested in algebraic law but in law which establishes norms adaptable to an efficient, fair way of getting work done.\(^6\)

The test seems to be one of degree. Where the Administrator substantially carries out the recommendations of the committee, though not in the form recommended, he is well within his discretionary powers. On the other hand, where a committee’s scope is narrowly limited, it would seem that if the Administrator is unable to break the industry down any further, the recommendations of the committee would have to

\(^1\)Ibid. \\
\(^2\)Ibid. \\
\(^3\)Ibid. at 626. \\
\(^4\)Ibid. at 624.
be approved or rejected as offered. The court, in the following language, while specifically refusing to decide the question, does hint at its possible answer, "We pass no opinion upon the situation where a committee has been appointed along a narrow industrial line and proceeds to make recommendations upon particular branches and the Administrator makes only a partial approval." The court then goes on to suggest that in such a case the Administrator might have to refer the matter back to the committee with the result that there would ensue a tug of war between the Administrator and the committee or committees, until one or the other gave in.

Turning again to the work of committee and considering the time consumed, the amount of money spent by various groups, the number of people involved and the amount of work done by them, it is hardly reasonable to require that the Administrator discard all of this material and labor simply because he found that the evidence did not support the classification of the single pants business in two divisions or the inclusion of embroidery manufacturing as part of the apparel industry. Nor is it any more reasonable to suppose that the courts would be misled by purely formal objections into discarding this same material.

The apparent result of the Southern Garment Co. case is to show that in the absence of arbitrary behavior on the part of the Administrator there is little likelihood that his decisions will be upset by the courts, and that by virtue of the powers vested in him, he can virtually control the entire administration of the Act. He can, at the outset, define the industry and appoint the members of the committee. He can hardly avoid having some influence upon the deliberations of the committee while it is in session. If the recommendations of the committee are not satisfactory the first time, he can turn them back for further consideration. If the committee continues obstinate he can appoint a new one, or a series of new ones until he gets the recommendations he wants. The only check—again in the absence of arbitrary behavior—is where after defining an industry along narrow lines, he thereafter attempts to reject in part the recommendations of the committee.

The reason for putting so much power into the hands of the Administrator is obvious. While the Congress has been criticized for its willingness to delegate its powers to Administrative agencies, the drafting of legislation which will cover even a majority of situations likely to arise under an Act of this kind is a manifest impossibility. The alternative is to put the administration of the legislation into the hands of experts who can carry out its purposes. Looking at the particular piece

25Id. at 627.
26Id. at 628.
of legislation under consideration here, it may be seen that it is vital to the administration of the Act that the Administrator have broad powers. He is in much the same position with respect to industry as a whole as an industry committee is with respect to a particular industry. Just as a committee must consider the interrelationships of the various parts of a single industry, so must the Administrator consider the interrelationships of various industries. Just as the committee might not want to have part of its recommendations rejected because of the possibility of such rejections affecting adversely the recommendations which were accepted, so the Administrator cannot accept a recommendation in one industry which might have an adverse effect on some other. It seems only logical then, for the Administrator to have the last word. Unless the Congress does attempt to retain in itself the job of administration it seems to be the only way to make the Act work.

A. CAREY SEWARD, JR.
ON November 8, 1941, Hamilton Fish, member of the House of Representatives from New York, was issued a subpoena to appear before the Special Federal Grand Jury investigating German agents. On November 10, he announced this to the House, and by apparent pre-arrangement, the matter was promptly turned over to the committee on the Judiciary for consideration. At the same time Fish was ordered by the House not to respond to the subpoena until the committee should report.

These events immediately brought up the question of the dual Congressional privileges; first, that of the individual from arrest, and second, the asserted privilege of the House as a whole to throw their toga of protection around each member.

The personal privilege of the individual member is granted by the Constitution:

"The Senators and Representatives ... shall in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their representative Houses, in going to and returning from the same. . . ."

The term "treason, felony and breach of the peace" by judicial interpretation embraces all crimes. The leading case Williamson v. United States deduces this from the adoption of the identical words employed in England, where that is the settled meaning.

The failure of a member to obey any subpoena would put him in con-
tempt of court. The only way to enforce the judicial command, however, would be arrest. If the contempt is a criminal contempt, the personal congressional immunity is no bar and the member may be arrested. If the arrest is for civil contempt, the member is protected by his constitutional privilege. It appears that the contempt would be civil.

In Long v. Ansell, the Supreme Court decided that a Senator is not exempt from service of civil process in a libel suit although Congress is in session.5

In United States v. Cooper, 135 years earlier, Justice Chase said:6

"I do not know of any privilege to exempt members of Congress from service, or the obligation of a subpoena... If upon the service of a subpoena the members of Congress do not attend, a definite question may arise; and it will then be time enough to decide whether an attachment ought, or ought not, to issue."

Thus it appears that the individual member is privileged only from civil arrest, not from criminal arrest nor from the service of a subpoena or civil process.

The immunity arising from the privilege of the House can be traced back to England where it was of vital importance to Parliament in its long struggle with the Crown.7 The privilege of the House is given emphasis in Jefferson's Manual, which governs proceedings of the House of Representatives.8 It is there provided:9

"The privilege of the Member is the privilege of the House; if a Member waive it without leave, it is ground for punishing him, but it cannot in effect waive the privilege of the House."

The House has always claimed that if a member could be compelled to absent himself, his constituency would lose their voice and vote; and the House has always held that it was the paramount duty of each member to attend the sessions of Congress. Somewhat illogically, Congressional precedents hold that even a service of a subpoena or any other process by a court or grand jury commanding a member to appear and testify invades the rights and privileges of the House of Representatives.10

In the seven or eight instances where the question has been raised, the Houses of Congress have frequently waived their privilege and author-

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6United States v. Cooper, 4 Dall. 341 (U. S. 1800).
7Tilson, Parliamentary Law and Procedure (1935) 41.
8The House adopted Jefferson's Manual in 1837, permitting these provisions to govern the House in all cases to which they are applicable.
1022 Cong. Rec., Nov. 17, 1941, at 9164.
ized a member to respond to service. On May 6, 1846, the House refused to make a general rule permitting members to waive the privilege of the House; but authorized a single member to testify.

Again, on March 21, 1876, members gave notice that they had been summoned before the grand jury of the District of Columbia, and the House authorized them to respond to the summons. Congressman New, one of the members summoned, said that:

"Inasmuch as it seemed well settled that the privilege of the Member is the privilege of the House and that privilege could not be waived except with the consent of the House, they thought it their duty to submit the matter to the House."

On at least one occasion, March 7, 1876, the House, when a member stated he had been served with a summons and had disregarded it, directed him to continue to disregard it until further orders—which were not given.

When the House waives its Congressional privilege, and puts the matter of testifying up to the individual, it is then a question of personal privilege, and if the member refuses to testify he may be guilty of contempt of court, and possibly subject to arrest. There is a scarcity of precedent. The question of whether the court can arrest a member for this type of contempt arose in the case of the late Senator Blease of

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11The Houses of Congress have not always waived their privileges even though Mr. Celler said on the floor of the House: "It would seem, therefore, that the House invariably waives its privilege and allows its Members to testify." 22 Cong. Rec., Nov. 17, 1941, at 9164. Cf. note 15 infra for a refusal.

12This House having been informed that Mr. Hopkins, one of its members, has been served with a process of the Circuit Court of the United States, now sitting in this city, to attend as a witness in a criminal proceeding pending in that court; Resolved: that Mr. Hopkins has the leave of this House to attend said court." Cong. Globe, 29th Cong., 1st Sess. (1846) 767-769.

13Whereas, John M. Glover, Jeptha D. New, A. Herr Smith, Members of the House and of the committee of this House who investigated the affairs of the real estate pool of the District of Columbia, having been summoned to appear as witnesses before the Grand Jury of the District Court of said District of Columbia to testify; whereas, this House sees no reason why the said Members should not appear and testify; Therefore, Resolved: that they be, and are hereby, authorized to appear and testify under the said summons." 14 Cong. Rec., 1847 (1876).

14HINDS' PRECEDENTS, Vol. III. § 2662. Cf. Fish's statement: "Mr. Speaker, I have been summoned to appear before the District grand jury to give testimony next Wednesday morning. The subpoena has just been read by the clerk. Under the precedents of the House, I find that I am unable to comply with this summons without the consent of the House, the privilege of the House being involved. I therefore submit the matter for the consideration of this body." 22 Cong. Rec., Nov. 10, 1941, at 8963.

15HINDS, op. cit. supra note 14 at § 2661. Cf. supra note 11.
South Carolina. On December 5, 1929, Blease was served with a subpoena issued by the Supreme Court of the District of Columbia, directing him to attend and testify before a session of the Grand Jury. Senator Blease failed to appear. He then informed the Senate that he had failed to respond to the subpoena and the Senate directed him to disregard it. Upon receiving the report of the Grand Jury that Senator Blease had not appeared, Justice Peyton Gordon addressed the grand jury and said:

"The Congress of the United States is now in session, and until yesterday I never heard of a precedent to this procedure in an instance of this kind.

Section 6, Article 1, of the Constitution of the U. S. gives immunity to arrest to members of Congress while that body is in session. It does not say that they are privileged from subpoena, but if they do not obey, the only step the court could take would be to issue an attachment for their arrest. Since the Constitution provides immunity from arrest, in my opinion they are not subject to such action.

Unless the gentleman sees fit to obey the subpoena, this court at the present time has no power to compel him to do so."

The report of the Committee on the Judiciary, in reference to the summons received by Mr. Fish said:

"The service of this summons does invade the rights and privileges of the House of Representatives."

Then the report went on to say:

"The language in the summons 'to testify on behalf of the United States, and not depart the court without leave of the court or district attorney' removes any necessity to examine the question as to whether a summons merely to appear and testify is a violation of the privileges of the House of Representatives."

The Committee refused to decide whether a summons that merely purports to command a Congressman to appear and testify would be a violation of the privilege of the House. It indicates that the phrase "and not depart the court without leave of the court or district attorney" is objectionable. The report, however, suggests that the House may waive its privilege and attach such conditions to its waiver as it see fit.

The report defended the privilege of the House as a protection for its members against outside interference while they are performing their constitutional duties. It ended with an assertion that there is a high duty attached to the privilege and that the House must not keep members from discharging their responsibilities as civilians.

13Now the District Court of the United States for the District of Columbia.
14Cannon op. cit. supra note 16.
Acting on this report, the House passed a resolution authorizing Fish to appear before the grand jury at such time as the House was not in session.20

The committee neatly side-stepped the fundamental issue put to it in the initial resolution.21 The subpoena served on Fish is the usual summons.22 Any summons issuing from a federal court or grand jury would contain both the clause commanding a witness's attendance and the clause commanding that he should not depart the court without leave of the court or of the district attorney. The accepted view appears to be that if a court does not have power to compel a Congressman's attendance it cannot compel him to remain in said court once he has appeared by his own leave.23

The privilege of a member is not infringed by the bare service of a summons or subpoena. The privilege is invaded only when an attempt is made to enforce attendance. If the enforcement is attempted when a member is going to and from the sessions or while he is attending the sessions he is clothed with his Congressional immunity. How then is the privilege of the House invaded by the mere service of a subpoena on one of its members? The collective privilege should protect only when steps are taken to enforce compliance.24 Perhaps the House intends to continue jealously guarding the privilege it has created so that some day the cloak of protection may be thrown around a member, to protect him from inconvenient or undesired compliance with the judicial branch of the government. The House should not claim a power of no value except as it allows a member to evade the service of process.

CHARLES E. CHANNING, JR.

20H. Res. No. 340, 77th Cong., 1st Sess. (Nov. 17, 1941); or see 22 Cong. Rec., Nov. 17, 1941, at 9163.


22Holtzoff and Cozier, Federal Procedural Forms (1941) form 765.

23See discussion in 22 Cong. Rec., Nov. 17, 1941, at 9165.

24On the other hand, it may be urged that the service of the subpoena is a pointless formality if it cannot be enforced. And moreover, that it is a formality tending in the direction of an assertion of power to enforce. But, if the Congressman knows his rights—and most do—it cannot have a serious in terrorem effect. Beyond that, the duty of giving testimony is seldom so onerous as to interfere in a material degree with the Congressman's floor time.
NOTES

VALIDITY OF PROSPECTIVE AIRPORT ZONING

THE rise in airport development and flying activities both public and private, during 1940 and 1941 have brought to the forefront the question of safe airports for the public. The majority of aerial accidents occur in or near the airports and are often due to obstructions in airport approach areas. The problem, therefore, is to discover some uniform method, simple to apply and not too costly, by which approaches to airports may be kept free from obstructions.

