TAXATION: SOME REFLECTIONS ON THE QUEST OF SUBSTANCE

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"How could they see anything but the shadows if they were never allowed to move their heads?"

Plato, Republic, bk. VII

If you thrust part of a stick into water, it appears to be broken in the middle. Parallel railroad-tracks seem to converge in the far distance. When after staring at the sun you close your eyes, you will see it first in its own color, then as crimson, next as purple, fading to black until it disappears. The sky seems to meet the earth along the horizon. Thus our faculties play their merry game of illusion, dancing about us like a company of mischievous gnomes. It is only the watchful correction of our minds that keeps us balanced and erect.

Nowhere is the adjustment between the apparent and the real, the surface and the substance more imperative than in taxation. Here the hand of artifice is all too often quicker than the eye of justice. Here the subtle and complex weave of modern tenure and business organization covers and disguises essential economic form. To penetrate these outward shows is the task of judgment, enlightened by experience. Failure therein signifies lost revenue, inequality of burden and thwarted social aims. If this be true, the methods of discerning the real and taxing in terms of it offer a worthy study.

Of course, every science begins with refusal to accept the mere appearance of things. If a man is to see clearly, his eyes must occasionally slip out of focus. The structure beneath, the interplay of form and function—these are to be intuited, to be described and ultimately to be used. And these are the subject matter of science, this description is its intellectual

victory, this use its contribution to society. If then systematized and 
organized knowledge is possible in the field of taxation, it must be knowl-
edge of significant function and structure, and it must be employed in 
terms thereof. The surface too is significant, but more for what it hints 
or hides than for what it says or shows. The surface, in all objective 
study, is only a preface and an invitation.

In the field of taxation, three major obstacles have retarded success. 
The first of these is substantially a matter of semantics. Tax statutes 
are parts of the law. They use the terminology of the law. They fasten 
upon transactions which have meanings in law. And they are adminis-
tered, at least in large part, by lawyers. Thus the vocabulary of taxation 
is, on the surface of things, compounded of the concepts, the traditional 
ways of thought and the historic ideals of a specific profession. The tax 
statutes “talk like lawyers.”

They do not think or act like lawyers. The subject matter of taxation 
is the vast complex of relations and transactions which go to make up 
the economic world, with its hemisphere of business and its hemisphere 
of property. Taxes have their uses,—to raise revenue or to regulate 
human affairs. (That “or” is, of course, a failure of language, for 
raising revenue is designed to the end of regulating human affairs and 
is itself one of the forms of regulation.) These uses are matters of 
finance, of politics and of social reconstruction. They dwarf the fine 
points of legal terminology. They are too big for neat dichotomies and 
subtle distinctions; they are too crude and rough for lawyer’s grist, 
that is, at least since the Sixteenth Amendment.

Before the income tax, these difficulties of vocabulary were few. One 
could easily translate economic fact into rule of law, and little was lost 
in the process. A tax on ownership of property or on performing a speci-
fied transaction sounded the same in either language. Then came the 
Income Tax Amendment with its broad, sweeping phrases,—like all 
great reforms, to engender a progeny of new problems. There is a 
malignancy in human progress, a sort of “cussedness” that forbids rest 
and denies contentment. The very act of decapitating the Hydra brings 
into being a new pair of venomous reptiles. The bigger the step forward, 
the more one is thrown off balance. So the Sixteenth Amendment, with 
its “tax on incomes”, which every layman thinks he understands and 
which two dozen volumes of court decisions have been unable to define.¹ 
If there is a way out of all this darkness, it must follow the light of 
reality, the incandescence of raw facts. “And it is right to call anything

¹Mrs. Paul aptly calls the Sixteenth Amendment “that umbrageous tree of controversy”. 
M. S. PAUL, THE FEDERAL TAX STATUS OF WILL CONTESTANTS, in PAUL, SELECTED STUDIES 
in FEDERAL TAXATION (2d Ser. 1938) 305.
that which nature intends it to be, and which belongs to it, rather than that which it is by constraint and contrary to nature."

Not much will be gained by the familiar device of "loan words." As one language borrows vocabulary from another, often losing the aura of feeling, experience and meaning in the process, so the courts have sought to borrow traditional terms of law to denominate business doings. The labels do not fit, they do not adequately describe the contents. Hence, for instance, much of our confusion in the taxation of corporations. The business world knows corporations as disparate as General Motors Company and Ford Motors Company, American Telephone and Telegraph Company and J. P. Morgan and Company, Inc., John Doe and Richard Roe Advertising Corporation and Henry Hoe Holding Company, Inc., not to mention mutual and commercial banks, mutual and stock insurance companies and a score of others. You can call all these things "corporations" if you will, but they do not do business, run their internal affairs or account to the public in the same way. They are all corporations only in the sense that they are not individuals, and some of them are better understood and more effectively taxed as individuals. Language, that is, the translation of economic facts into legal terminology, is the first great stumbling block. As Judge Hand says, "we need more than a dictionary."

The second obstacle to realistic tax administration consists of an attitude. The attitude is that all the shifts and progressions in revenue laws are loophole-plugging, just that and nothing more. True, a certain biological evolution appears, but it resolves into the story of this one perpetual struggle,—clever lawyers devising tax avoidance schemes, observant Treasury experts working to thwart them. "Trial and error" sums up the whole. Theories and high motives are quite irrelevant, as irrelevant as a musical accompaniment to a perennial game of legal chess. What counts is not the meaning of the game in the vast epic of human society, but simply whether I can get my pawn through to Queen's row. This is the attitude of a considerable portion of the bar. Every creed has its heresy, and pragmatism can degenerate into mere expediency.

\[^2\text{Aristotle, De Caelo, 297 b. p. 436. All citations herein from Aristotle refer to folios in the edition by R. McKeon, } \text{The Basic Works of Aristotle (1941).}\]

\[^3\text{Electrical Securities Corp. v. Commissioner, 92 F. (2d) 593, 595 (C. C. A. 2d, 1937).}\]

"Error is the judgment that a limited truth holds outside that limit. It is the false identification of a limited truth with a less limited truth. Error is made evident by contradiction, since the presence of contradiction signals that the positive termini have been passed and negation has been reached." \text{Friend & Feibleman, The Unlimited Community (1936) 170.}\n
These authors contend, with much force and perspicacity, that our failure to accomplish either theoretical or practical success in the social sciences, is largely due to the predominant nominalism of the past centuries.
Schopenhauer recalls that when the courtiers at Weimar pressed Goethe for a play that they might perform, each learned only his own role, his own lines, his particular entrances and exits. None knew the whole, the point and purpose of the play, the grand unity that underlay the parts. And this was a cardinal sin against the intellect, for things do not begin to mean and point and tell until they are fitted together. In the grand drama of which all law is a mere episode, there are other acts and scenes which give that episode its right to be.

The history and meaning of taxation are compounded of many peculiar ingredients. As these lines were being written, a controversy has raged on the issue of compulsory joint returns for husband and wife. Much was heard from the clergy and other strangers to Treasury Regulations. Feminists were vocal, though oddly enough no one spoke up for the equally “oppressed” husbands. Newspapers, with their gift for labels (that fit the headline-spaces better than the subject matter), called this a “marriage penalty” proposal. The Shakespeare of the future will portray Romeo and Juliet whiling away their time on the balcony with close computation of their taxes. Young lovers will lay aside “Sonnets from the Portuguese” and tenderly read to each other Paul and Mertens. So, at any rate, we are led to believe.

But the merits of this controversy are much less important than the sincere conviction it showed, the conviction that taxes affect human conduct and human affairs and that they must therefore agree with moral and ethical ends. Taxation is not a subject for cynicism, either of the taxpayer or of the collector. It too, viewed as part of the whole social scheme, must bow to the standards of that scheme. Loopholes should be plugged, the artisans and mechanics of government are expected to see to that. But there is room as well for artists and philosophers, for economists and statesmen in the process of tax evolution. They will not be debarred. To repair *ad hoc* is provident, to build *ad hoc* is philistine.

Obviously, the “trial and error” or loophole-plugging attitude has very practical implications for our subject. It resolves taxation into a boyish game of skill, of move and countermove. According to it, the law has drawn a line between fair territory and foul, and you must simply keep on the right side. The real sport is to see how close you can come without stepping over. Sometimes the dividing line is hard

“As long as corporations are recognized before the law as if they were creatures of substance, there is nothing to distinguish this corporation from innumerable others, whether they be devised to achieve a temporary tax reduction or some other legitimate end. . . . A statute so meticulously drafted must be interpreted as a literal expression of the taxing policy, and leaves only the small interstices for judicial consideration.” Gregory v. Commissioner, 27 B. T. A. 223, 225 (1932); rev’d, sub nom., Gregory v. Helvering 293 U. S. 465 (1935).
to discern, sometimes the umpire seems to move it while the game is in progress. This enhances the risk, but also the fun.