THE PROBLEM

The magnitude of the legal problem can be envisioned when the minimum requirements for a safe airport approach area are studied. These general standards have been set by the Civil Aeronautics Administration, Department of Commerce. The area surrounding the airport is divided into two zones, the approach zone and the turning zone, extending two miles in a 360° circle from the boundary of the airport.

Approach zones apply to runways only. In the case of a non-instrument runway, the obstruction ratio is a glide of 20:1 for class 1 airports,

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2 Air traffic is increasing. Three years ago there were 20,000 civilian pilots and 9,732 planes flying the airways; now there are 82,000 pilots and 22,025 planes exclusive of military or naval pilots and planes. Speech of Oswald Ryan, Member, Civil Aeronautics Board, before the National Association of Railroad and Utility Commissioners, at St. Paul, Minn., August 26, 1941.

3 During 1939 and 1940, 105 air accidents were caused by collision with public utility wires alone.

4 One of the recommendations made by the Select Committee to Investigate Air Accidents was that state legislatures pass zoning acts which would protect the approaches to an airport. H. R. Rep. No. 933, 77th Congress, 1st Sess. (1941) 6.

5 Tentative Airport Approach Standards, drawing No. 152-C, Revised 11-19-41, Airport Division, Civil Aeronautics Adm., Dept. of Commerce. It must be pointed out that these standards have not been officially adopted by the Civil Aeronautics Board. Under the reorganization act (Reorganization Plan #III Sec. 7 eff. June 30, 1940, and Reorganization Plan IV. Sec. 7 b eff. June 3, 1941), the Civil Aeronautics Adm. and the Civil Aeronautics Board have separate and distinct functions. The executive functions are handled by the former, the quasi-judicial functions by the latter. In respect to safety regulations, the Civil Aeronautics Administration can propose standards but cannot enforce them until the Civil Aeronautics Board has adopted them.

6 A glide path is an angle of descent computed from the boundary of the airport to a distance of two miles. When a 20:1 glide is used, the plane goes forward 20' to every foot of descent. See Airport Design Information, C.A.A., May 8, 1941 at page 5.
and 30:1 for class 2, 3 and 4 airports. The zones should be 500' wide at the boundary of the airport widening to 2500' at a distance of two miles.

In the case of an instrument runway, the glide ratio is 40:1 for class 3 and 4 airports. At the boundary of the airport, the zone should be 1000' wide, widening to 4000' at a distance of two miles.

Therefore, if a 20:1 glide path is followed, at 2000' from the airport boundary the maximum height of any structure or tree in the approach zone should not exceed 100'; at 5000' the obstruction should not exceed 250'; at 10,000', not in excess of 500'. If a 30:1 glide is allowed at 2000', the maximum height of an obstruction should not exceed 66.6'; at 5000', not in excess of 166.6, and at 10,000', not in excess of 333.3. If a 40:1 is required for a safe landing, as it is on an instrument runway, no obstruction over 50' high at 2000'; 125' at 5000'; and 250' at 10,000' respectively from the boundary of the airport should be permitted. These approach zones are designed primarily for the safety of landing aircraft.

The turning zones are the areas located between the approach zones. These areas have been provided in cases when a plane, after taking off, develops engine trouble or for some other reason is forced to turn and land. A comparatively unobstructed turning area will in most cases permit a safe return to the airport.

The height restrictions in the turning zone areas are not so stringent as those in the approach zones. A structure or tree not over 75' in height is permitted from the boundary of the airport to a distance of ½ mile. From the ½ mile limit to the two mile limit of the turning area no obstruction should exceed a 30:1 slope line.

These are classifications used for purposes of indicating the size of an airport and the type of flying operations which may be conducted therefrom. These classes have not been officially adopted. A class 1 airport, the smallest desirable, has landing strips 1800' to 2500' in length and 300' in width which face 75% of the prevailing wind. This type of airport is for light craft and is not very prevalent. No scheduled air transportation is permitted on this type of field. Class 2 airports have landings strips from 2500' to 3500' in length and 500' in width with paved runways thereon 100' or 150' wide and 2500' to 3500' long. These runways must face 80% of the prevailing winds. Airports of this type can be used by planes with gross weight between 4000 and 15,000 pounds. Class 3 and 4 airports are those used for scheduled air carrier operations. Class 3 airports have landing strips 500' wide and 3500' to 4500' long and paved runways thereon 150' wide and 3500' to 4500' long. The requirement for a Class 4 airport demands landing strips and paved runways 4500' in length and over. All the dimensions mentioned are measured from sea level. See Airport Design Information C.A.A., May 8, 1941 at pages 11 and 12.

An instrument runway is one used for a blind landing i.e. the pilot of the plane is guided to the airport through the medium of a radio beam which is cast at the correct glide ratio. This procedure is resorted to when bad weather prevents visual navigation.

In case of a class 1 airport, the obstruction ratio is 20:1 from the two mile limit of the turning area to the boundary of the airport.
The area embraced by the approach zone and turning zone areas amount to approximately thirty-four square miles. It must be remembered that these approach standards are considered as meeting the minimum requirements only for a safe approach area.

SUGGESTED SOLUTIONS

Several methods have been suggested by which the height of future obstructions in the approach area to an airport may be controlled. They are:

(1) Acquisition of property interests by
   (a) gift (b) purchase (c) condemnation.

(2) Regulation by
   (a) court action (b) zoning.

It has been suggested that the commerce, war and postal powers of the federal government be used to regulate hazards in the airport approach area. Federal action might possibly be available but the use of such powers is inadvisable for two reasons: the difficulty of administering the regulations with the uniformity and reasonableness necessary to satisfy due process and the possible encroachment upon the reserved powers of the States.

The ineffectiveness of the gift method is obvious. Few citizens, however public spirited, would give air rights over their land for the welfare of the community. If the interested municipalities attempted to purchase the land adjoining their airports, it would require an inexhaustible exchequer. Exorbitant demands would be the rule rather than the exception. The cost would be prohibitive. A normal approach area covers approximately thirty-four square miles. The condemnation methods would not be as costly but sufficiently so to strain the ordinary city's budget. In certain cases eminent domain is the only legal method other than purchase, by which rights over the land or airspace may be acquired. But it has the disadvantage of delay necessitated by a separate condemnation proceeding for each parcel of land taken.


Ibid.

See note 4, supra, the official attitude of the Department of Commerce is that regulation of approach areas to airports should be left to the local governments. Speech by Robert H. Hinckley, Asst. Sec. of Commerce for Air, before the Association of State Aviation Officials, October 3, 1941. See also AMERICAN AVIATION, August 15, 1940.

United Airports Co., of California, Ltd. v. Hinman, 235 C.C.H. 1940 Av. L. Serv. where the defendant asked $5000 an acre for land adjoining the Union Air Terminal at Burbank, California, which price was far in excess of the fair market value. (No official report).
The most satisfactory solution seems to lie in the police power regulations adopted by municipalities or states, since no compensation is required. These may be effected either by injunction or by zoning regulations. However, the injunctive method has the inherent infirmity of all legal process; namely, delay. A court action is required for the removal or prevention of each hazard.

This leaves zoning. Zoning not only requires no compensation but also avoids a multiplicity of court actions. The airport zoning ordinance prevents at once any obstruction of the approach area and applies to all land at one and same time. The zoning method thereby presents to the courts a general plan from which the legislative intent to apply the regulations with reasonableness and uniformity for the benefit of the community is clearly apparent.

Zoning of airport approaches is not new. It has been attempted in several states. Several municipalities or counties have passed zoning ordinances establishing height limits in the approach areas to their airports. However, these measures have been piece-meal and with the present emphasis on airport development a more uniform system was desirable. Accordingly, two model airport zoning acts were drawn up under the auspices of the Civil Aeronautics Administration, Department of Commerce, and the National Institute of Municipal Law Officers. These acts have undertaken to combine the better features of previous

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14Provisions for airport zoning were made in sections 7 and 8 of the proposed Uniform Airports Act drawn up by the Committee on Aeronautical Law of the American Bar Assn. See (1931) 2 JOUR. AIR LAW 555, and U. S. AV. R. 275 (1931). A model state airport zoning enabling act was recommended by a Committee on Airport Zoning and Eminent Domain appointed by the Aeronautics Branch, Dept. of Commerce. See report of Committee on Airport Zoning and Eminent Domain, U. S. Dept. of Commerce, Aeronautics Branch December 18, 1940.


Iowa—Iowa Code (1935) Sec. 12395-12401.


16County of Alameda, State of California, Ordinance No. 203 adopted December 3, 1928. Board of Port Commissioners of the City of Oakland, Cal., Port Ordinance No. 45, adopted January 7, 1929; City of Akron, Ohio, Ordinance No. 600 passed June 18, 1929.

17Department of Commerce, Civil Aeronautics Administration, Model Airport Zoning Act, January 6, 1941. National Institute of Municipal Law Officers, Model Airport Zoning Act, February 15, 1941.
work. That the need for this type of act was pressing, may be seen from the fact that seven states have already adopted legislation based on the model acts. These acts are drafted like any well-drawn general zoning enabling act. The legislative intent is made crystal-clear by the legislative declaration that airport hazards are contrary to the public safety, health or general welfare. This declaration is a guide which will aid the courts in interpreting the act by defining the public evil which is sought to be regulated. It is to be noted, however, that legislative fiat cannot aid an act too broadly confiscatory.

In essence the two acts are alike. The only difference is one which relates to policy. The power to adopt airport zoning regulations is granted to the political subdivisions in both, but in the Civil Aeronautics Administration draft, it is provided that these regulations must be in conformity with an approach plan for each airport formulated by a State Commission. In the draft prepared by the National Institute of Municipal Law Officers, the power to make the regulations is left to the local governmental units. Several observations should be made upon the content of the acts.

The zoning regulations apply only to publicly-owned airports. It is felt that this distinction was made to insure the passage of the act, and to prevent a court interpretation that these regulations benefit a few individuals alone.

The determination of the area to be zoned, the permissible height of structures and trees, the possibility of moving existing obstructions are left to the Commission or local subdivision who may consult with the federal agency charged with fostering civil aeronautics.

Both acts permit the incorporation of airport zoning regulations within an existing general zoning ordinance regulating inter alia height of buildings in the same area or any portion thereof. It is further stipulated that the scope and effectiveness of the airport zoning regulations shall not be limited by the general zoning regulations. In case of a conflict between a general zoning ordinance and airport zoning regulations, the latter shall prevail.

The Institute Act provides three alternative methods of zoning airports located wholly or partially outside the territorial limits of the

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18See note 14 supra.
20Sec. 3 C.A.A. Act.
21Sec. 3 (1) Institute Act.
22Sec. 3 (2) Institute Act and Sec. 4 (1) C.A.A. Act.
23Sec. 3 (2) Institute Act and Sec. 4 (2) C.A.A. Act.
municipalities owning them:24 (1) Power to zone extraterritorial lands; (2) Each political subdivision zones the area within its territorial limits; and (3) Appointment of a joint board to adopt and enforce the regulations. However, no provision as to jurisdiction is made for cases in which the airport itself is located within the limits of the municipality but a portion of the approach area is located within the territorial limits of an adjoining local governmental unit. In the C. A. A. draft, the adoption of the airport zoning regulations is left to the local governmental units.24 Each municipality is to regulate that portion of the approach area within its territorial limits. Uniformity is assured by the provision for approach plans which are to be developed by a State Commission. The ultimate power is left in the Commission with the municipalities basing their ordinances upon the approach plan. According to the Institute Act since the municipality has extraterritorial jurisdiction over the airport itself, by necessary implication it would have jurisdiction of the extraterritorial approach area.

Existing non-conforming uses are allowed to continue25 but shall not be allowed to be made higher or become a greater hazard than they were when the zoning regulation was adopted. If the non-conforming use has been abandoned or more than 80% destroyed, deteriorated or torn down, the owner at his own expense25a shall be compelled to make the use conform to the regulations.26 Variances are permitted on the basis of practical difficulty and unnecessary hardship.26a Conditions may be attached to any permit or variance—e.g. requiring the owner to permit the marking and lighting of the obstruction for safety.26b

Both acts insure procedural due process by providing for notice and hearing, for the appointment of an administrative agency and Board of Appeals, and for a judicial review of decisions of the Board of Appeals.27

Enforcement of the provisions or regulations adopted under the Acts may be had by obtaining a restraining or mandatory injunction from the courts.28

A feature of the two model acts not found in a general zoning enabling act is a provision permitting acquisition of air rights.29 This power is to

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24Sec. 3 (3) & (4) Institute Act.
25Sec 4 (3) C.A.A. Act.
26Sec. 3 (5) Institute Act and Sec. 4 (4) C.A.A. Act.
25a This provision is, to say the least, of doubtful constitutionality and should be omitted. To compel a man to spend his own money to make his land safe for the trespasses of adults strains constitutional limits however elastic.
26Sec. 4 (1) Institute Act and Sec. 5 (2) C.A.A. Act.
26aSec. 4 (2) Institute Act and Sec. 5 (2) C.A.A. Act.
26bSec. 4 (3) Institute Act and Sec 5 (3) C.A.A. Act.
27Sec. 5 and 6 Institute Act and Sec. 6 and 7 C.A.A. Act.
28Sec. 7 Institute Act and Sec. 8 C.A.A. Act.
29Sec. 8 Institute Act and Sec. 9 C.A.A. Act.
apply when it is desired to terminate a non-conforming use, where it appears that the airport zoning regulations because of constitutional limitations cannot be used, and finally when in the judgment of the local governing bodies public policy would be better served. The local bodies can acquire these rights by purchase, grant, or condemnation.

The two model acts, therefore, incorporate the features of a well-prepared general zoning enabling act with the purposes of airport zoning clearly brought home. Although similar to community zoning, airport zoning has its own peculiar traits.

Although the need for regulation of obstructions in the airport approach area is recognized, there is no unanimity of opinion as to the validity of this type of zoning. No cases from the higher courts have been decided on this point. However, it has been argued that airport zoning standing by itself cannot be justified as a reasonable exercise of the police power either because such regulations are not for a public purpose or because the impingement upon one's right in the full enjoyment of property is too drastic and constitutes a taking without due process of law. The analogy is used that railroads must pay for their right of way.

The Mutual Chemical Co. case was decided in the city court of the City of Baltimore, Maryland. The plaintiff, a large chemical concern, attacked the validity of the state airport zoning act on the ground that the act affected the marketability of its land adjacent to the municipal airport. The defendant demurred. On demurrer, the court held the zoning act unconstitutional as a confiscation of private property without due process of law. The court based its decision upon two grounds: (1) that there was no public interest involved, the protection afforded the airport being for the benefit of those using aerial transportation or owning airplanes; (2) that the regulation was unreasonable as applied to the plaintiff's property. It is felt that the court overlooked the public purpose of an airport and the real, tangible benefit which the general public derives from the existence of an airport within the community. The decision assumes without investigation that an airport is never in the public interest and that the restriction of building heights within its approach area is always confiscatory. The court proved the words of the late Justice Cardozo that "The dweller within the gates, even more than the stranger from afar, will pay the price of blindness."

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[30] Mutual Chemical Co. of America v. Mayor and City Council of Baltimore and State Aviation Commission of Maryland, 235 C.C.H. (1940) Av. L. Serv. 1821 (Md. CC Baltimore 1939). This case was decided in a lower Maryland court wherein an airport zoning ordinance was held invalid. See also note (1939) 10 Air L. Rev. 312 and note (1939) 10 J. Air L. 424.

[31] Ibid.


court, in the opinion of most commentators, failed to recognize a valid exercise of the police power.\textsuperscript{34} 

It has now been generally recognized that airports serve a public purpose.\textsuperscript{35} There is no doubt that twenty years ago any attempt at airport zoning would have been declared invalid as being for the benefit of flyers alone. With the increase in flying activities, the courts have declared that the construction and operation of airports are legitimate functions of the municipalities.\textsuperscript{36} Airports have been compared to harbors and public utilities.\textsuperscript{37} They are public in nature if the public is generally invited to use their facilities,\textsuperscript{38} whether publicly or privately owned.\textsuperscript{39} If the airport is used primarily by private flying clubs or other restricted clientele, it does not serve a public purpose and its approach area cannot be protected by a police power regulation because neither the public benefit nor the public health and safety are endangered. This type of airport is, however, subject to regulation as a public or private nuisance.\textsuperscript{40} 

It has also been argued that if airport zoning is not undertaken in connection with the zoning of the entire community based upon a master community plan, the community benefit cannot be shown. There is no doubt that the integration of airport zoning with community planning and zoning presents many advantages.\textsuperscript{41} For one thing, the protection of the aerial approaches to the airport could be facilitated by zoning the areas in the vicinity of the airport as residential districts, with the probable result that since industrial uses would be prohibited, land values would not increase too greatly, thereby avoiding changes in conditions which might later render a zoning ordinance valid when applied, invalid as confiscatory. The integration of the two types of zoning would clearly show that the regulation possesses a reasonable degree of permanency 

\textsuperscript{34}The decision in the Mutual Chemical Co. case has been criticized generally by those who have commented upon the case. See McIntyre and Rhyne, Airports and Airplanes and The Legal Problems They Create For The Cities, Report No. 42, National Institute of Municipal Law Officers (1939). Note (1939) 10 AIR L. REV. 312; Note (1939) 10 J. AIR L. 424. 
\textsuperscript{35}See Note (1941) 30 GEORGETOWN LAW JOURNAL 198 for a collection of cases on the public nature of airports. 
\textsuperscript{36}Hesse v. Rath, 249 N. Y. 436, 164 N. E. 342 (1928). This juridical blessing has been given not only to municipally owned airports but also the commercially owned fields which have been leased and operated by the municipalities. 
\textsuperscript{38}See (1930) 1 JOUR. AIR L. 483, 484. 
\textsuperscript{39}Removal of power lines which are a danger to the users of the airport has been permitted in Pennsylvania by an order of the Public Utilities Commission, notwithstanding the fact that the airport was privately owned. 
\textsuperscript{40}California v. Dycer Flying Service 1939 U. S. Av. R. 21 (Cal. March 31, 1939). 
\textsuperscript{41}This integration is in prospect in King County, Washington and Los Angeles County, California.
and that the community benefit is being substantially promoted by having adequate approaches to the airport.

This contention is based on the theory that a zoning ordinance for the benefit of the community must result in an average reciprocity of advantage between all the parties affected by the regulation. This average reciprocity of benefit theory was the basis of the decision in *Pennsylvania Coal Co. v. Mahon*[^42] and *Piper v. Ekern.*[^43] In both cases there were vigorous dissenting opinions, the one by the late Mr. Justice Brandeis[^44] in the *Mahon case* being remarkable in that his dissent has now become the general rule. In both cases the majority held that the regulations under attack did not protect or promote the public health, safety or morals and that there was no public interest involved because the only interests being promoted were those of private individuals. The Brandeis dissent in the *Mahon case* maintained that the average reciprocity of advantage theory did not apply where the regulation was to protect or promote the public health, safety or morals. The dissent in the *Piper case*[^45] argued that the protection of the state capitol of Wisconsin by restricting the height of buildings in the environs was for the public welfare and therefore was a legitimate exercise of the police power.

These two cases were decided at the dawn of community zoning. The courts faced by the then novel method of zoning used in regulating the orderly growth of cities, attempted to set a limit beyond which zoning became confiscatory. Some limit obviously is necessary. Otherwise every grassy estate may be zoned as a park, for the public clearly derives some advantage. But the early courts were too severe. Since that time community zoning has come to be recognized as a legitimate method for the protection and promotion of the general welfare and the average reciprocity of benefit theory has seldom if ever been the limit set in the more recent zoning cases. It is not mentioned in the *Euclid case,*[^46] which is considered the leading case on community zoning. The general test as to the validity of a community zoning regulation is not whether there is an average reciprocity of benefit between all parties affected, but whether the ordinance bears a real and substantial relation to the protection and promotion of the general welfare or benefit.

While the integration of airport zoning with community zoning presents, as stated above, many advantages it is not necessary for the validity of airport zoning.

It has been argued that airport zoning is confiscatory because the

impingement upon the use of private property is always too drastic. It is, no doubt, confiscatory in cases where the regulation deprives the owner of a substantial and probable beneficial use of his land. In all cases, the balance of conveniences must be weighed by the courts in order to determine which right shall yield. A remote and improbable use of field or pasture should yield. The owner of a valuable factory site should be compensated if the state needs it.

NATURE OF AIRPORT ZONING

There is an essential difference between airport zoning and community zoning. In the words of Bassett "zoning is the regulation by districts under the police power of the height, bulk and use of buildings, the use of land and the density of population."47 Airport zoning is the regulation under the police power of the height of structures and objects of natural growth in the vicinity of airports.48 Community zoning must be based upon the preservation of either the public health, safety, morals, convenience or welfare and must apply uniformly to all property within a use district. Any regulation adopted must bear a reasonable and substantial relationship to one, a combination, or all of the police power heads. In many cases, community zoning extends to factors which bear no relationship to the public health, safety and morals.49 The essence of community zoning is the protection of the general welfare of the community. On the other hand, airport zoning is a regulation designed not only for the community benefit and welfare, but primarily for the protection of the public health and safety.50 The purpose sought is not only the protection of the airport itself but the protection of the lives and property of the flying public and the residents living in the neighborhood of the airport. Police power does not lend itself to precise delimitation as it varies with the circumstances and conditions which arise with the growth of the population.51 Although apparently limitless in scope, the exercise of the police power must be reasonable.52 Any regulation adopted pursuant to this power must bear a real and substantial relationship to a legitimate police power purpose. There must be some logical connection between the means and the end.53 It is further circum-

47 Bassett Zoning 45 (1939).
48 This definition represents the consensus of opinion among the framers of the two model airport zoning acts.
49 Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930).
50 See The Relation of Airport Zoning to Community Planning and Zoning by John M. Hunter, Jr. of the Civil Aeronautics Administration, a paper presented at the Southwestern Planning Conference, Dallas, Texas, April 8, 1940.
52 Williams v. Chicago, 266 Ill. 267, 107 N. E. 599 (1914).
scribed by the fact that it should apply equally to all persons affected.\textsuperscript{54} The application of the police power must necessarily result in some interference with the possession and enjoyment of private or property rights.\textsuperscript{55} If the welfare of the individual conflicts with that of society, the interest of society must prevail even at the expense of the individual,\textsuperscript{56} on the theory that all property and private rights are subject to an implied condition that they shall not be used or enjoyed to the detriment of the commonweal.\textsuperscript{57} Such a restriction, if legitimate, is not a taking without due process of law.\textsuperscript{58} To what extent may a police power regulation interfere with the use of private property without compensation to the owner? The courts have said that the use restriction must be reasonable and that in some cases it may be retroactive in effect.\textsuperscript{59} What is a reasonable restraint upon the use of property cannot be defined with exactness. However, it is certain that a police power regulation designed for the protection of the public health and safety can interfere with the use of private property more than one which is designed for the protection of the general welfare only.\textsuperscript{60}

The power to protect the public health and safety from injury includes the power to regulate nuisances. One approach to airport zoning is via "nuisance". A well-drawn general zoning act never mentions the word "nuisance" because this would limit zoning regulations to matters affecting the public health, safety or morals.\textsuperscript{61} To what extent may the police power be used to prevent the creation of nuisances?\textsuperscript{62}

As has been seen, airports serve a public purpose. It follows that any nuisance affecting it is a public nuisance and the fit subject of regulation.

A public nuisance is any use of private property that is injurious or dangerous to the public health, safety or morals.\textsuperscript{63} Public nuisances generally fall into three classes: those acts which are nuisances \textit{per se} and recognized as such at common law or so defined by statute;\textsuperscript{64} those which

\textsuperscript{54}Welch v. Swasey, 214 U. S. 91 (1908).
\textsuperscript{56}Jardine v. Pasadena, 199 Cal. 64, 248 Pac. 225 (1926).
\textsuperscript{57}Miami Beach v. Texas Co., 141 Fla. 616, 194 So. 368 (1940).
\textsuperscript{59}Hadachek v. Sebastian, 239 U. S. 394 (1915).
\textsuperscript{60}Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930).
\textsuperscript{61}1 Bassett Zoning 93 (1939).
\textsuperscript{62}This paper deals only with the prospective regulation of obstructions in the airport approach area. A discussion of the validity of a retroactive police power regulation may be found in an article by John M. Hunter, Jr., "Retroactive Airport Zoning", (unpublished thesis in library of the George Washington University Law School, 1939). \textit{See also} Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930) and Note (1930) 39 Yale Law Journal 735.
\textsuperscript{63}Mugler v. Kansas, 123 U. S. 623 (1887).
\textsuperscript{64}Chicago v. Shaynin, 258 Ill. 69, 101 N. E. 224 (1913).
in their nature are not nuisances in themselves but may become so because of the locality or the manner in which used; and those which may be nuisances but over which there may be an honest difference of opinion. Statutory nuisances are subject to the balance of convenience theory. The statute does not create an irrebuttable presumption of nuisances such as is attached to common law nuisances per se. On the contrary, it is generally held that the legislature can declare as nuisances only those things which are nuisances in fact. The regulation of these statutory nuisances may be delegated to the municipalities but the latter have no power to declare an act a nuisance which was not so recognized at common law or by the legislature. Other acts which might constitute a nuisance are left to the decision of the courts.