As a criterion of judicial decision, the attitude just described could hardly be more pernicious. It virtually forbids all realistic inquiry into the substance of what the taxpayer has done, and enjoins the court to focus examination upon superficial form alone. It makes of a judge the referee of a fascinating game, rather than the instrument of social ends. If the surface of the transaction is sufficiently polished, it will reflect light so blindingly that the underneath remains quite unseen. And it is the underneath that is real and meaningful.

Of course, the Gregory case5 is the classic rejection of the "loophole-plugging" attitude. Here the Supreme Court made clear that taxation is more than a sport in which taxpayer and collector try to outwit each other. Taxes are levied upon what people do, not upon what they say they do. There is a line between the taxable and the tax-free, but its path follows the push and thrust of economic effects, not the labels and signposts of legal vocabulary. If a taxpayer and his lawyer choose to create ex nihilo a dreamworld of unreal relations between persons and property or persons and income, they may do so; but they cannot expect the Government to inhale from the same pipe. Your transaction may conform literally to the tax-free; you will be taxed all the same upon the substance of what you have done.

All of this is incompatible with the game of loophole-finding and loophole-plugging. Effectual administration begins with the question, "What really took place?" That question is not concerned with contests of wit or inventive genius. It uncloaks the transaction and sees it as it looked to the taxpayer in its naked inception.

We said that there were three major obstacles to perception of economic substance. Advisedly, the word "sham" has not been used in our discussion, and therein lies the key to the third obstacle. The Gregory case condemned "sham" transactions, that is, transactions which were deliberately planned in advance to meet the letter and to defy the purpose of the law. The case did much to clear and cleanse the atmosphere, and to engender a realistic attitude. But, just because the element of "sham" was present in its facts, just because the taxpayer’s manipulations offended the conscience of the court, the Gregory decision has been susceptible of an unfortunate implication,—the implication that unless the morals of any particular case are repulsive, its superficial appearance must be accepted. The popular interpretation is that courts must swallow the taxpayer’s concoction, unless they can find deliberate "sham."6

This view is best illustrated by comparing *Gregory v. Helvering* with *Lea v. Helvering*. In each case, a subsidiary corporation was formed in connection with a proposed sale of assets; in each case, the subsidiary corporation was employed purely as a conduit of title in the transfer of these assets to the individual stockholder; in each case, the subsidiary corporation served no other purpose and was dissolved as soon as the transfer was effected; in each case, the motive of tax avoidance was admittedly manifest. Yet what was not a reorganization (hence tax-free exchange) in *Gregory v. Helvering*, was held to be one in *Lea v. Helvering*. In the business meaning of the two transactions, in their economic effect, no respectable distinction could be found. But the taxpayer contended, and the circuit court found in *Lea v. Helvering*, that the intent to dissolve the subsidiary corporation arose a couple of days after the transfer to it, whereas in *Gregory v. Helvering*, such intent existed before the subsidiary was even incorporated. Hence the Lea subsidiary was formed in good faith and for a legitimate end, its existence as a separate entity (though startlingly shortlived) was entitled to judicial recognition, and it was a party to a true reorganization. This result was not affected by the parties’ so sudden change of mind and intent.

It has been correctly observed that the *Lea case* limits the doctrine of *Gregory v. Helvering*. The limitation is peculiarly cogent, for what taxpayer (whose counsel has read these decisions) will ever admit a prior purpose to do what the facts show he actually did? Every such corporate dissolution will become a mere afterthought, an utterly new inspiration, perhaps (as in *Lea v. Helvering*) upon the suggestion of the purchaser, perhaps upon a brooding consultation of the horoscope. No one will ever, like Gregory, be so imprudent as to work out a plan in advance. It pays just to muddle along, to cull the new wisdom of each passing hour.

Our avoidance of the word “sham” is now explained. There are innumerable instances in which the economic substance of a transaction differs from its superficial form, but in which evidence of bad faith is

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*See note 6, supra.*
entirely lacking. Taxation is a practical matter, taxes deal with the mundane affairs of men. Again and again, where "sham" is absent, the acute can still discern a real transaction covered by a plausible substitute. The purpose and intent of the taxpayer are not irrelevant, of course, but they cannot effectually belie the very acts he performed. If the courts were to rest their gaze, once good faith and serious motive are established, tax administration would be naïve indeed. Of course, that is not the state of the law.

Unreal transactions do include the "sham," but are by no means restricted to them. For example, if a close corporation pays excessive salaries to stockholder-officers, the excess payment may be treated as a dividend. The real distribution is the dividend, the substitute distribution is the unearned portion of the salary,—perspicacious administration will tax in terms of the former, without regard to motive. Sham is simply the advertisement of a substitute transaction.

These substitute forms and guises permeate the entire body of tax law. They are to be found in all the customary genera of gross income, in deductions, in problems of basis. They abound particularly where the identity of the recipient of income or where the time element is decisive. Such objectives are elementary—the shifting of income or deductions from one person to another or from one year to another. Then there are subordinate illustrations, such as the substitution of a capital gain for ordinary income, or the deferment of gain through the semblance of a tax-free exchange.

Of course, substitute transactions are not confined to the scope of the income tax. The estate tax embraces gifts in contemplation of death, certain "irrevocable" trusts and similar quasi-testamentary transfers; and the younger gift tax is now going through the same process of extension and absorption. Experience reveals one coating after another and peels them off.

Is this to say that men may never order their affairs so as to pay the lesser rather than the greater tax? Are all attempts at tax-avoidance to be condemned? Shall we disregard every customary form? Of course not. Form is essential to effective administration of tax laws. It is the handle by which men's affairs are grasped and held and moved about. Form makes intelligent taxonomy possible. We can hardly manipulate the hot, flowing mass of economic metal until it sets and takes shape within one or another matrix. Slavish worship of form may be naïve, but an iconoclastic contempt for it is even more so.

The point is that form must reflect substance, must be at least consonant with it. Form must conform. The taxpayer's transaction and the appearance he has chosen to confer upon it must be organically one. Substance must not belie form, form must express substance. The
credulity of the observer should not be strained. In fine, courts should be enabled to feel that they are looking at the face of the transaction, not at a smiling mask. Instances are Douglas v. Willcutts,10 (income of alimony trust taxable to husband whose obligation it fulfilled) Helvering v. Clifford11 (income of short-term trust taxable to husband-grantor who reserved control as trustee) and the balance of the familiar cases involving income taxation of trusts. In each of these, the Supreme Court subordinated superficial form to essential form. In each, the measure of economic control and enjoyment in the grantor was the touchstone. Who enjoys, pays. And, of course, where the grantor's enjoyment has ended substantially as well as apparently, he owes no tax.12

These cases further illustrate our theme as to the word "sham." Here again it is possible to penetrate, to explore, quite without a preliminary finding of guilt. The motive of the taxpayer is not decisive in such transactions, because the motive is not an ingredient of the end result. It does not serve to shift the stream of goods and burdens flowing out of what the parties have done. So, too, there is the instance of the Supreme Court's recent decision as to sales on mortgage foreclosures.13 These were held to be true "sales", hence the efficient cause of capital-losses rather than ordinary losses, no matter how reluctant the mortgagor might be to see the hammer fall. Motive is a criterion in those transactions only, whose reality stems from it.

If, for example, a stockholder advances money to a close corporation, that act may represent a capital contribution, a loan, a quasi-gift, or even an immediate loss sustained in business.14 We cannot categorize the advance until we know why it was made and what were the expectations of the parties. If there was no expectation of repayment, we must inquire further into the reasons for that. And, in the course of this inquiry, we must look for some organic unity between the circumstances and the taxpayer's protestations. Many a case has been steamed out of court by blowing hot and cold at the same time. When the vapors have drifted away, perhaps the truth will appear. But it is written that "the devil himself knoweth not the heart of man."

It is not enough to say that the form of a transaction must comport with its substance, unless we can agree in identifying the substance. As legal processes and relations become increasingly complex, reasonable

10296 U. S. 1 (1935).
11309 U. S. 331 (1940).
14See, e.g., Young, Inc. v. Commissioner, 120 F. (2d) 159 (C. C. A. 1st, 1941). The point has been made that the subjective element in tax law tends to compensate for the inadequacy and rigidity of objective standards. R. E. Paul, Motive and Intent in Federal Tax Law, in Selected Studies in Federal Taxation (1938) (2d Ser.), 255, 303-4.
minds may be found to divide in their analysis. When that occurs, the
problem is not so much the compatibility of form as the ascertainment of
substance. An example is afforded by the recent decisions of the Supreme
Court in the bondholders' reorganization cases.\textsuperscript{15} When a bondholders'
committee buys in at foreclosure and conveys to a new corporation in
exchange for its stock or securities, what is the essence of the transfer?
Is there "continuity of interest" sufficient to support a tax-free exchange?
The circuit courts of appeals were in conflict. Some viewed the bond-
holders' foreclosure as a revolution in business arrangements and relations.
The former ruling class, the stockholders of the old corporation, are
overthrown. Their representatives,—the officers and directors,—are re-
moved. The foreclosure abolishes the old charter and sweeps away the
rights of subordinate creditors. Moreover it was felt that, although such
revolution appears retrospectively inevitable, it develops prospectively
quite otherwise. Up to the very moment of capitulation,—the moment
of the filing of a petition in bankruptcy, bill in equity, or complaint for
foreclosure,—the former management and stockholders may somehow
save the situation and retain control and ownership. This line of reason-
ing led to the conclusion that there was a cessation of interest and a new
regime,—hence no tax-free exchange.

The Supreme Court, with somewhat surprising unanimity, has adopted
the opposite view. Under the 1928 and 1932 Acts, the continuity-of-
interest test is satisfied when the resultant new corporation literally
reflects the equitable position during insolvency, that is immediately prior
to the reorganization\textsuperscript{15a} (provided the property is acquired directly from
the insolvent debtor).\textsuperscript{15b} According to these cases, the economic line flows
unbroken.\textsuperscript{15c}

We must not be dismayed by these differences of approach, or expect
all men to view a complex fiscal process in the same light. Let us rather
rejoice that the dispute is set temporarily at rest, and that there is a
truce of argument and uncertainty. As was said of the Stoics, "Neither

\textsuperscript{15}Helvering v. Alabama Asphaltic Limestone Co., 62 Sup. Ct. 101 (1941); Palm Springs
Holding Corp. v. Commissioner, 62 Sup. Ct. 108 (1941); Marlborough House, Inc. v. Com-
94 (1941).
\textsuperscript{15a}Helvering v. Alabama Asphaltic Limestone Co., 62 Sup. Ct. 101 (1941); Palm Springs
missioner, both cited note 15 supra.
\textsuperscript{15b}Marlborough House, Inc. v. Commissioner, cited note 15 supra.
\textsuperscript{15c}What the Court gave under the 1928 and 1932 Acts, it simultaneously took away under
the 1934 Act (the existing statute). Helvering v. Southwest Consolidated Corp., cited note 15
supra. Continuity of interest, though present, cannot avail against express legislative
criteria. Regarding the 1934 Act, "Plainly the normal pattern of insolvency reorganization
does not fit its requirements." This observation, however, implies no misgivings as to the
Court's decisions under the prior statutes. The requirement of continuity of interest
was the Court's own creature and its ambit was to be determined by the creator.
do they think that the divergence of opinion between philosophers is any reason for abandoning the study of philosophy, since at that rate we should have to give up life altogether.\footnote{\textit{Diog. Laert., VII, 129.}}

It is time now to tie up these loose ends. Recapitulating a bit, courts should seek underlying substance whether or not warned by the red flag of "sham." On the other hand, form, when wholly congruous with substance, should be respected. In certain limited types of cases motive and intent lend reality to taxable transactions, and are therefore criteria in classifying them. Finally, we observed that reasonable men may disagree as to what is the essential substance of a transaction. We felt that substance should be discovered prospectively, not retrospectively. Courts should not fall into the popular error of viewing in reverse. Whatever historians may say "wise with afterwit", dramas unfold forward.

If such is the nature of the unreal in taxation, what can be done about it?

II

Few of us will ever forget the strange and dark passage with which Plato opens the seventh book of his \textit{Republic}. The scene is a cave or underground den, in which human beings live,—their legs and necks chained so that they cannot move and can see only in front of them. They face the inner wall of the den and behind them and above, light pours forth from a blazing fire. As they sit and stare at the wall, behind them pass other men bearing on their heads and shoulders statues and figures, vessels and images. So these strange prisoners, locked with their backs to the light, see only the dancing shadows on the wall, flickers of the roaring fire, unearthly lines and distortions of what passes between them and it. They will never see anything but shadows, unless they are allowed to move their heads.

The efforts of the law to break away from such chains have not been confined to matters of taxation. Its struggle against formalism constitutes the main stream of its history. This struggle does not end, nor does its inner aspect vary. Throughout the centuries, common law legislatures and common law judges have employed the same basic implement of progress,—the method of categorization through assimilation. The new or recalcitrant fact is forcibly classified with the old or docile, classified by a discovery of relation, affinity or similarity. The "writ in the nature of a writ of right", the "action on the case" are phrases that recall great successes of assimilative method. An altogether novel class will not arise unless nothing familiar, nothing reminiscent of the known can be discerned. Thus the pigeonholes increase in size, but rarely in number.
The process of classification has a special nature in tax law, because tax law itself impinges upon human acts and dealings in a special manner. In every other legal field, rules grow to determine the juridic effect of transactions within the field. If a man desires to buy a parcel of real estate, the law of real property will tell him who can sell it, whether he can obtain a good title, what kind of documents he needs. If, after buying the real estate, he dies, the law of wills and of descent governs questions as to his heirs and their portions. Thus, real property law is designed and shaped to control transactions in real property, the law of wills and descent to control the passage of title from the dead to the living, and so on through all the customary divisions of private law.

But once we leave the domain of private law, the picture is reversed. Taxation and its rules operate quite otherwise. Tax law deals with transactions not within its own sphere, but rather within the scope and boundary of some particular division of civil legislation and jurisprudence. The imposition of taxes on persons, incomes, property and business always assumes the normal pre-existence of the objects of taxation. Merchandise, it is taken for granted, is sold whether or not there are sales taxes; incomes are received, property is owned simply because they are deemed desirable in themselves. Taxation thus operates in an entirely different dimension. Where private law grows out of the very acts and relations which it is designed to govern, tax law hovers above these same acts and relations—to give them a special meaning, economic force and purpose.

It is just because of this assumption, that motive and intent become significant. As taxation proceeds on the hypothesis that men do things for reasons within the respective domains of private law, all goes well as long as they do. But when the satisfactions they seek are not those of the normal business scene, the tax machine is thrown completely out of gear. If men sell their stocks because of customary economic motives such as the expectation of falling markets, the revenue from taxes and the incidence of taxes remain just about what the legislature contemplated. But if they sell only to "take losses" and reduce their tax bills, they distort the entire picture. Once the "tax motive" is introduced, taxation loses its original aspect and requires new techniques. It can no longer classify exclusively in terms of the civil transactions of men; it must classify also in terms of itself, its own body of law, its revenue and its social aims.

This need was first recognized in Watson v. State Comptroller of New York.¹⁶ There the court, speaking through Mr. Justice Brandeis, held that the power to classify extended not only to the things or acts classified, but also to "the purposes and policy of taxation." Our doctrine

¹⁶254 U. S. 122, 125 (1920).
was stated explicitly in *Helvering v. City Bank Farmers Trust Company*:

"A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property without due process."17

It will be remembered that the *City Bank Farmers Trust Company* case involved the classification of a trust revocable only with the consent of a beneficiary. This was placed by Congress in the same pigeonhole as other quasi-testamentary transfers, and taxed as if it actually were the type of transaction which it resembled. The Court sustained this classification and mentioned other examples: (1) estate taxation of gifts in contemplation of death; (2) requirement for income tax purposes that a donee employ his donor's basis; (3) taxation of income of revocable trusts to the grantor; and (4) taxation to the grantor of income used to meet his obligations or to pay his insurance premiums. In each instance, there is classification by affinity, reasonably designed to fulfill the "purposes and policy of taxation" itself.

The illustrative examples taken at random by the Supreme Court throw a clear light on the problem of motive. It will be noted that in only one instance is the taxpayer's state of mind relevant. That is the case of a gift in contemplation of death. In every other example, it is what the taxpayer has done, not why he has done it, that determines the classification. When we come to the gift in contemplation of death, we see that here motive is part of the essential nature, part of the very definition. Under the statute the taxpayer must simply be mindful of mortality and impelled by thoughts of the day of eternal reckoning, such thoughts as would prompt him to make his will, to set his affairs in order, to imagine life's stage as it will appear after his exit. Whether he desires to escape death duties is not determinative. The category to which his transfer is assigned will depend upon the very test which we have proposed: is what has been done so clearly a substitute for a testamentary benefaction that it should be assimilated to one? If it is, then it will be taxed, not on any theory of sham or guilt, but because the economic substance of the transaction has been found and realistically classified. And in aid of that process, Congress has enacted that death will be presumed to have been contemplated whenever the donor dies within two years. Thus presumptions of fact, though rebuttable, may be employed to lighten the burden of classification. They are, of course, most needed in the tracking down of subjective purpose.