Certain prospective property uses, which if allowed to live to fruition would create a nuisance, can be regulated in advance. If the performance of a certain act will result in a nuisance per se, no matter how carefully performed, and if the intention to perform is clearly proved and measures have already been taken leading to its performance, the courts may restrain its consummation. If the state declared that structures extending beyond a certain height within the approach areas to a public airport public nuisances, it would seem that the state could prevent the creation of the nuisance without being obliged to wait until the obstruction existed in fact before being able to act.

If certain structures or objects of natural growth were in existence prior to the establishment of the airport and in fact constituted hazards to air-navigation, the public interest in having clear approaches must be weighed against that of the landowners in the enjoyment of their property. In this type of situation if the abatement of the obstruction would result in substantial loss to the owner, compensation must be made. In the case of spite obstructions, abatement can be decreed at the owner's expense on the ground that these are both public and private nuisances erected specifically to deprive the airport owner and the public from the full enjoyment of the airport, because the motive eliminates the public interest in maintaining the property owner's rights. In the Hinman case the adjoining landowner desired to sell his land to the United Airports

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65Ibid.
66Ibid.
67Stockwell v. State, 110 Tex. 550, 221 S. W. 932 (1920).
68Ibid. v. City of Spartanburg, 148 S. C. 229, 146 S. E. 12 (1928).
69Stockwell v. State, 110 Tex. 550, 221 S. W. 932 (1920).
70Fischer v. St. Louis, 194 U. S. 361 (1904) (Prohibition of dairy business within the city limits).
71Clutter v. Blakenship, 346 Mo. 961, 144 S. W. (2d) 119 (1940).
Co. of California, the owner of the Union Air Terminal in the City of Burbank, California. This land lay in the direction of the prevailing winds, and of necessity, planes taking off or landing from or on the airport had to pass over it. Hinman offered to sell for $5,000 per acre or to rent for $21,000 per year. This offer was exorbitant and far in excess of the fair market value of the land. His offer was rejected. He then erected 10' poles along the boundary of the airport and 20' poles directly in line with the prevailing wind runway. An interlocutory decree was granted compelling him to remove these poles. He threatened to erect additional poles. On application for an injunction, the court found that the erection of the additional poles would constitute both a public and a private nuisance; public in that they interfered with transport planes thus menacing the flying public; a private nuisance in that the owner of the airport would suffer irreparable injury in the loss of business.

The court fixed zones within which the adjoining landowners could not erect objects beyond a fixed height and stated that any higher structure would be a public nuisance. This was airport zoning by judicial decree. The airport which was being protected by the court was privately owned and operated. But the court reserved the right to modify on a showing by the owner that the beneficial use of his land required higher structures. This is the difficult problem—denial of normal subsequent erection of buildings.

Airport zoning, being primarily a regulation for the public health and safety, will permit a greater interference with property rights than community zoning. Moreover, like community zoning, airport zoning promotes the general welfare of the community. It insures the benefits received by the public from air-mail, air-transportation and air-express services. The protection of the approach areas lessens the risk of crashes damaging adjoining landowners.\(^73\)

Again, the public who are attracted to the airport either as sightseers or for business purposes ought to be guarded against any crash caused by approach obstructions. To sum up, without adequately protected airports, no sound air-transportation is possible.

CONCLUSION

It would appear that the prospective zoning of the approaches to a public airport is a legitimate exercise of the police power, if reasonable. The reasonableness of the restrictions upon private property will have to be determined by weighing in each particular case the public interest in having a safe airport against the individual interest in having full beneficial use of property. There will be cases where the injury to the

\(^73\)See note 3 supra.
individually will be so great as to amount to a confiscation. In such a case, compensation should be made. The temptation to jump to conclusions by thinking of extremely harsh examples where, in fact, no police power regulation could ever be valid, should be avoided. Each case should be examined upon its merits.

LEO C. LORD
RECENT DECISIONS

ADMIRALTY—Burden of Proof in Contract of Affreightment for Private Carriage
Held to Be with Cargo Owner

Libellant filed its claim for the loss of the molasses on the barge of the respondent. By the contract of affreightment, the carrier undertook to transport the molasses by barges in New York harbor from vessels or tidewater refineries to the shipper’s customers. He agreed to provide barges which were “tight, staunch, strong, and in every way fitted for the carriage of molasses. . . .” The “T. N. No. 73” was a steel tank barge with four cargo tanks, two forward and two aft. The customary method of loading the barge was to pump the molasses into the forward tanks until the barge had a specified freeboard, then into the stern tanks until the stern had another specified freeboard, then back into the forward tanks until the barge was trimmed fore and aft. In the present case, that procedure was followed. When the desired freeboard in the stern had been reached, the mate went forward to open the valves which connect the forward and aft tanks, in order that the vessel might be trimmed. He stopped for a short time to converse with someone on the boat alongside, and before he could open the valves, the barge sank by the stern in smooth water and through no contact with another vessel. The shipper introduced no evidence that the vessel was unseaworthy, whereas the carrier had a representative of the cargo interests, a diver who examined the barge while it was on the bottom, and others who examined her condition after she had been raised to testify to her seaworthiness. Held, the respondent is a private carrier, hence, the burden of proving a breach of warranty of seaworthiness is on the owner of the cargo. When his inference of seaworthiness is balanced by evidence, leaving the result in doubt, the carrier succeeds. Commercial Molasses Corp. v. New York Tank Barge Corp., 62 Sup. Ct. 156 (1941).

The principal question was the burden of proving unseaworthiness. The burden of proof in admiralty cases involving private carriers, as in law, is always with the party who offers an affirmative fact in support of his case; but where such party has proved his case by a preponderance of evidence, the burden of proceeding rests with his adversary. Hupper v. Hyde, 296 Fed. 862 (C. C. A. 5th, 1924); The Smith Terry No. 1, 34 F. (2d) 570 (S. D. Fla. 1923). The court held that the distinction has long been drawn between a private and common carrier. When the owner of the vessel gives to the charterer the full capacity of the vessel, the owner is not a common carrier, but a bailee to transport as a private carrier for hire. Private carriers are not subject to the exceptional or extraordinary duties and liabilities of the common carrier. As such they are bound merely to use ordinary care. The Nordhvalen, 6 F. (2d) 883 (1925); The Lyra, 255 Fed. 667 (C. C. A. 9th, 1919); The C. R. Shefer, 249 Fed. 600 (C. C. A. 2d, 1918); The Fri, 154 Fed. 333 (C. C. A. 2d, 1907). Common carriers by water, however, like common carriers by land, are in the nature of insurers of the cargo they are carrying, and are liable for every loss or damage, unless the damage is the result of an act of God or a public enemy, an act of the shipper, or from some other cause or accident expressly excepted in the bill of lading. Gardner v. Dantzler Lumber & Export Co., 98 F. (2d) 478 (C. C. A. 5th, 1938); Pacific Coast Steamship Company v. Bancroft-Whitney Co., 94 Fed. 180 (C. C. A. 9th, 1899).

In general, in the case of the common carrier, the burden rests on the carrier to bring himself within any exception relieving him from the liability otherwise imposed by law. In Schnell v. The Vallescura, 293 U. S. 296, 304 (1934), the court stated,
"The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence the law casts upon him the burden of the loss which he cannot explain or explaining, bring within the exceptional case in which he is relieved from liability." The same principle is stated in *The Edwin I. Morrison*, 153 U. S. 199 (1894); *The Northern Belle*, 9 Wall. 526 (U. S. 1869).

In a contract for private carriage, the mere fact of the sinking of the vessel does not throw upon its owner, as it would with a common carrier, the burden of proving she was seaworthy. The distinction between the duty of a private carrier or bailee to explain as far as possible a loss of goods intrusted to its care and the ultimate burden of proof can be seen in *Robert A. Munroe Co. v. Chesapeake Lighterage & Towing Co.*, 283 Fed. 526, 528 (D. Md. 1922), "One who . . . has charge of another's gear does not insure its safety; but he is bound to do all he can to throw light on the reason why he was not able to return that which was committed to his keeping. . . . It is true that after all of the discoverable facts are in evidence, the burden rests Upon the bailor to show by a fair preponderance of the evidence that the loss was the result of the lack of due care upon the part of the bailee." Therefore, if there is no preponderance of evidence, and the matter still remains in doubt after the carrier has disclosed all facts peculiarly within his knowledge the loss falls on the bailor since he has failed to sustain the burden of proof. *Southern Ry. v. Prescott*, 240 U. S. 632 (1916); *The Nordwalen*, supra; *Kohlsaat v. Parkensburg & Marietta Sand Co.*, 266 Fed. 283 (C. C. A. 4th, 1920); *The Lyra*, supra; *The C. R. Shaffer*, supra.

In the case of loss or damage, the bailor has a *prima facie* case if he shows that such loss or damage occurred while the subject of the bailment was in the exclusive custody and control of the bailee. *Delaware Dredging Co. v. Graham*, 43 F. (2d) 852 (D. C. E. D. Pa. 1930). A presumption of unseaworthiness arises and will alone sustain recovery in a case where a vessel sinks from an unknown cause under circumstances where she has been subjected to no external peril, and where nothing but her unseaworthiness can explain the accident. *The Transit*, 250 Fed. 71 (C. C. A. 3d, 1918). But this showing merely imposes upon the bailee the duty of going forward with the evidence. It does not constitute evidence of unseaworthiness. When the bailee accepts this duty and shows how the loss occurred, or that the vessel was seaworthy, the force and effect of the *prima facie* case disappears. Then unless it affirmatively appears from the evidence so produced that the loss was due to unseaworthiness, the burden reverts to the bailor and it becomes necessary for him to produce evidence of unseaworthiness. Otherwise his case must fail. *Delaware Dredging Co. v. Graham*, supra.

In this case, it seems that the shipper has failed in his burden of proof, and, hence, must fail. Four members of the court felt that in distinguishing between a common and a private carrier the case would be turning on a "technical nicety" of the common law. The shipper's difficulties of proof are the same in either case but the distinction has been made. As a result, the carrier, who has the care of the goods as well as the care of the boat, and who should, in the opinion of the dissenting justices, have the burden of proving seaworthiness, is relieved of his duty. The duty is placed on the shipper. Here, the latter sustained his duty by his inference of unseaworthiness, no other cause for the sinking appearing. The result was that the burden of going forward shifted to the carrier to introduce evidence to prove the boat was seaworthy. He did this by introducing the testimony of experts, an
CONSTITUTIONAL LAW—California "Okie" Law Violative of Commerce Clause

The issue involved is the constitutionality of California's "Okie law," Cal. Welfare and Institutions Code (Deering, 1937) § 2615 which provides: "Every person, firm or corporation, or officer or agent thereof that brings or assists in bringing into the State any indigent person who is not a resident of the State, knowing him to be an indigent person, is guilty of a misdemeanor." Defendant was arrested for bringing into the state one Duncan, a citizen of Texas. The state contends that due to the great influx of indigent persons into the state with the resulting social problem and financial burden thus imposed upon its own citizens, the statute is a valid exercise of the police power. Held, Section 2615 violates U. S. Const. Art. I, § 8. The majority considered the statute an unlawful interference with interstate commerce. The minority, however, contended that the statute violates the "privileges and immunities" guaranteed by U. S. Const. Amend. XIV, § 1. Edwards v. California, 62 Sup. Ct. 164 (1941).

That transportation of persons across state lines is interstate commerce has long been established. Hoke v. U. S., 227 U. S. 308 (1912) (transportation of women for immoral purposes); Gloucester Ferry Co. v. Penn, 114 U. S. 196 (1884) (transportation of persons by boat across); Seadlund v. United States, 97 F. (2d) 742 (C. C. A. 7th, 1938) (transportation of persons against their will.) It is immaterial whether the purpose of transportation is commercial. Gooch v. United States, 297 U. S. 124 (1936); Caminetti v. United States, 242 U. S. 470 (1917). That this statute seeks to regulate interstate commerce (transportation of persons) there is little doubt. Such regulation, however, is not always invalid. In some instances the state and the federal government have concurrent jurisdiction over interstate commerce and until Congress acts State control is not precluded. Cordwell v. American Bridge Co., 113 U. S. 205 (1884) (construction of dams and bridges across the navigable waters of a state); Cooley v. Board of Wardens, 12 How. 299 (U. S. 1851) (regulation of pilots); Gibbons v. Ogden, 9 Wheat. 1 (U. S. 1824) (quarantine and inspection laws). In all cases of concurrent jurisdiction, action by Congress necessarily supersedes that of the state. Covington Bridge Co. v. Kentucky, 154 U. S. 204 (1893). The exclusive jurisdiction of Congress is found where the subject matter is national rather than local in character. Mayor of Vidalia v. McNeely, 274 U. S. 676 (1927) (town regulation requiring a license to run an interstate ferry); Kuykendall v. Bund, 267 U. S. 307 (1925) (state regulation tending to restrict the number of common carriers); Penn v. West Virginia, 262 U. S. 553 (1923) (state statute preventing the sale of natural gases to out of state consumers before the local needs had been supplied). Failure to legislate in such cases is equivalent to a declaration that such interstate commerce shall be free and untrammelled. Minnesota Rate Cases, 230 U. S. 352 (1913); Robbins v. Shelby County, 120 U. S. 489 (1881); Wilton v. Missouri, 91 U. S. 275 (1875). "A state statute which, by its necessary operation directly interferes with or burdens such commerce is a prohibited regulation and invalid regardless of the purpose with which it was enacted." Shafer v. Farmer's Grain Co., 268 U. S. 189, 199 (1925). The national character
of transportation of persons restricted by this California statute, as well as the retaliation to be expected from other states, points to an intrusion by the state into the field of exclusive federal jurisdiction.

In rare cases the police power of a state has been validly invoked to regulate interstate commerce where such measures have been necessary to protect the people from a pestilence either physical or moral. *M.K.T. Ry. v. Haber*, 169 U. S. 613 (1897) (diseased cattle); *Plumley v. Massachusetts*, 155 U. S. 461 (1893) (oleomargarine); *City of New York v. Miln*, 11 Pet. 103 (U. S. 1837) (pestilence of any type). There are *dicta* in these cases that poverty is in the same category, but to call poverty a pestilence of this type is a misnomer and destructive of the primary precepts of democracy.

Without denying that the statute violated the commerce clause, the minority based its decision on infringement of the privileges and immunities guaranteed by the Fourteenth Amendment. The privileges and immunities thus protected arise from *national* citizenship. *Slaughter House Cases*, 16 Wall. 36 (U. S. 1872). A general classification of them has never been made, the Supreme Court preferring to decide each case as it arises. In *Crandall v. Nevada*, 6 Wall. 35 (U. S. 1867), a state statute taxing passengers traveling through the state by common carrier was declared unconstitutional as depriving a person of the right to move freely throughout the nation. A partial enumeration of the rights of national citizenship was given in *Towリング v. New Jersey*, 211 U. S. 78 (1908). Among these was "the right to pass freely from state to state."

This right was protected by the Federal Constitution many years before the Fourteenth Amendment was passed. Art. IV, § 2 had been interpreted as guaranteeing to a *state* citizen the right of free transit among the several states. *Ward v. Maryland*, 12 Wall. 418 (U. S. 1870); *Paul v. Virginia*, 8 Wall. 168 (U. S. 1868); *Corfield v. Coryell*, Fed. Cas. No. 3230 (C. C. E. D. Pa. 1823). In such an interpretation, Art. IV, § 2 was declared to state by implication what was expressly provided in Article IV of the Articles of Confederation. The Fourteenth Amendment enlarged on this right only to the extent that it made free transit among the several states a privilege of *national* citizenship, whereas Art. IV, § 2 was protective only of *state* citizens. *Slaughter Houses Cases*, supra.

That transportation of persons is interstate commerce (the majority reasoning) and that the right of free movement among the states is a privilege and immunity protected by both Art. IV, § 2 and the Fourteenth Amendment (the minority reasoning) both rest upon strong constitutional precedent. A close scrutiny of the facts is required to choose the more applicable. The statute in question does not prohibit the entrance of paupers into the state. It is made a misdemeanor to bring or assist in bringing into the state an indigent non-citizen of California. The statute by its words is pointed directly at the transportation of persons in interstate commerce and interstate commerce of a type over which Congress has exclusive jurisdiction. The transportation of another has never been considered a privilege and immunity. The popular conception of the statute should not be more controlling than the words of the statute themselves. No doubt the effect of the statute is to deprive indigent persons of the means of transportation into California. To that extent it invades freedom of movement. However, there is no valid reason for thus going outside the statute to attack its constitutionality when its invalidity is apparent on its very face. "The court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." (Opinion of *Brandeis, J., concurring in part, Tennessee Valley Authority v. Ashwander*, 297 U. S. 288, 341, at 375 (1936)).

EUGENE E. KLECAN, JR.
CONSTITUTIONAL LAW—Travel Bureaus Not Susceptible to Regulation Under Police Power

Relator operated a travel bureau in Texas. His business is bringing together two travel-minded persons with a common destination in order that they might share the expenses of the trip. When the prospective travellers contact each other his services are ended. For this service he is paid a small fee by the passenger. He has nothing to do with their agreement, nor does he make any guarantees or representations regarding the course or conduct of the trip. Relator is held under a warrant charging him with violation of a statute regulating travel bureau agents. Tex. Stat. (Vernon, 1936) art. 911e. The statute requires the travel agent to take out a license from the Railroad Commission of Texas. It requires him to furnish a bond of $1,000 and authorizes a suit for damages for any negligence, violation of any condition of his license, or failure to perform any duty imposed by the statute and provides for recovery upon the bond. The Act further provides that the license may be cancelled for violation of the statute or any other statute of the state, or of any rule or regulation promulgated by the Railroad Commission. Relator sued out a writ of habeas corpus which was heard. He was remanded to custody. On appeal, held, the travel bureau business is an innocent one and not susceptible to an exercise of the police power. Ex parte Garland, 154 S. W. (2d) 834 (Tex. 1941).

The regulation of the travel agent sought by the present statute is not newly attempted legislation in Texas. The legislature's first attempt was frustrated by the courts in 1934. Ex parte Martin, 127 Tex. Cr. R. 25, 74 S. W. (2d) 1017 (1934). Again in 1935 the legislature enacted a similar statute, and again the courts declared it unconstitutional. Ex parte Talkington, 132 Tex. Cr. R. 36, 104 S. W. (2d) 495 (1937). The reasoning of the court in these cases was relied on by the court in the instant case.

A similar statute was brought before the Supreme Court of Tennessee to test its constitutionality. There the court asserted that the travel agent business is inherently wrong, and dangerous to the property rights of the people, and is therefore within the police power of the legislature. The court in effect held that since the legislature might prohibit such occupations, they might enact prohibitive restrictions. Bowen v. Hannah, 167 Tenn. 451, 71 S. W. (2d) 672 (1934). In the instant case, the court concluded that the travel agent business is essentially a private matter and is an innocent one in that it merely brings the parties together to enter into a private contract in an open-eyed manner, and therefore is not susceptible to an exercise of the police power. Thus it is seen that these two courts decided their respective cases on the basis of the reasonable necessity for such enactment.

It is fundamental that if a business becomes prejudicial to the welfare of the community, society has the right to protect itself against such injurious consequences. Mugler v. Kansas, 123 U. S. 623 (1887). This is accomplished through the police power. The courts have recognized that this power, which is that of the sovereign to protect and promote the general welfare, is inherent in government and is the fountainhead of laws aimed at the promotion of the order, morals, and general welfare of society within the limits of the Constitution. License Cases, 5 How. 504, 583 (U. S. 1843); see Note, MAURER, CASES ON CONSTITUTIONAL LAW (1941) 573. But it is equally fundamental that the Fourteenth Amendment of the Federal Constitution guarantees to every citizen freedom from the abridgment of his privileges and immunities as a citizen, and forbids the taking of his property without due process of law. The liberty thus guaranteed means, among other things, the right to pursue any lawful business. Adams v. Tanner, 244 U. S. 590 (1917); Smith v. Texas, 233 U. S. 630 (1914). The police power may be exercised in the form of
state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public safety, health, morals, or some other phase of the general welfare. *Liggett Co. v. Baldridge*, 278 U. S. 105, 111 (1928); *Maurer*, loc. cit. *supra*. However, the legislature, under the pretended exercise of what may be deemed its police power, may not interfere unreasonably with or prohibit a lawful and useful occupation or business. A business may be prohibited only if the business either of itself or as conducted is injurious to persons or property, or to the public morals, safety, comfort, health or convenience. *Jay Burns Baking Co. v. Bryan*, 264 U. S. 504 (1923); *Frost v. City of Los Angeles*, 181 Cal. 22, 183 Pac. 342 (1919). As a practical matter, virtual prohibition has often been achieved within constitutional limits by use of heavy taxation. *Cf. Note* (1941) 30 *GEORGETOWN LAW JOURNAL* 83.

The Supreme Court approved the states' use of the police power to regulate business more than fifty years ago, but restricted the scope of the power to those businesses "affected with a public interest." *Munn v. Illinois*, 94 U. S. 113 (1877). This limitation became crystallized by several cases in the early part of this century. *New State Ice Co. v. Liebmann*, 285 U. S. 262 (1931); *Ribnik v. McBride*, 277 U. S. 350 (1928); *Wolff Packing Co. v. Court of Industrial Relations*, 273 U. S. 350 (1926); *Tyson v. Banton*, 273 U. S. 418 (1926). This "closed category" test was rejected by the Supreme Court in *Nebbia v. New York*, 291 U. S. 502 (1934). Nevertheless, even after the *Nebbia case*, some courts persisted in applying the "closed category" test. *People v. Redfield*, 366 Ill. 562, 10 N. E. (2d) 341 (1937); *State v. Kinney*, 138 Neb. 534, 293 N. W. 393 (1940), (1940) 29 *THE GEORGETOWN LAW JOURNAL* 110. Finally, in *Olsen v. Nebraska*, 61 Sup. Ct. 862 (1941), the Supreme Court reaffirmed the *Nebbia case* as the leading authority for all public interest problems which may arise. In the *Nebbia case* the Supreme Court posed the broad test that the circumstances of each case will determine whether it is the proper subject for an exercise of the police power. Justice Stone dissenting in the *Ribnik case* stated that the public interest was not the use to which the business was put, but rather its effect upon the welfare of the public; his dissent was accepted by Justice Roberts in the *Nebbia case*. Thus it seems that the actual conditions prevailing in a business will be a strong determinant of the validity of the attempted regulation of that business.

The view that the reasonable necessity for regulation as shown by the conditions prevailing in the business is a strong determinant of the validity of the regulation achieved noteworthy prominence by a decision of the Supreme Court just after the *Nebbia case*. *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194 (1934). That the legislature being familiar with local conditions is, primarily, the judge of the necessity of such regulations has long been established. *McLean v. Arkansas*, 211 U. S. 539, 547 (1909); *Mugler v. Kansas*, *supra*. When the legislative action "is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge, or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary." *Farm Products Co. v. Baldwin*, *supra* at 209; *Pacific States Box & Basket Co. v. White*, 296 U. S. 159 (1935).

In the instant case, as in *Bowen v. Hannah*, *supra*, the court considered the validity of the statute as dependent upon the factual basis demonstrating the need for legislative action. The court in *Bowen v. Hannah*, *supra*, accepted the declaration of the legislature concerning the need for regulation; in the instant case the court rejected the legislative declaration. Exercising its judicial prerogative, the court discussed the occupation and gave its reasons for concluding that the statute
attempts to prohibit (e. g. bond requirement) under a guise of regulation, an occupation innocent in itself, and which works no harm to the public.

An extension of the police power to regulate a business not previously connected with the public welfare is not to be accepted without circumspection. It is well to remember that the police power extends only so far as the public interest is concerned. The careless acceptance of legislation as an infallible assertion defining the sphere of public interest will tend to become dangerous to private rights. The Texas court's refusal to uphold this statute after three legislative attempts exemplifies a needed vigilance on the part of the judiciary.