But, whatever they may attempt, legislatures cannot finish these undertakings. Once the general structure of a tax statute has been enacted, once the scheme has been announced, its fruition lies as it must

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in the hands of administrative tribunals and courts. Tax problems grow out of particulars, the strange, obstinate concatenations of fact that men improvise. From the statute, the cases unfold like a spreading fan. The problem of classification is therefore most frequently and significantly a judicial problem. It has presented the same countenance in the Board of Tax Appeals as in the federal courts, and has in each evoked much the same attitude and method,—an attitude of sophisticated realism, a method of categorization through assimilation, in the historic tradition of the common law.18

Nevertheless, much can be accomplished through the exercise of legislative ingenuity. The framework of our tax statutes and the responsibility for their improvement lie with Congress. Here is where the flaws that become evident in administration can best be remedied; here response can be offered to the suggestions and provocations of the judiciary. Above all, in Congress the journey through sham to substance, through legal appearance to economic reality is a complete sight-seeing tour. The entire landscape may be examined, and truth may be sought at the bottom of a well. Unlike the judiciary, legislators are not confined to the record of a single case, the affairs of a single taxpayer, or the inventions and contentions of one group of attorneys. Policy originates in Congress, policy which may constrict and delimit the decisions of the courts. It follows that, as Congress is the freer agent, its responsibility in the quest of light is the heavier. A few simple illustrations may indicate how the legislative contribution could be made.

(A) The first instance has to do with deductions from taxable income. If taxpayer Jones occupies a rented house or apartment, he is not permitted to deduct his rent, for that is deemed a personal expense. On the other hand, if taxpayer Brown owns his home, he may deduct both mortgage interest and taxes. Yet nothing could be clearer to common sense, much less to economic law, than that the rent Jones pays is only a compound of mortgage interest (or other form of return on capital), taxes and cost of maintenance. Of course, Jones’ landlord may enjoy the same deductions as Brown, but as to him the transaction is one entered into for profit and the net return will be taxable income. The fact remains that Brown, who owns his home, is permitted to reduce his tax bill by incurring an essentially personal expense. Examples of this type might be multiplied, but in daily experience most of them would be found to relate to interest paid, taxes and bad debts.18*

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18 The use of common-law techniques by the Board of Tax Appeals and by field officials is quite apparent. See Final Report of the Atty. Gen’s. Comm. on Administrative Procedure (1941) 466.

18* This advantage to home-owners is now being used as a sales argument by real estate interests. (N. Y. Post, October 20, 1941, p. 16).
The proper categorization of these items is manifestly a matter of legislative policy. If certain clearly personal expenses are permitted as deductions, and all the balance are denied, some rule of reason must be advanced to justify the discrimination. That it has existed in a series of Revenue Acts proves nothing, for tax statutes do not appear with umbilical cords. If, therefore, deductions that are in the nature of personal expenses may be taken under the current revenue act, it would be well to assign them to the class in which they belong. Allowing only deductions incident to business or to transactions entered into for profit is one of the available techniques.

(B) A second instance of the need for realistic categorization is the whole institution of life insurance. We have never been able to decide just how to tax insurance proceeds, and the simplicity of the statute on that score is more a confession of bewilderment than anything else. The experts always tell us that the insurance contract is *sui generis*, and it certainly has been *sui generis* in its immunity from tax. But they mean something quite different, that is to say, that legislatures should be careful not to get themselves tangled in a mechanism so subtle and abstruse. It is like the "vapors" that Victorian ladies used to experience—you ask no questions as you tiptoe away.

Now, if the American people wish to subsidize the life insurance companies through tax advantages and immunities, they may of course do so. But such a subsidy should be granted advisedly, not by way of ignorance, inadvertence or mystification. It should be granted only after looking squarely at the uncooked facts. The average policy-holder has never heard of the phrase "*sui generis*." On the contrary, he was sold his insurance by argument and persuasion to the opposite effect. He was shown the advantages of insurance in terms quite familiar to him, in little sketches out of his own daily life, in simple, unassuming parables. He was sold ("Insurance is not bought but sold") his policy as a substitute for other things needed or desired.

A substitute for what? Well, not always for the same thing. In most cases, the insurance proceeds are a substitute for a bequest or devise to the beneficiary. Smith has been told that if he lives to age 65, he naturally expects to leave his family about $50,000. Hearing this makes Smith feel rather optimistic about his own future earning power, and by the same token all the more sensitive to the suggestion that it may be prematurely nipped off. But here in this little policy is the way to make sure that his "program" (whose existence he has not before suspected) will be realized. If the frigid hand of death should knock over his stack of chips, his family will get something just as good as though the game had been played to the end. Insurance thus stands in the place of inheritance.

In other cases, the function is different. Smith happens to have an
engaging smile and a way about him that would be hard for his employer to replace; he uses the right dentifrice and positively reveres an invoice. He is a valuable man, of appreciable earning power to the business. Hence it is considered an excellent idea to have a little contract by which Smith’s exit will automatically release the cash-register of an insurance company. Smith goes out, the check for the proceeds comes in: each has a charm all its own. The employer has insured himself against loss, say the experts. We say, he has made sure of his profits. He has substituted the insurance proceeds for the earning power, the profits associated with the lamented Smith. He has anticipated, with or without discount, the income of the future years. Here insurance represents anticipated income.

Of course, we must now quickly admit that there are cases that straddle the borderline between inheritance and anticipated income. Whenever the mode of settlement of an insurance policy calls for installment payments, there is an appearance, a complexion of surrogate income, rather than surrogate inheritance. Inheritance itself may consist of life-interests or limited estates. Hence we shall look, not to the mode of payment, but to the nature and purpose of the transaction. If the insurance is a substitute for an inheritance, it should be taxed as such. If it serves to replace profits, it should be taxed as income,—all by assimilation to the type of economic event for which it stood.18b

Now even a lawyer astride a distinction should not ride too far or tilt too hard. Perhaps all insurance proceeds, perhaps all inheritances should be treated as taxable income. The technique described above is not the only one available. It is one of many. Its merit lies in conforming to the facts of life insurance, and in reducing those facts to the level of familiar things. We have stated it too baldly for administrative use, and have done so advisedly. The china-closet invited the bull.

(C) Categorization through assimilation may be effected not only in the more patent ways which we have been considering, but also by means of the rate structure. For example, the legislative inclusion or exclusion of a type of income or deduction for normal-tax or surtax purposes is it-

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18b A significant step in this direction was taken by T. D. 5032 (1941), which adopted payment of the premiums as the criterion of inclusion of insurance proceeds in the gross taxable estate. Of course, this does not solve the problem in its larger aspects, even if evasion through indirect payment were not so probable. What counts is the implied recognition that premiums paid and proceeds received are economic functions of each other. See M. R. Schlesinger, Taxes and Insurance: A Suggested Solution to the Uncertain Cost of Dying (1941) 55 Harv. L. Rev. 226. Valuable suggestions in aid of the solution of this difficult problem are to be found in R. E. Paul, 1 Federal Estate and Gift Taxation (1942) c. 10. When a plenary scheme is projected, it is to be hoped that the material in TNEC Monograph No. 28 (Study of Legal Reserve Life Insurance Companies) will not be overlooked.
self a classification, a determination of resemblance or disparity. A further illustration is the relation of gift tax rates to estate tax rates, a relation so direct that one may be roughly computed in terms of the other. This parallelism of rates means simply that Congress has sensed the affinity between types of transactions, and has categorized accordingly.

There is room for much improvement in the structure of our gift and estate taxes. That the statutes should be wholly consolidated seems quite clear, for gifts and decedent’s estates are functions of each other. One suggestion has been the imposition of a single progressive tax on all gratuitous transfers, so that the estate at death would be taxed in the higher brackets to which it belongs. Large gifts inter vivos have become a popular substitute for testamentary benefactions, a part of the complex process by which wealth is passed from one generation to the next. The proper classification of such substitute transactions can be effected through revision of the rate structure.

These examples point the paths to categorization by the legislature. First of all, one must discover the “quintessential marrow” of the transaction. To do this, we put aside the midnight oil of metaphysics and simply keep our eyes open in the daylight. Once the nature of the transaction has been found, we classify it along with others which it resembles,—resembles not necessarily in legal terminology, not necessarily in subjective purpose, but necessarily and essentially in economic effect. If economic effects change from time to time (and they do), our classification must change with them.

Centuries ago, men used to express their opinion of the passing hours by placing this maxim on clocks and sun-dials: “All of them wound; the last one kills.” The same may be said of taxes, and with justification. But we have not concerned ourselves here with tax-rates or ultimate contributions. These are matters of public finance, now profoundly obscured by the demands of a national emergency. Whatever the rates, a tax system must justify itself in reason. Minor inequities are inevitable; major ones will not be tolerated. Every substitute transaction which is not realistically classified distorts the incidence of taxation and increases the burdens of others. With Congress rests the responsibility for justice, reason and realism, the responsibility for pushing through shadow to substance. Legislative policy is the true point of departure. But, when that much has been accomplished, what may the courts contribute to the same end?