PAUL R. DEAN

CONTEMPT—Bitter Newspaper Criticisms of Pending Court Action Protected by Fourteenth Amendment

Harry Bridges, the Times-Mirror Co., and the managing editor of the Los Angeles Times were found guilty and fined for contempt by the Superior Court of Los Angeles. The case against the newspaper grew out of several editorials concerning cases decided or then pending in the Superior Court. The most serious was one entitled "Probation for Gorillas?" It recommended that two men, found guilty of assault in a labor dispute, be denied probation and be assigned to the "jute mill." Bridges was held because of his telegram to the Secretary of Labor concerning a decision handed down by the Superior Court in a case where he personally was not involved, but against the C.I.O., of which he was a leader. The telegram, which Bridges caused to be published in the papers on the Pacific coast, said the decision was "outrageous", that the entire Pacific coast would be tied up in a strike if the decision was enforced, and that the "International Longshoremen-Warehouse Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow State courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board." On appeal to the Supreme Court of California the decision of the Superior Court was affirmed. The case was appealed to the Supreme Court of the United States, which handed down one decision for the two cases. Held, the contempt citations on the facts of the two cases were an abridgement of the freedom of speech and press guaranteed by the first and fourteenth amendments of the Constitution. Bridges v. California; Times-Mirror Co. v. Superior Court of Los Angeles, 62 Sup. Ct. 190 (1941).

This decision, while it holds only that in these two specific cases there was a violation of free speech and free press, in effect holds that contempt by publication is outlawed. The court finds the English rule on such contempt cases very shaky and that "history affords no support for the contention that the criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case." Bridges v. Superior Court, supra, at 196.

It may well be that the foundation of the power in England is clouded, and that King v. Almon (unreported 1765), was not a valid precedent. Fox, Contempt of Court (1927) 207. But the Huggonson case, 2 Atk. 469 (1742) would seem to refute this. Also, there is the statement in 1788 in an American case of summary contempt proceedings for publication "... not only my brethren and myself, but, likewise, all the judges of England, think, that without this power no court could possibly exist, ..." Respublica v. Oswald, 1 Dallas 319 at 326 (1788); Nelles and
King, Contempt by Publication (1928) 28 Col. L. J. 431. At any rate, regardless of the foundation, this power is as well established in England now and for the past 125 years as any in English law. See cases Sullivan, Contempt by Publication (3d ed. 1941) § II.

In America, even as the newborn state wavered between the Confederation and the final ratification of the Constitution, the principle found affirmation. Respublica v. Oswald, supra. Oswald was defendant in a libel suit and had caused to be published in his paper, the Independent Gazetteer, a story that since the libel suit was being prosecuted under the influence of Dr. Rush, whose brother was one of the judges of the court, he would be unable to get a fair and impartial trial. The court in a summary contempt proceeding found that these statements tended "to corrupt the source, and to dishonour, the administration of justice."

To reenforce this common law concept Congress in the first year of its existence included this power in its formation of the Federal judiciary, Judiciary Act of 1789, § 17, 1 Stat. 73, and was used by the court in a number of early cases. United States v. Hudson, 7 Cranch 32 (U. S. 1812); Ex parte Kearney, 7 Wheat. 38 (U. S. 1822). As any power may be, this one found abuse by enlargement of the common law in the famous Lawless case. (U. S. D. C. Mo., 1826.) The abuse by Judge Peck, because of publications made by Lawless, led to his trial for impeachment by the Senate. Stansberry, Trial of James H. Peck (1833). Although Peck was acquitted, the injustice of his action so aroused Congress that they proceeded immediately to change the contempt clause, to limit it to misbehaviour in the presence of the court or so near thereto as to obstruct the administration of justice. 4 Stat. 487 (1831), 28 U. S. C. § 385 (1934). But even in the temper of the injustice and indignation, Congress did not specifically outlaw contempt by publication—but it was done, rather, by judicial interpretation. Nye v. United States, 313 U. S. 33 (1941).

The cases which arose during the years after the passage of this act were mostly from the State courts, and the finding was that the state had this power. See Justice Frankfurter’s dissenting opinion in the principal case. Sullivan, Contempt by Publication, supra § I. In Patterson v. Colorado, 205 U. S. 454 (1907), Justice Holmes says, "What constitutes contempt, as well as the time during which it may be committed, is a matter of local law." For a review of contempt cases in California see (1939) 28 Georgetown Law Journal 840. In the federal courts the power reached its highest point in Toledo Newspaper Co. v. United States, 247 U. S. 402 (1917), where publications of a nature similar to the present case, though not so explicit, were held to be contempt not in violation of free speech or press. "It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints that separate right from wrongdoing." Toledo Newspaper Co. v. United States, at 419, 420. From the time of its decision until 1941 the Toledo case was followed in the Supreme Court. Craig v. Hecht, 263 U. S. 255 (1923); Francis v. People, 11 F. (2d) 860 (C. C. A. 3d, 1926); cert. denied Francis v. Williams, 273 U. S. 693 (1926). Compare Mr. Bridges’ statement: "The I.L.W.U. does not intend to allow the State courts to override the majority vote of its members in choosing its officers and representatives. . . . and the old rule "a publication . . . calculated and intended to destroy its function as a department of government . . . is neither a privilege nor a right accorded by law." Francis v. People, supra, at 865.

But, as has been noted, the Toledo Newspaper case, supra, and the chain of cases leading up to it as well as those following, were overruled by the Court in Nye v. United States, supra. The 110 year old interpretation, set out in the Toledo case,
of a "reasonable tendency" to obstruct the administration of justice was overturned and the construction of "geographical nearness" to obstruct was substituted. "Trial by newspaper" was sanctioned in the federal courts.

It should be pointed out, however, that the instant case has not limited the state courts to the test of geographical nearness and the facts in the Nye case, which the court admitted caused a serious obstruction and delay to the administration of justice, Nye v. United States, 313 U. S. at 54, could yet be found by the state courts to be contempt. The fact situation in the Nye case was not at all similar to the one in this case. The Nye case involved a question of the power of the federal courts to punish summarily for contempt in the face of the statutory provisions of the Judiciary Act of 1831, supra; the Bridges case involves a question of determining what is contempt in relation to the Federal Constitution. This distinction is best brought out in the light of Justice Frankfurter's dissenting opinion, holding that the determination of what constitutes contempt is a matter for the state courts to define for themselves. The jettisoning of the Toledo case, however, met with Justice Frankfurter's complete approval. See Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts (1924) 37 Harv. L. R. 1010, cited in Nye v. United States, 313 U. S. at 47.

That the extent to which contempt proceedings violate free speech is within the power of the Supreme Court to determine, is clear. That within these constitutional limits it is within the power of the state to determine contempt in its courts is admitted by the Court. Before this case, the Court had found previous restraints on the liberties of speech or press to be allowed where there was "a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree," Schenck v. United States, 249 U. S. 47, at 52 (1919) (italics supplied). Using this statement and the cases following it, which held that the evil must be substantial, Whitney v. California, 274 U. S. 357 (1926), and that minor matters of public inconvenience and annoyance are not substantive evils, Schneider v. State, 308 U. S. 147 (1939), the court has now indicated that the proximity and degree required must be extremely high before these liberties may be curtailed. The only check now left, it would seem, on "trial by newspapers" is the common law action of libel.

HARRY L. KUCHINS, JR.

CRIMINAL LAW—Reckless Homicide—Sufficiency of Indictment Charging in Language of Statute.

Defendant was charged with reckless homicide under the Indiana reckless homicide statute (Ind. Stat. Ann. (Baldwin's Supp. 1939) § 11189-62), providing that "Any person who drives a vehicle with reckless disregard for the safety of others and thereby causes the death of another person shall be guilty of the offense of reckless homicide." The affidavit charged that the defendant drove an automobile on a public highway with reckless disregard for the safety of others by operating it at a time when his vision was obscured by ice and frost on the windshield, resulting in the defendant's driving against another person on the highway and causing his death. Defendant moved to quash the affidavit on the ground, among others, that the offense charged was not stated with sufficient certainty. Held, motion granted. The affidavit is bad because it fails to state the offense charged with sufficient certainty. State v. Beckman, 37 N. E. (2d) 531 (Ind. 1941).

To reach its decision, it was first necessary for the court to find that the words
reckless disregard for the safety of others,” as used in the statute, were sufficiently definite to apprise the defendant, with reasonable certainty, of the act which the statute prohibited. Booth v. State, 179 Ind. 405, 100 N. E. 563 (1913), aff’d, 237 U. S. 391 (1915). This the Court did by referring to the use of the term “unlawful act” in the local statute defining involuntary manslaughter (Ind. Stat. Ann. (Baldwin’s Supp. 1934) § 2408) which followed the common law definition of that crime, and by holding that by construction of that statute the words “reckless disregard for the safety of others” as used in the reckless homicide statute, were at least as specific as “unlawful act” in the statute defining involuntary manslaughter. See, Armstrong v. Binzer, 102 Ind. App. 497, 199 N. E. 863 (1936); Minardo v. State, 204 Ind. 422, 183 N. E. 548 (1933); Smith v. State, 186 Ind. 252, 115 N. E. 943 (1917); State v. Dorsey, 118 Ind. 167, 20 N. E. 777 (1889).

Decisions sustaining statutes as sufficiently definite usually rest upon the conclusion that they employ words or phrases having a technical or other special meaning, well enough known to enable those within their reach to apply them correctly, or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ. The rule was first articulated in Connally v. General Construction Co., 269 U. S. 385 (1926). See also Neblett v. Carpenter 305 U. S. 297 (1938); United States v. Shreveport Grain & Elevator Co., 287 U. S. 77 (1932); Hygrade Provision Co. v. Sherman, 266 U. S. 497 (1925); United States v. Henderson, 121 F. (2d) 75, 73 App. D. C. 369 (1941); People v. Smith, 36 Cal. App. (2d) 748, 92 P. (2d) 1039 (1939); People v. Green, 368 Ill. 242, 13 N. E. (2d) 278 (1938); People v. Gardner, 255 App. Div. 683, 8 N. Y. S. (2d) 917 (1939); State v. Schaeffer, 96 Ohio St. 215, 117 N. E. 220 (1917). The objection to generality of the terms used in such statutes was answered by the United States Supreme Court in Nash v. United States, 229 U. S. 373, 377 (1913): “... the law is full of instances where a man’s fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.”

Reference to the common law definition of manslaughter, which the Court found it necessary to make in the instant case in order to uphold the statute, also led it to the holding that the affidavit charging in the language of the statute was not sufficient. The Court said, “Involuntary manslaughter does not belong to that class of crimes that may be charged in the language of the statute. When the affidavit or indictment is based upon the commission of an act which is unlawful because it is negligent, the allegation must allege facts by which it is made to appear that the act was done wantonly or with reckless disregard for the safety of others.” 37 N. E. (2d) at 534.

As a general rule, an information or indictment drawn in the language of the statute will be sufficient without more, if the language of the statute apprises the accused, with reasonable certainty, of the nature of the accusation against him. Ledbetter v. United States, 170 U. S. 606, 609-612 (1898); Potter v. United States, 155 U. S. 438, 444 (1894); United States v. Simmons, 96 U. S. 360, 362 (1877); Capone v. United States, 56 F. (2d) 927 (C. C. A. 7th, 1932), cert. denied, 286 U. S. 553 (1932); Chesevoir v. District of Columbia, 29 F. (2d) 798 (App. D. C. 1928). The purpose of this requirement is to insure both that the accused will be able properly to prepare his defense, and that thereafter he will be able to plead the judgment in the case as a bar to a subsequent prosecution for the same offense. United States v. Henderson, supra at 78. See also, United States v. American Medical Ass’n, 110 F. (2d) 703, 72 App. D. C. 12 (1941); Beard v. United States, 82 F. (2d) 837, 65 App. D. C. 231 (1936), cert. denied, 298 U. S. 655 (1936).