III

Since 1932 we have had an excise tax on “gifts” but without any legislative definition of the term itself. What is a gift must therefore

become a judicial question, to be answered bit by bit as new sets of facts arise. For example, if large sums are paid, under court direction, by the committee of an incompetent mother for the support of her impoverished daughters, are these taxable “gifts”? If a husband, pursuant to an antenuptial agreement, purchases annuities for his wife and transfers property to her in consideration of her relinquishment of prospective statutory rights in his other property, are these taxable “gifts”? In the first case, at least, the taxpayer simply could not intend to give, and in the second case, the consideration for the transfers was adequate under local law. Yet both were held to be gifts, quite without regard to motive or intent.20

This sort of categorization has been roundly abused as “judicial legislation”. The courts, it is argued, have far exceeded their constitutional authority and have, in effect, assumed to levy taxes without sanction of statute. The Hallock case,21 Le Tulle v. Scofield,22 the Clifford decision,23 Higgins v. Smith24 have been particular targets of this criticism. All of the complaints and arguments which were marshalled against the courts before and during 1937, are now heard from the other side of the house. They can hardly be appraised without sketching the function of the judiciary in the administration of tax law.25 If that brings us to issues larger than taxation, we shall have to face them, for, strangely enough, it is only in the flinty process of arguing about axioms that light is struck.

We have come a long way since Montesquieu wrote, “In a republican government, it is of the nature of the constitution that judges follow the letter of the law”26 and since Hamilton said in the same vein, “It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them. . . .”27 In these utterances,
of course, the axiom was the doctrine of separation of powers into legislative, executive and judicial.

Credit for originating the doctrine of separation of powers is customarily accorded to Montesquieu, and it is true that he was its spokesman in the middle 18th century. But the three-fold division of governmental functions was so clearly stated by Aristotle that any intelligent discussion must start with him. It is hard to find anything important that was not known, or at least suspected, by the ancients.

Aristotle explicitly divided the powers of government into legislative, executive and judicial, but he did so for taxonomic, not normative reasons. Like Plato before him, he desired to review the various types of political communities, and began by classifying the functions appearing in each. He was not urging a system of checks and balances, for he found, as characteristic of democracy, that the legislative assembly must be supreme.

Aristotle admitted that the "magistrates" had the duty of applying to specific instances statutes framed in general terms. Nevertheless he advocated, again and again, a strict adherence to the letter of the law. Perhaps this was in the interest of mental tidiness and rational organization. Perhaps it reflected his distrust of politicians. At any rate, he wished the "magistrates" to hew closely to the line.

But we must picture the scene in which he wrote. The "magistrates" were the executive branch of the government, not the judicial. The judicial powers were exercised by the general populace. Greece had no legal profession as such, no system of judge-made law. It left no inheritance of jurisprudence to the modern world. The problem of the judicial power, as it presented itself in the 18th century and subsequently, was unknown to the Greeks. Hence, Montesquieu, in writing of division of powers and strict construction, borrowed Aristotle's words, but not his meaning. He translated and, as the proverb has it, traduced.

Aristotle did stand for a particular political philosophy which retains its appeal to this day: the equilibrium theory of government. He, like most 18th century thinkers and many since, recognized the struggle

28Politics, 1298a, p. 1226 (see note 2, supra).
29Politics, 1317b, p. 1265.
30Politics, 1269a, p. 1163; 1282b, p. 1192; 1287b, p. 1202; 1292a, p. 1212; Nichomachean Ethics, 1137b, p. 1019; Rhetoric, 1354b, p. 1326.
32George Santayana adopted this view: "What are called the laws of nature are so many observations made by man on a way things have of repeating themselves by replying always to their old causes and never, as reason's prejudice would expect, to their new opportunities. This inertia, which physics registers in the first law of motion, natural history and psychology call habit. Habit is a physical law. It is the basis and force of all morality, but is not morality itself. In society it takes the form of custom which, when codified, is called law and when enforced is called government. Government is the political representative of a
between economic classes, and considered government to be the instrument by which balance was maintained. In democracies, the rich should be spared because the poor have political power. *Per contra*, in oligarchies the poor should be raised and nourished. It is easy to see how the excesses of 17th and 18th century despotism served to popularize this view. Government should remain inert unless equilibrium is disturbed.

There is a further comment on the relation of Montesquieu to Aristotle. Aristotle wrote of income taxes as part of the economic scene in which he lived; he knew them and their effects upon the distribution of wealth. Montesquieu mentions, as his sole example of the income tax, Pollux's description of that prevailing in ancient Athens. The complexities and subtleties of income tax administration, were not dreamt of in Montesquieu's philosophy.

Although the American leaders of the Constitutional period were fairly steeped in "The Spirit of the Laws", they sensed its limitations. Taxonomic arrangement, pure and simple, is often a poor premise for practical action. Madison wrote, "... Yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? ... The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice." And, not much later, Paine declared, "So far as regards the execution of the laws, that which is called the judicial power, is strictly and properly the executive power of every country. It is that power to which every individual has an appeal, and which causes the laws to be executed; neither have we any other clear idea with respect to the official execution of the laws." Thus, as to governmental theory in general and as to taxation in particular, there were doubts, reservations annexed to the doctrine of division of powers. Government, in daily operation, might not be so sharply divisible, so neatly balanced. The legislature might exercise judicial functions, and the judiciary might appear as part of

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natural equilibrium of custom, of inertia; it is by no means a representative of reason."  

2 *The Life of Reason* (1922) 70.  
3 *Politics*, 1296, a p. 1221 *et seq.*  
4 *Politics*, 1309a, p. 1248.  
6 *The Federalist*, No. 10.  
the executive. It will be remembered that, at our Constitutional Convention, the initial proposal of a Presidential veto called for participation therein by the Supreme Court. All Gaul, too, was divided into three parts, which circumstance lent no little aid to its conquest.

What the men of the 18th century did not doubt was that votes and taxes went together. "No taxation without representation" was the battle-cry of the Revolution, a motto intelligible to one and all. The Constitution linked direct taxation with representation in its very first Article. And the Declaration of the Rights of Man proclaimed, "XIV. Every citizen has a right, either by himself or his representative, to a free voice in determining the necessity of public contributions, the appropriation of them, and their amount, mode of assessment and duration."

It must be admitted that democratic government has largely failed to realize this ideal. Madison's prediction of the clash of interests, groups and factions has proven all too true. The complexity and technical jargon of our tax statutes (mirroring a society completely metamorphosed since the adoption of the Constitution) make it almost impossible for the average citizen to understand, much less to influence their form. Intricate provisos, exceptions, cross-references convert revenue acts into intellectual mazes, from which only the most skilled and the most persistent can ever emerge. A handful of Congressmen draft the bills at committee-meetings, which are often held behind closed doors. Hearings are unsystematic, hurried and frequently "packed." Employees of the Treasury Department, not elected by or responsible to the population, do their utmost (usually quite well) to guide and assist the House and Senate committees. When a bill finally emerges, it is beyond the reach and capacity of most of the Congressmen, most of the Senators. Short of some exceptional eventuality, the final act will be the composite product of a small group in the treasury, a small group in the House, and a small group in the Senate. Government by Congressional Committees has become a familiar phenomenon in the 20th century; it is most conspicuous in matters of taxation. The hope of the founding fathers is less realizable in practice today than ever before.37

Separation of powers has fared as poorly. The growth of administrative and executive machinery, the delegation of authorities by Congress, the transmutation of the functions of Government have conspired to obscure, if not to obliterate, all sharp dividing lines. The needs for federal action mount day by day, and with these needs arise new, elastic means for their satisfaction. Courts find themselves inquiring into labor disputes and securities issues; the Executive tells farmers where and when to plant; Congress seeks to provide for the hungry, the old, the unemployed.

37See A. H. Hansen, Fiscal Policy and Business Cycles (1941) 448, proposing delegation to the Executive of the power to decide the timing and application of tax rates.
Democratic efficacy has become the keynote of a period in which govern-
ments must become dynamos or museum-pieces. Hence, the doctrine
of a government of limited, separate powers, checked here, balanced
there, constricted everywhere, has lost its force. It bows before the
economic, political and social whirlwind.88

These considerations have, of course, a special application in tax pro-
ceedings. It must be remembered that a case involving liability for taxes
is not an ordinary litigation between two individuals in which the
Government, through its courts, acts as impartial arbiter. On the con-
trary, the Government is a party to all tax proceedings, and must use its
own machinery to fix its own rights. Essentially, therefore, all the complex
mechanics of tax litigation is nothing but a method of ascertaining the
individual citizen's tax bill. He can go from one department to another,
from the Bureau to the Board, from the Board to the circuit courts,
from the circuit courts to the Supreme Court, but he is always dealing
with and within his sovereign and his creditor,—a sovereign in which he
has his representative voice, a creditor which collects and disburses at
the mandate of that voice. The individual's bill is thus fixed and made
certain, all within the machinery of which he himself is a molecular part.89

In such proceedings categorical separation of powers becomes un-
thinkable. It is the function and duty of the executive to advance this
process of assessment. It is the function and duty of the judiciary to
forward the same process. The legislature, of course, starts the operation
by enacting a tax statute, but that statute, so general and impersonal in
its phrases, has to be translated into millions upon millions of individual
tax bills. This is a strictly administrative undertaking. What then is
the role of the courts in tax litigation, if not an administrative role?89a
They move and mesh as part of the vast machinery of administration,
part of the comptometer of Government. The Supreme Court, in matters
of taxation, appears as the head of an administrative hierarchy, leading
the lesser elements in the performance of their duties. Functions have
been differentiated, but not with mathematical precision. They remain
functions of the same sovereign and are all integrated in the end result.