The authorities are clearly divided on the question whether, in a prosecution for manslaughter under a statute making it unlawful to operate a vehicle on a public
highway in a reckless manner, it is sufficient to charge the offense in the language of the statute. The majority seems to hold that it is sufficient to do so, and that it is not necessary to allege specifically the unlawful or negligent acts committed by the accused. *United States v. Henderson,* supra; *Story v. United States,* 16 F. (2d) 342, 57 App. D. C. 3 (1926), cert. denied, 274 U. S. 739 (1927); *Holt v. State,* 26 Ala. App. 223, 157 So. 449 (1934); *Gutierrez v. State,* 44 Ariz. 114, 34 P. (2d) 395 (1934); *Sallas v. State,* 98 Fla. 464, 124 So. 27 (1929); *People v. Wallage,* 353 Ill. 95, 186 N. E. 540 (1933); *State v. Porter,* 176 La. 467, 146 So. 465 (1933); *Williams v. State,* 161 Miss. 406, 137 So. 106 (1931); *State v. Schueffler,* 285 S. W. 419 (Mo. 1926); *State v. Gondeiro,* 82 Mont. 530, 268 Pac. 107 (1928); *Schultz v. State,* 89 Neb. 34, 130 N. W. 972 (1911); *State v. Welford,* 29 R. I. 450, 72 Atl. 396 (1909); *State v. Randall,* 107 Wash. 695, 182 Pac. 575 (1919). Thus, in *State v. Gee,* 48 Idaho 688, 284 Pac. 845 (1930), a prosecution for manslaughter, it was charged that the defendant did wilfully, unlawfully and feloniously kill the deceased, "all of which is contrary to the form, force and effect of the statute in such case made and provided. . . ." It was held that the defendant was not deprived of any substantial right by being required to plead to the information, and that it was not subject to the objection that, since the offense charged was involuntary manslaughter, and the state was relying on certain acts of negligence and violations of the laws and rules of the road, it was necessary to set forth these acts as the manner and means of the commission of the homicide.

On the other hand, another line of cases takes the view that where the act is wrongful because it is negligent, it is not sufficient to charge the offense in the language of the statute, but that the facts constituting the negligence must be set forth. *Kimmel v. State,* 198 Ind. 444, 154 N. E. 16 (1926); *People v. Maki,* 245 Mich. 455, 233 N. W. 70 (1929); *People v. Townsend,* 214 Mich. 267, 183 N. W. 177, 179 (1921); *Bradford v. State,* 166 Miss. 296, 146 So. 635 (1933); *Vaughn v. State,* 42 Okla. Crim. Rep. 376, 276 Pac. 701 (1929). As the Michigan Court said in *People v. Townsend,* supra at 273: "The distinction between involuntary manslaughter committed while perpetrating an unlawful act not amounting to a felony, and the offense arising out of some negligence or fault in doing a lawful act in a grossly negligent manner and from which death results, must be kept in mind upon the question of pleading. In the former case it is sufficient to allege the unlawful act with sufficient particularity to identify it, and then to charge that as a consequence the defendant caused the death of the deceased, and there is no need to aver in detail the specific acts of the accused; but in the case of manslaughter committed through gross or culpable negligence while doing a lawful act the duty which was neglected or improperly performed must be charged, as well as the acts of the accused constituting failure to perform or improper performance." Thus in *People v. Butler,* 133 Misc. 658, 233 N. Y. Supp. 656 (Co. Ct. 1929), an indictment for second degree manslaughter charged that the defendants "drove, operated, guided, governed and controlled" an automobile with "such gross and culpable negligence" that it was propelled and driven "with great force and at a great speed," and struck, ran over and killed a third person. It was held that the allegation of "gross and culpable negligence" was a sweeping conclusion of law or fact, and was not sufficiently reduced to particulars by the further allegation that the defendants drove and operated their automobile "with great force and at a great speed. . . ."

The diversity between these two lines of authority would seem to be the result of the desire on the one hand to cling to the technical requirements of the common law, and on the other to take a liberal, rather than a technical, view, when judging the sufficiency of an indictment or information. The holding of the minority
is grounded solely on the principle that where the wrongful act was not malicious, the facts constituting that act must be set forth specifically. It would seem that, so long as sufficient facts are alleged to enable the accused to identify the offense and to plead the judgment in the case as a bar to a subsequent prosecution for the same offense, it would make little difference whether the offense was committed with or without malice.

JOHN R. HIGGINS

FEDERAL RULES OF CIVIL PROCEDURE—Diversity of Citizenship As to Third Party Defendant Will Not Supply Federal Jurisdiction Otherwise Wanting

For damages sustained in an auto collision in Pennsylvania, action was brought in the federal court for the Western District of New York. Both parties were residents of that district. The court granted defendant’s motion to bring in as third-party defendant a resident of Pennsylvania who appeared specially and moved to quash service for lack of jurisdiction. Held, motion granted. The court’s order which provided for bringing in the third-party defendant did not comply with Rule 4 (e) requiring the court to prescribe the circumstances and manner for service of summons. Even though diversity of citizenship existed as to the third-party claim, the ancillary claim could not supply a ground of federal jurisdiction where there was none in the main proceeding. O’Brien v. Richtarsic, 2 F. R. D. 42 (W. D. N. Y. 1941).

The court mentioned the ambiguity of Rules 4 (d) (7) and Rule 4 (e). However, the apparent ambiguity has to some extent been resolved. Rule 4 (d) (7) provides that personal service of process is sufficient if made in the manner prescribed by a federal statute or according to the law of the state where made. This rule refers to cases in which the person to be served is within the district and the court unquestionably has both jurisdiction and proper venue. 1 Moore, Federal Practice 339. For practical application see Clancy v. Balacier, 27 F. Supp. 867 (S. D. N. Y. 1939). Rule 4 (e) provides that service of summons upon a party not a resident of or found within the state in which the court is held, shall be made under the circumstances and in the manner prescribed by an order of court or a federal statute. This rule relates to cases which arise under federal statutes such as 36 Stat. 1102 (1911), 28 U. S. C. § 118 (1934) (in rem actions), and 40 Stat. 544 (1918), 8 U. S. C. § 405 (1934) (cancellation of naturalization certificates). See Moore op. cit. supra, 289, 339; Hughes, Federal Practice (1931) 178-199. The effect of the two rules is further limited or extended, as the case may be, by Rule 4(f). This rule provides that service of process is effective throughout the state in which the district court is located, but that service outside the state is effective only when a federal statute so provides. Rule 4 (e) simply requires that when there is such statute, service of process must be in accordance with its terms. When there is no such statute there can be no effective service outside the state. F & M. Skirt Co., Inc., v. Wimpfheimer & Bros., Inc., 27 F. Supp. 239 (D. Mass. 1939); Totus v. United States, 39 F. Supp. 7 (E. D. Wash. 1941); Moreno v. United States, 35 F. Supp. 657 (D. Mass. 1940). The instant case is in accord.

The ancillary relation of the third-party proceedings with the main action and the jurisdictional and venue requirements to be met were also considered by the court in the instant case. Before the new rules even though the court had ancillary jurisdiction over the third-party claim, if the third party defendant was allegedly liable to the third-party plaintiff, diversity of citizenship between them was requisite. Wilson v. United American Air Lines, Inc., 21 F. (2d) 872 (S. D. N. Y. 1927);
Sperry v. Keeler Transportation Line, Inc., 28 F. (2d) 897 (S. D. N. Y. 1928). And if the third-party defendant was allegedly liable over to the original plaintiff, there must be diversity of citizenship as to them. Lowry & Co., Inc. v. National City Bank of New York, 28 F. (2d) 895 (S. D. N. Y. 1928). However, since the adoption of the new rules, there is little dispute that when a third-party complaint is deemed ancillary, a separate ground for federal jurisdiction on the basis of diversity of citizenship as to the third-party defendant is not required. Crum v. Appalachian Elec. Power Co., 27 F. Supp. 138 (S. D. W. Va. 1939). But whether improper venue will prevent service of process upon the third-party defendant is a controversial question.

The courts that refuse to give effect to the provisions of Rule 4 (f), permitting service of process outside the district in which the court is located, cite Rule 82 which provides that jurisdiction and venue shall not be extended or limited by the rules, and then reason as follows: General jurisdiction over the third-party defendant depends on whether the third-party complaint is ancillary to the main suit. The presence of venue depends directly on the federal statutes, which in most cases provide that no defendant can be sued in a district in which he is not a resident. And, regardless of the relation between the subject matter of the ancillary suit with the subject matter of the principle one, the ancillary suit is original as to the third-party defendant, and he may object to improper venue in the absence of his consent to it. Tullgren v. Jasper, 27 F. Supp. 413 (D. Md. 1939). In Melekov v. Collins, 30 F. Supp. 159 (S. D. Calif. 1939), which was in the federal court solely on the basis of diversity of citizenship, service of process on a defendant in the same state but in another district was declared invalid. It was denied that Rule 4 (f) could so extend the court's jurisdiction. Except where specifically authorized by a federal statute, the civil process of a federal district court does not run outside the district. Service outside the district is void. Toland v. Sprague, 12 Pet. 300 (U. S., 1838); Carby v. Greco, 31 F. Supp. 251 (W. D. Ky. 1940). In construing the rules, it must be kept in mind that the method of serving a process is procedural, but the effect of such service when made is jurisdictional. Sewchulis v. Lehigh Valley Coal Co., 233 Fed. 422 (C. C. A. 2d, 1916); Carby v. Greco, supra.

However, there is equal, if not greater, authority for the view that the provisions of Rule 4 (f) should be given effect. The courts so holding reason that, in keeping with the spirit and purpose of the new rules, once the general jurisdiction of the court has properly attached under constitutional and statutory provisions to the suit between the original plaintiff and defendant, the court should retain jurisdiction to hear and determine all the related issues arising from one transaction. These courts argue that it is illogical to permit the mere location of the forum to prevent the court from determining the whole case at one time. Tullgren v. Jasper, supra; Satink v. Township of Holland, 28 F. Supp. 67 (D. N. J. 1939); Kravas v. Great Atlantic & Pacific Tea Co., 28 F. Supp. 66 (W. D. Pa. 1939); Bossard v. McGwwiff, 27 F. Supp. 42 (W. D. Pa. 1939). "To regard such controversies otherwise would be to defeat the purpose of the rule (Rule 14—Third-Party Practice), which is to avoid circuity of action and to adjust in a single suit, several phases of the same controversy as it affects the parties." Holtzoff, New Federal Procedure and the Courts (1940) 47. See also Sklar v. Hayes, 1 F. R. D. 415 (E. D. Pa. 1940). As further justification for this view, the court in Lewis v. United Air Line Transport Corp., 29 F. Supp. 112 (D. C. Conn. 1939), stated that once the third-party claim was held within the ancillary jurisdiction of the court, the third-party defendant is placed under no greater hardship in making his defenses than those which must be borne by a nonresident defendant in a case founded only on a diversity of citizenship jurisdiction, in which instance the venue of the suit may be that of either the plaintiff or defendant.
The instant case presented the difficulty of service of process beyond the territorial limits of the state of the court's location, while most of the cases cited dealt only with service of process in a different district within the same state. As pointed out, such service of process is not authorized except by federal statute. For practical application of this interpretation, see F. & M. Skirt Co., Inc. v. Wimpfheimer & Bros., Inc., supra. In Koncewicz v. East Liverpool City Hospital, 31 F. Supp. 122 (W. D. Pa. 1940), a motion to quash the service of process outside the limits of the state was sustained although the defendant was technically in default when the motion was made.

If in the original suit by the plaintiff, the federal court does not have jurisdiction for want of either diversity of citizenship or federal question, can the federal court permit a third-party defendant to be brought in as to whom there is diversity of citizenship, and thereby gain the jurisdiction that it theretofore lacked? The instant case holds that it could not. No other case in point has been located. In a somewhat similar situation, where the suit was begun in a state court and a third-party defendant, as to whom there was diversity of citizenship, that the third party could have the suit removed to a federal court. City of Waco v. U. S. Fidelity & Guaranty Co., 293 U. S. 140 (1934); cf. Galveston, H. & S. A. Ry. v. Hall, 70 F. (2d) 608 (C. C. A. 5th, 1934). The reasoning of the court in such a case is that the entire suit should be treated as a whole, rather than as separated units. The same argument might be made here; the obvious difference is that in the case of removal from state to federal court, all parties were served validly with state process before removal.

The decision in the instant case seems undoubtedly correct. In determining the issues which the motion presented, the court sought to interpret the new rules in the light of the spirit and purpose which called them into being and yet to guard against their use as a license to expand the jurisdiction and venue of federal courts. The temptation to use general language of one or another of the rules as a vehicle upon which process might run from coast to coast can be thus arrested by timely application of Rule 4 (f) at the border of the state in which the federal court sits, without undue restriction of the contemplated liberality of the new rules.