We have not mentioned the adjudication of constitutional questions in
tax proceedings. Here is a very different problem, though hardly a
common one. Infrequently these days does a taxpayer invoke the Con-
stitution, and with little hope of success. When he does, he calls upon
the courts to perform a strictly judicial duty. The system of checks

88Obviously, the Constitution cannot be bound down to those things which its framers
were able to foresee. United States v. Classic, 313 U. S. 299 (1941).
89See Report, cited note 18 supra, pp. 55-60.
70, 71.
and balances has gravitated into their care, and it is this system to which he appeals. The case then is no longer one of tax administration; it becomes a particular manifestation and example of the doctrine of separation of powers. It becomes a case in constitutional law.

This point has not been sufficiently noted. Because problems of statutory construction or of the scope of regulations so often impinge upon constitutional principles, the disparate functions of the courts have appeared to merge and blend. Often it is hard to see just where tax administration ends and application of the Constitution begins. Certain it is that courts do both at the same time and in the same opinion. Yet the distinction is real, even vital, for Congress can control one but not the other. If the courts err in the interpretation of "gift", "reorganization" or other key phrases of a tax statute, the error is remediable by a new statute. The voice that was misunderstood need only speak again. But if the courts erect a constitutional barrier to "retroactive" taxation or to taxing one individual in terms of the income of another to whom he is economically related, then only those who built the wall can tear it down.

It is just because of failure to observe this rather obvious distinction that the complaint of "judicial legislation" has been so loud. The arguments of 1937 are paraded in full panoply, now on behalf of a different gored ox. But those arguments, directed against excessive constitutional restrictions, have no weight where only statutes and their meaning are involved. If the courts misconstrue the intent of Congress, they can easily be set right. A "usurper" so submissive to the bridle need arouse no fears.

Of course, the pained cry against "judicial legislation" ignores a thousand years of common law history. How little of all our law is not judge-made! Shining through the statutes, the codes and regulations are all the concepts, the methods and standards which we heard in law school, and which the legislators, the codifiers and the commissioners heard with us. Even when we depart from the ideas and principles of the common, the judge-made law, it is precisely from them that we depart. They are our tradition, our equipment, our point of departure. If it were not for them, we should still be awarding judgment by ordeal of arms, of fire or of water. It is because of their absence that those ordeals still determine the disputes of nations.

We said that the men of the 18th century had expected (although with certain reservations) a government of three separate and distinct parts, checking and balancing one another. We said that this expectation had been largely disappointed. Now it appears that there is considerably more to the story, more in the way of compensation than of loss. The fathers of the Constitution were themselves fully versed in common law
history and knew, as well as we, how much was owed to the courts and their creations. They could hardly have desired to put an end to that grand evolutionary process. Certain it is that distrust of the courts was not the leit-motif of the Convention. How could it be, when the preservation of Constitutional limitations was committed, at least implicitly, to these same courts?

If separation of powers has not proven entirely feasible, there have been important countervailing gains. The Supreme Court, under frequently inspired leadership, has attained a dignity and prestige unexampled in judicial history. And the principle of cooperation among the departments of government offers a new and more fruitful creed for democratic action. The emphasis has shifted, the departments no longer pursue their courses like competing horses in the race for power. They have become more like a team.

In the administration of tax statutes, that team operates with marked success. The courts have not only applied legislative policy to myriad individual cases, but have contributed by their suggestions to the development of that policy. The interplay goes on so closely that a judicial phrase of today will be found lodged in tomorrow’s statute. The constant, daily experience of the courts, as case follows case before them, offers an invaluable guide. Judicial wits are sharpened on the grindstone of observation. It would be folly to waste their keen edge.

The gift tax cases to which we referred at the beginning of this topic, illustrate the value of judicial realism. In each of them, the court penetrated to the economic marrow of the transaction, subordinating the element of motive and purpose. It is what men do, not what they protest, that makes and shapes the world. As Bion said, though boys throw stones at frogs in sport, yet the frogs do not die in sport but in earnest. Behind the shadows and screens, behind the forms and the labels, stands true substance. If they are to see it, the courts must be free to turn their heads.

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40For an insight to the pangs of this transition, see Estate of Mary H. Hughes, 44 B. T. A., No. 184 (1941).
THE NEW COURT AND THE SPIRIT OF LAWS: A CLINICAL STUDY

CHARLES B. NUTTING*

I

AVAILABLE evidence seems to indicate that one of the principal achievements of the present administration has been the creation of a revolutionary Supreme Court composed of revolving justices. The description of the Court is amply supported by its willingness to overrule, in many instances wisely, cases of long standing. The characterization of its members is not so easily supported. But a consideration of the attitudes variously assumed toward the subject of statutory interpretation lends weight to the description.

Popular criticism of the Supreme Court in its latest "conservative" period dwelt largely on the charge that it was engaged in thwarting Congress and the legislatures of the states. Primarily this was said to be due to decisions on constitutional power which adopted an unduly restrictive view of due process of law and interstate commerce. However, it was also asserted that by refusing to give proper regard to legislative intention the purpose of much desirable legislation was frustrated. The "dead hand of the court" rested clammy on society and its weight hindered the rise of the American new order. The tolerance of a Holmes and the diligent delving of a Brandeis were insufficient to overcome the drag on progress imposed by the recalcitrant majority. Reform was urgently needed.

In the fullness of time, reform arrived through the appointment of seven new justices, all of them definitely committed to a "liberal" view of the extent of legislative power. Their attitude has been demonstrated in a long series of cases sustaining various attempts by Congress and the

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2Jackson, The Struggle for Judicial Supremacy (1941) c. III.

3id. at p. 64 ff.; Frankfurter, Press Censorship by Judicial Construction, Law and Politics (1939) 129.

states to extend the scope of governmental activity. However, when the question is not so much one of constitutional power as of attaching meaning to words, there seems reason to wonder whether the technique of the court has altered appreciably. In a number of cases decided during the October Term, 1940, somewhat bewildering shifts in attitude on the part of the justices are apparent.

It was, of course, to be expected that judges selected in part for their friendly attitude toward legislative activity should frequently declare, as had their predecessors, that their goal was to ascertain and give effect to legislative intent. It might also be expected that they actually meant what they said. But in the manner of arriving at legislative intention, in the weight to be given certain types of extrinsic evidence and in the underlying views of the scope of the judicial function, widely divergent and seemingly inconsistent results may be observed.

II

Probably the most extraordinary examples are to be found in the labor cases recently decided by the court. Of these, United States v. Hutcheson6 merits first consideration. Here, Mr. Justice Frankfurter, by construing the Norris-LaGuardia7 and Clayton8 Acts together with the Sherman Antitrust law9 was able to discover an intention on the part of Congress to exempt labor organizations from the criminal provisions of the latter statute.10 This result was achieved by deciding that the

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6312 U. S. 219 (1941). No attempt is here made to discuss the merits of the decision from the standpoint of labor law. This has been exhaustively done elsewhere. See, e.g., Steffen, Labor Activities in Restraint of Trade: The Hutcheson Case (1941) 36 Ill. L. Rev. 1. Cf. the amiable casuistry of Nathanson and Wirtz, The Hutcheson Case: Another View (1941) 36 Ill. L. Rev. 41.


10A short time previously the court had unanimously decided that the Norris-LaGuardia Act precluded the granting of an injunction in a labor dispute even though the defendants were charged with the commission of acts violating the provisions of the Sherman law. Mr. Justice Black in the course of his opinion referred to congressional dissatisfaction with the judicial interpretation of the Clayton Act and its determination to restrict the use of the injunctive power in such cases. Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc., 311 U. S. 91 (1940). Just before the decision in this case, Mr. Justice Stone, although holding the Sherman Act inapplicable to the case at bar, had said: "... this court, in its efforts to determine the true meaning and application of the Sherman Act has repeatedly held that the words of the act ... do embrace to some extent and in some circumstances labor unions and their activities, and that during that period Congress, although often asked to do so, has passed no act purporting to exclude labor unions wholly
two former statutes were designed not only to curtail the equity powers of federal courts but also to correct the continued misconstruction of the Sherman law by which the courts had mistakenly held labor organizations to be included within the bar of the statute. In the words of the justice, "... whether trade union conduct constitutes a violation of the Sherman law is to be determined only by reading the Sherman law and section 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of the outlawry of labor conduct."11

Dissenting, Mr. Justice Roberts relied on the judicial construction of the Sherman law holding secondary boycotts to be in violation of the act and the failure of Congress specifically to exempt labor unions from the criminal provisions of the law in spite of the continually asserted claim that they should not be subject to it. He also referred to the legislative history of the Norris-La Guardia Act as indicating that it was aimed only at abuses of the injunctive power by federal courts in labor disputes. Thus he concluded that the acts in question were properly subject to prosecution under the Sherman law.

It seems clear that a textual interpretation of the statute supports the contention of the minority. Save for the catch-all provision of the Clayton Act,12 readily disposed of when considered in its context,13 the two statutes relied on are concerned only with the use of the injunction. This is further supported by the committee reports, the language of which clearly indicates concern with the alleged abuse of the injunctive power rather than the liability of labor unions to criminal prosecution.14 Against this, the majority opinion advances a general and, apparently, wholly gratuitous, view of the purpose of the enactment and falls back on the Holmesian dictum, "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed... but it is not an adequate discharge of duty for courts to say: We see what you

from the operation of the Act." He then stated that the failure of Congress to do so, in the light of the continued controversy, was indicative of an intention to make unions subject to the act in at least some particulars. Apex Hosiery Co. v. Leader, 310 U. S. 469, 487 (1940).

11312 U. S. at 231.
12"I.e., that the conduct enumerated shall not be "considered or held to be violations of any law of the United States."
14SEN. REP. No. 163, 72d Cong., 1st Sess. (1932) 7, 8, 16, 18; H. R. REP. No. 669, 72d Cong., 1st Sess., 2. At the latter page, the following language appears: "This bill is the so-called anti-injunction bill. It is the outgrowth of years of agitation in the Congress for restriction upon the powers of Federal equity courts in the issuance of injunctions in labor disputes." See also 75 CONG. REC. 5464, 5467 (1932). The debate indicates that the members of congress were interested in making available to defendants in labor cases the usual constitutional safeguards to be found in criminal prosecutions.
are driving at, but you have not said it, and therefore we shall go on as before.”15

Granted the applicability of this doctrine to the case at hand, one is still at liberty to speculate on how the purpose of the statute as determined by the majority has been made evident. Normally it would be expected to appear in the words of the act, or by inference therefrom. This is not the case here. Possibly it might be deduced from extrinsic evidence of the type to which the federal courts are accustomed to refer.16 But the only supporting evidence from this material has to do with expressions of discontent regarding the judicial construction of the Clayton Act. It would seem relatively easy for Congress, if it actually intended the result reached by the present decision, to have specifically provided for it, especially since the lawmakers were obviously aware of the existing case law on the subject.

Apart from the private knowledge which the author of the opinion may have had,17 it appears that the only actual evidence of legislative purpose supporting the prevailing view is the indisputable fact that labor organizations had consistently contended that they were not subject to the provisions of the anti-trust laws. Thus, the contention of one of the groups interested in the legislation has been assumed to be the same as the purpose of Congress in enacting a measure which obviously was a compromise between violently opposed points of view.

Mr. Justice Frankfurter also had occasion to rely on his conception of legislative purpose in the Phelps-Dodge case.18 There, the majority of the court reached the conclusion that the National Labor Relations

15 Johnson v. United States, 163 Fed. 30, 32 (C. C. A. 1st, 1908). The question in this case was whether a schedule of assets and liabilities filed in an involuntary bankruptcy proceeding was a “pleading” and therefore inadmissible in evidence under a statute. It was held that it was, since it was closely similar to a technical pleading and fell within the class of matter which congress wished to make inadmissible. Obviously, the case is quite different both in kind and degree from the situation involved in United States v. Hutcheson. It is interesting to note that Mr. Justice Holmes also said in the course of the opinion, “We quite agree that vague arguments as to the spirit of a constitution or statute have little worth.” 31, 32.


17 The committee reports do not show definitely the extent of Professor Frankfurter’s participation in the drafting of the bill. It is stated, however, that he with a number of other men, consulted with the sub-committee preparing a draft bill. SEN. REP. No. 163, 72d Cong., 1st Sess. (1932) 3. He also prepared a memorandum on the power of Federal equity courts in the issuance of injunctions. H. R. REP. No. 669, 72d Cong., 1st Sess., 12. Cf. “My Lords, I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed.” Earl of Halsbury, L. C., in Hilder v. Dexter [1902] A. C. 474, 477.

18 313 U. S. 177 (1941).
Board had power under the statute to require the company to offer employment to persons whom it had failed to hire because of union activity, even though they had obtained substantially equivalent employment elsewhere and that it might also force the company to pay such workers the wages which they failed to earn because they did not receive employment from the company. In so doing, the court brushed aside the definition of employee contained in the act on the ground that to give it effect would be violative of the general policy of the law and hence it should be disregarded.

It must be admitted in connection with this case that a mass of extrinsic aids to construction indicate the general policy of the act to safeguard the right of collective bargaining. However, the restrictive definition in section 2(3) is difficult to disregard if any attention at all is to be paid to legislative language in determining the meaning of a statute. As Mr. Justice Stone remarked, "It is the policy of the Act and not the Board's policy which is to be effectuated, and in the face of so explicit a restriction of the definition of discharged employees to those who have not procured equivalent employment, we can only conclude that Congress has adopted the policy of restricting the authorized "reinstatement of employees' to that class."21

By its decision the majority reaches the anomalous result of treating as "employees" those who have never been hired and requiring the "reinstatement" of workers who had never been "instated." Congress is regarded as having meant what it obviously did not say and furthermore, as meaning something contrary to what it did say. Thus legislative "intention" is discovered and applied.

III

Three tax cases decided during the same term as that in which the opinions in the labor cases were handed down furnish interesting examples of the same technique. In one of these, Mr. Justice Frankfurter again declares his desire to get at the purpose of the legislature. While Wisconsin v. J. C. Penney Company22 may be regarded as a case involving only constitutional power, the existence of the power depended on whether the statute in question was an excise tax on the privilege of

19Sec. 2 (3) of the Act provides that the term "employee" shall include "any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment."

20As considered in the majority opinion they include the history of labor disputes, actions of the National War Labor Board, state legislation, committee reports and statements made in the course of debate.

21313 U. S. at 209.
22311 U. S. 435 (1940).
declaring and receiving dividends as the legislature had stated or was merely an income tax of a sort which had previously been sustained. In declaring it to be the latter, the author of the prevailing opinion declared that the operating incidence of the exaction was to be considered rather than its description. Since, as he found, the tax operated in the same way as an income tax and was apparently designed to fill a gap in the Wisconsin law on the subject, the words which the legislature used to describe what it was doing were in effect treated as irrelevant and the law was sustained. Mr. Justice Roberts, with whom three other members of the court joined, was of the opinion that the statute could not be judicially declared to be different from what the legislature had expressly stated and that therefore the attempted exaction was unconstitutional, since it dealt with acts over which the state of Wisconsin had no control.

Granted that the injunction to "think things and not words" has merit, it nevertheless is difficult to apply when words are the "things" being considered. Disregard of the express words of an enactment in order to sustain its constitutionality is not only an unusual method of arriving at legislative purpose but is also an exceedingly dangerous technique. It should be remembered that a taxpayer relying on a statute has an interest in clear and precise terminology so that he may judge whether or not he is subject to its provisions. This rudimentary requirement of fairness has frequently been lost sight of in decisions on the subject.

Additional evidence of the truth of the last observation is found in two opinions by Mr. Justice Douglas involving interpretation of federal revenue acts. In Helvering v. Reynolds, the problem was the valuation of securities in which the taxpayer had enjoyed a contingent remainder, which had subsequently become vested. The statute provided that the basis of valuation should be the fair market value at the time of "acquisition." A treasury regulation stated that title should relate back to the death of the decedent in a case such as this, whether or not the interest of him who took the title was, at the time of death, contingent. The precise question was whether or not the administrative regulation was valid. The majority held that it was. The basis seems to be that the statute itself is ambiguous and in the absence of what the court was willing to consider controlling evidence to the contrary, the administrative inter-

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23Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113 (1920); United States Glue Co. v. Oak Creek, 247 U. S. 321 (1918).
24313 U. S. 428 (1941). The problem of valuation under the Revenue Act of 1928 was considered in Maguire v. Commissioner, 313 U. S. 1 (1941); Helvering v. Gambrill, 313 U. S. 11 (1941); and Helvering v. Campbell, 313 U. S. 15 (1941). Although they involve interesting problems of statutory interpretation they are not of particular significance as far as the subject matter of this paper is concerned.
25Revenue Act, 1934, § 113 (c) (5).
pretation was permissible. Mr. Justice Douglas dismissed with a wave of the hand evidence of a contrary administrative interpretation which Mr. Justice Roberts, dissenting, considered material. He also disregarded evidence of legislative history including recognition of the prior interpretation indicated by congressional readoption of the provisions of former acts, related provisions indicating that the lawmakers specifically provided for valuation as of the date of death when they wished to, and hearings showing dissatisfaction on the part of the treasury with the provision of the statute finally adopted. An apparently dogmatic assumption that these extrinsic aids were irrelevant resulted in sustaining the doubtful administrative ruling and, of course, increased the revenues paid to the government.