EDWARD A. DECLERCK

TAXATION—Complete Enjoyment by Donee Necessary to Establish Gift as Present Interest

In 1934 William Taylor created an irrevocable trust for his four living nephews and nieces, the income of the principal to be distributed among them for life, with powers of appointment and remainders over. Payments by the trustees were to commence when the children attained twenty-one, and until that time the trustees were directed to accumulate the income, but were privileged to make disbursements for the support and education of the children. Defendant sought exemptions of $5,000 for each gift under the Revenue Act of 1932, 47 Stat. 164 (1932) 26 U. S. C. § 504 (b) (1934), which exempted gifts other than future interests in property. The Commissioner of Internal Revenue claimed the gifts in trust were not gifts of present interests, but were gifts of future interests, and therefore specifically excluded from the exemption in the act. Held, for the Commissioner. Where the ascertained beneficiary of a gift in trust lacks complete and certain enjoyment of the gift until he reaches a specified age, such a gift is a future interest within the meaning of the act. Commissioner of Internal Revenue v. Taylor, 122 F. (2d) 714 (C. C. A. 3rd, 1941).

In the committee reports Congress a future interest is described as an estate, whether vested or contingent, to commence in possession or enjoyment in the future,

The beneficiaries, not the trust or trustees, are the recipients of the gift in trust, and the donor is entitled to an exemption for each beneficiary if the gift creates a present interest in the beneficiary. Helvering v. Hutchings, 312 U. S. 393 (1941). Earlier cases held that the trust or trustees were the recipients of the gift. Commissioner v. Wells, 88 F. (2d) 339 (C. C. A. 7th, 1937); Commissioner v. Krebs, 90 F. (2d) 880 (C. C. A. 3d, 1937); Noyes v. Hassett, 20 F. Supp. 31 (D. Mass. 1937).

The Hutchings case, supra, was the first of a series of three cases; preceding United States v. Pelzer, 312 U. S. 399 (1941), and Ryerson v. United States, 312 U. S. 405 (1941). In the latter cases the beneficiaries could be ascertained only after the happening of a future event, and the Court held that the interests created were future interests.

In Hopkins v. Magruder, 122 F. (2d) 693 (C. C. A. 4th, 1941), a donor gave to his sons the income of a gift in trust until they were twenty-four. At that time the principal would be turned over to them if they were capable of managing their shares. If the sons predeceased their father, the gifts went to the heirs of the sons. The court held the interests created were future interests and the donor was not entitled to an exemption. The Ryerson case, supra, was used as the basis for the decision, although there the estate would not vest in the beneficiary until she had survived the donor. In the Hopkins case, supra, it was not a condition that the beneficiaries survive their father before they benefit from the trust, but they immediately received income under its provisions and an interest for their heirs. A decision similar to the Hopkins case, supra, was reached in Welch v. Paine, 120 F. (2d) 141 (C. C. A. 1st, 1941), where the facts were almost identical with those in the Hopkins case, supra, the court based its decision more on the provisions of the Revenue Act than on the Ryerson and Page cases, supra. It pointed out that the Pelzer and Ryerson cases, supra, were distinguishable since they left open the question whether or not an immediate life interest was a present interest. The court said, that "such an interest might reasonably be defined as a present rather than a future interest," but it resolved the doubt against the taxpayer.

Justice Maris, dissenting in the Taylor case, supra, expressed the not unreasonable view that the beneficiaries there were ascertainable and presently enjoyed the trust, and merely awaited the lapse of a few years before the enjoyment was unfettered. Such a view falls within the expressed intent of Congress so far as the committee reports reveal. Use of income for the beneficiary's support and education during minority might exhaust it, and prevent an accumulation which could be turned over to the beneficiary when he or she reached twenty-one years. Since enjoyment of the trust was possible from the day of its creation, the interest created was present, not future. A present interest in property which is the subject matter of a trust is an interest which includes "either the right to the immediate beneficial enjoyment of the proceeds of the trust; or the right of the trustee forthwith to have the control and management of the affected thing pursuant to the provisions of the trust." Restatement, Property (1936) § 153 (3b). Furthermore, whenever the beneficiary received the income for support or education he would be required to pay an income tax. Blair v. Commissioner, 300 U. S. 5 (1937).

The fact that § 505 of the Revenue Act of 1938 has withdrawn the specific exclusion for all gifts in trust may somewhat dim the importance of the Taylor case, supra, and related decisions. They will, however, be helpful in determining the nature of a future interest within the meaning of the act.

LEWIS A. MCGOWAN, JR.
BOOK REVIEWS


One of the authors prepared a book on interference practice in 1932, and at that time he seemed to think it was possible to cover the entire field in 202 pages. Since that time there have been numerous revisions and changes in the statute and in the Patent Office rules all of which lately are directed toward expediting and simplification of procedure. Despite this simplification apparently the authors think that instead of 202 pages it is necessary to cover about 1500 pages to explain the simplified practice.

Interference practice in the Patent Office, at least for the last half century, has been without question the most complicated and difficult legal procedure to conduct. Despite the efforts of the Patent Office and some members of the profession to simplify matters the procedure seems continuously to become more complicated. Probably nothing has done more to complicate practice than the doctrine of estoppel which looms large in interference matters and as a result of which a party to an interference who is not up on his toes to avail himself of every opportunity to confront his opponent with every imaginable phase of the invention may find himself thereafter estopped to conduct even ex parte proceedings. There probably is no legal procedure anywhere which allows so many interlocutory and preliminary motions, hearings, rehearings, petitions, etc. To be sure some of the recent changes in the Patent Office rules seem to be directed toward limiting the right to interlocutory appeals. These reforms have not been in effect long enough to be thoroughly tested. Many members of the profession have become so disgusted with interference practice in the Patent Office that they believe interferences should be abolished there and the whole matter of priority of invention left to federal courts in cases where priority is of real importance.

The present book is something of an experiment since Vol. I of the text book is produced only and it is sold by itself although it covers only a part of the interference procedure and in order to be effectively used throughout an interference case must be associated with the unpublished second volume. The authors have, however, made the present volume useful as far as it goes by providing an adequate index, table of cases, etc. The authors are very much to be commended for their introductory chapter in which they include in about fifteen pages an outline of interference law and procedure. A reading of these pages will give

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anyone a condensed idea of what an interference is and how it should be conducted in general. At the same time these pages act as more or less of an index to the entire two volume work. It is helpful to find such a general outline statement and it is believed that it would be a good thing if such an outline were put at the beginning of all text books. This is particularly desirable because substantially no one wishes to read a fifteen hundred page dissertation, although many will wish to have a general outline in mind on procedure and to know what they should and can do in interference.

It is unfortunate that changes in the practice and Patent Office rules were promulgated while this book was in press. Many of the cases cited and some of the textual matter has become unimportant in view of the amended rules. The authors, however, for the sake of completeness, have not eliminated this matter but seem to have been careful to indicate, sometimes by footnotes, the changes wrought by the new rules. This probably is adequate because many of the changed rules have not yet been interpreted by decisions.

While there has been some consideration of interference practice and procedure and of the cases on which it is based in the various law journals, the authors unfortunately have made no reference to such articles (aside from the chapters of this book which were so published in advance) and there is included no bibliography of such articles. Nevertheless the authors have been careful to indicate in some instances what is the actual practice in the Patent Office although there is no published authority nor any rules, orders or decisions for such practice. These matters are generally referred to as "present approved practice". In some instances they point out that decisions which are discussed, although they may not actually have been overruled, are not being followed by the Patent Office. Of course all this makes for difficulty and inconvenience in practice and makes the attorney feel that it is entirely impossible to be sure he is right in conducting interference practice and this feeling is almost justified.

The authors have presented some forms for use but the number is necessarily meagre and may be inadequate because situations which may arise are so many, so diversified and so different that it is probably impossible to ever assemble in a reasonable number of pages forms which will meet every situation without modification.

Certainly the profession has never before had as elaborate a key to interference practice and no one conducting interferences can feel safe without having access to this book.

KARL FENNING*

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The first edition of this book was published in 1926, and was a pioneer in its field. Lawyers, young and old, were given, for the first time, a working manual for businesslike office management—a "consummation devoutly to be wished," for attorneys, then as now, usually begin practice with little preliminary business training. The present edition (3rd) is a bulky volume, teeming with suggestions and plans for the lawyer in all stages of his practice and containing a bewildering array of charts and forms. The author states that the latest edition evolved from his own experience, suggestions from lawyers who had read and profited by the earlier publications and from his personal reading and investigations. Doubtless, Prentice-Hall, the new publishers, are responsible for many of the additions and changes.

The author contends that, while it may seem paradoxical to talk of law as a profession and at the same time say that law practice is a business, yet the distinction becomes clear, when we realize that law office procedure is the business end of the law.

Space limitations prevent a specific description and analysis of the forty chapters which make up the book’s contents. The chapters on the office tickler, planning and dispatching, time records, charges and billing, time saving forms and procedure, filing, determining office overhead, will prove of most interest to the average practitioner. A number of the chapters seem more adapted to large legal firms than to the lawyer who practices alone. One objection to the book is that if the individual lawyer attempted to use all the records suggested as necessary, he would have no time for other things during his working day. Another feature which makes one inclined to discount the book’s claims for practicality and usefulness is the statement in the preface that all the forms, appliances and special material described are manufactured and kept in stock by a named company “under license from the author.”

Despite these objections, the book is a helpful one for any lawyer to own. In selecting the material recommended, he will have to discriminate to prevent overloading; and he will be stimulated, if not convinced, by pondering the chapters on the development of personality, brain fag and fatigue, concentrating attention, applied psychology and the challenge of the future.

LEO P. HARLOW*

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Forty years ago, one of the large Eastern universities prescribed a brief course in "contracts" for its chemists and engineers in order that they might know "when they should consult a lawyer". This same thought was evidently in the mind of this author when in his preface he stated that "Legal training should provide the engineer with a warning in advance of those situations which may involve his employer or client in unsuccessful litigation."

The use of the casebook method instead of the older textual compilation of rules makes the book far more interesting and useful to engineers seeking the above goal. Even though no case cited exactly covers a specific problem that may arise, he has more examples from which to reason by analogy and may more easily discover when detailed applications require the professional services of a lawyer. The very complete glossary and index will also be useful.

The major subdivisions of the book are (1) Professional Problems, (2) Industrial Problems, (3) Aeronautics, (4) Property and (5) Business. Each embraces a series of cases with brief introductory expositions that are quite understandable even to the layman. Only the first part relates especially to engineering. It covers such problems of the engineer as his derivation of authority, standards of duties and responsibilities and rights to compensation. The fundamentals and characteristics of varying agency relationships are set out and the liabilities thereunder noted.

The larger portion of the book relates to problems not peculiar to engineering and is of interest to engineers principally because they now play important roles in the organization, construction, equipment and operation of enterprises for manufacturing, transportation and housing. The questions presented by workmen's compensation, nuisance, mechanics' liens, eminent domain, contracts, taxes and sales are as old as our modern civilization. In spite of the apparent complexity of Law, it is encouraging to the layman to find that a large proportion of the decisions rest upon what we are pleased to call a "common sense basis" and satisfy the urge for "abstract justice". For example, it appears obvious that a person who builds a residence in an industrial community has no just complaint against the results of the normal industrial operations carried on there.¹

Naturally the most specific applications of law to engineering are in those modern fields such as electricity and aeronautics that have been developed and operated almost entirely by engineers. Even here the


decisions show that the effort has been made to apply the same principles of law to these as to older fields. The chief difficulties are encountered in apparently novel problems, such as damage to water pipes by electrolysis caused by stray currents from a street railway. It is significant that, as early as 1910, the burden was placed upon the railway company to "make the damage as little as possible, by using the best means reasonably within its power"—even though there was disagreement among the experts as to the "best means", and the Court pointedly did not indicate the method to be employed.

In the field of aeronautics, a problem of timely and growing interest was raised regarding the ownership or control of the atmosphere above a given property. The decisions cited show clearly that, in the words of the author, "the concept of exclusive space ownership by the landowner has had to give way to the sovereign power of the state as well as to the commercial utilization of the sky." In other words, the interpretation of laws must be changed to meet entirely new conditions.

No reference is made to Patent Law, the closest marriage of Law and Engineering, presumably because this branch is highly specialized and its decisions are often based on fine distinctions in very specialized scientific fields.

This book will be valuable as a text for instruction of engineering students, and in fact it is dedicated to such use at the University of Michigan, a school distinguished by the quality of its graduates, both in Engineering and Law. It is also a useful addition to the library of all practicing engineers.

WILLIAM BLUM*

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