*United States v. Stewart* 26 was another case in which doubts were resolved against the taxpayer. Stewart had purchased farm loan bonds below par relying on the representation that profits from their sale were not taxable and had later sold them at a profit. The federal publican held that the profits constituted taxable income. The relevant statutory provisions are indicated in the footnote. 27 In upholding the administrative action, Mr. Justice Douglas took the position that although "income" is a general term broad enough to include capital gains and Congress is presumed to use words in their usual and well settled sense, there is nevertheless a difference between income derived from mere ownership and that derived from dealings and transactions. Adopting the analysis made in *Willcuts v. Bunn*, 28 the justice stated the decision indicated that, "in the absence of clear, countervailing evidence, an exemption of 'income

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26 311 U. S. 60 (1940).
27 Revenue Act, 1928 § 22 (a) includes in gross income profits from "sales or dealings in property whether real or personal." § 22 (b) (4) exempts interest upon securities issued under the provisions of the Federal Farm Loan Act. § 26 of the latter statute, however, provides that "farm loan bonds (are) . . . instrumentalities of the Government of the United States and as such they and the income derived therefrom shall be exempt. . . ." (Italics supplied).
28 282 U. S. 216 (1931). In this case the only question was whether Congress might constitutionally impose a tax on profits derived from the sale of municipal bonds. The statute clearly authorized the tax, so that no question of interpretation was raised. In order to justify the imposition of the tax it was necessary to show that it was not placed on the securities or interest derived therefrom, which had been held exempt in earlier cases. The analysis referred to in the *Stewart case* was almost certainly made in order to decide the constitutional problem. The court was careful to point out that it did not appear the securities were issued at a discount so that the gain derived could be considered to be in lieu of interest. In the instant case, the bonds were bought below par so that a profit could be derived from their sale. Further, in the *Bunn case* the attempt was made by the federal government to tax profits from the sale of a state security, while here the federal government was taxing its own instrumentality, so that the question was entirely one of interpretation rather than constitutional power.
derived’ from a security does not embrace ‘income derived’ from transactions in that security.”

Fortified by this assumption, the court was able to dismiss as inconclusive extrinsic evidence derived from other statutes in pari materia, the legislative history of the relevant section, administrative interpretations, changes in subsequent legislation and the wording of other exemption statutes, all of which diligent and hopeful counsel had quarried from the reports and statute books.

The actual basis of the decision from the viewpoint of statutory construction is far from clear. It seems evident that the statutory provisions were ambiguous. It also seems evident that much of the extrinsic evidence tends to support the interpretation placed on the enactment by the taxpayer. The court apparently took the position that the Bunn case stated the correct view as to the distinction between income from ownership of and income from transactions in securities, presumed that Congress was aware of the distinction asserted and refused to believe that it was not being followed in the legislation in question. In the light of its attitude toward judicial construction as exemplified in other cases, the technique employed is remarkable. It becomes all the more unusual when it is remembered that the Bunn case actually had nothing at all to do with the legislation under consideration, but was concerned with the constitutionality of an entirely different statutory provision. Thus, the only real evidence of what Congress meant seems to have been disregarded in favor of an artificial basis of decision.

IV

A group of cases which, in order to avoid the heading, “miscellaneous” may be grouped under the general class of procedural and jurisdictional problems, furnishes a marked contrast to those which have previously been considered. Here, the tendency has been to interpret the statutes restrictively and to confine their scope by adhering to the precise language of the enactments. Interestingly enough, Mr. Justice Frankfurter emerges as the protagonist of literal construction. Thus, in Federal Trade Commission v. Bunte Brothers, he wrote the majority opinion, deciding that the Commission had no authority under the act to regulate a trade practice “affecting” but not “in” commerce. He refused to adopt in this setting the construction placed by the court on similar language in the

311 U. S. 349 (1941).

312 U. S. 349 (1941).

311 U. S. at 63.

This is particularly true of the statement of Senator King set out in the majority opinion, 311 U. S. 67, n. 14.

Particularly in the Hutcheson case, supra p. 611 and the Nye case, infra p. 618.
Interstate Commerce Act,\textsuperscript{33} declaring that the situations were not analogous.

"The construction of section 5 urged by the Commission," he said, "would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. Such control bears no resemblance to the strictly confined authority growing out of railroad rate discrimination."\textsuperscript{34}

"...we ought not to find in section 5 radiations beyond the obvious meaning of language unless otherwise the purpose of the act would be defeated."\textsuperscript{35}

Mr. Justice Douglas, joined by two other members of the court, seemed to think that the purpose of the act would be defeated without radiations. He pointed out that the practice in question created a burden on interstate commerce, that it was the injury to commerce rather than the character of the acts which gave the commission jurisdiction and that the statute should be read as one of a series dealing with a common problem. From existing evidence of administrative practice and prior contentions of the Commission, he drew exactly the opposite conclusion from that derived by the majority by use of the same data.

Two other cases, in one of which Mr. Justice Frankfurter wrote the opinion, require little comment since they were unanimous decisions and if the court sinned, it did so in such a manner that criticism would seem unavailing.\textsuperscript{36} However, in the \textit{Columbia Broadcasting case}, it may be noted that the justice opined, "primarily our task is to read what Congress has written."\textsuperscript{37} Extrinsic evidence advanced by both contestants was inconclusive and did not alter "the construction required by a clear-eyed reading of the statute."\textsuperscript{38}

On occasion, even Mr. Justice Douglas becomes a literalist. In \textit{Nye v. United States},\textsuperscript{39} where the question was whether or not an act which admittedly obstructed justice could be punished as a contempt, he interpreted the word "near", used in the statute,\textsuperscript{40} as having merely a geographical rather than a causal connotation. The result was that the offense could not be treated as a contempt. In adopting this interpretation the majority overruled a case decided in 1918,\textsuperscript{41} and based its decision primarily on its opinion of what Congress was attempting to do.

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\textsuperscript{33}Houston, E. & W. T. Ry. v. United States, 234 U. S. 342 (1914).
\textsuperscript{34}312 U. S. at 354, 355.
\textsuperscript{35}312 U. S. at 351. (Italics supplied).
\textsuperscript{36}Federal Communications Co. v. Columbia Broadcasting System, 311 U. S. 132 (1940); Shamrock Oil & Gas Co. v. Sheets, 313 U. S. 100 (1941).
\textsuperscript{37}311 U. S. at 135.
\textsuperscript{38}311 U. S. at 138.
\textsuperscript{39}313 U. S. 33 (1941).
\textsuperscript{40}35 STAT. 1113, 18 U. S. C. § 241 (1940).
\textsuperscript{41}Toledo Newspaper Co. v. United States, 247. U. S. 402 (1918).
when the original statute was enacted in 1831. It disregarded entirely
the practical consequences of the decision in terms of its effect on the
administration of justice as well as a century of unbroken judicial con-
struction. The "intention" of Congress was discovered largely from
circumstances revealed by a law review article co-authored by one of
the members of the court. 42 From this it appears that abuses of the
power to punish for contempt, culminating in the impeachment of Judge
Peck, led Congress to attempt to limit that power. But the Peck case
involved punishment for the publication of a criticism of a judicial deci-
sion, whereas in the instant case, the defendants, as Mr. Justice Douglas
delicately puts it, "through the use of liquor and persuasion induced
Elmore to seek a termination of the action." There seems little if any
extrinsic evidence to show that Congress wished to curtail the power
of the Court in dealing with this sort of conduct. The use of the power
to punish for contempt as an instrument to abridge civil liberties is one
thing; its use as a device to prevent flagrant corruption is another.

The roll call is completed with the case of United States v. Cooper
Corporation. 43 The question to be determined was whether the United
States was a "person" under the provision of the Sherman Law allowing
recovery of treble damages. 44 In this instance, Mr. Justice Roberts
spoke for the majority in deciding that it was not. His opinion, a model
of orthodox technique in statutory interpretation, indicates reliance on
common usage, use of the word in related sections of the statute, the
general scheme and structure of the legislation, supplemental legislation,
dicta in judicial opinions, legislative history and administrative con-
struction. All of the evidence, it was said, indicated that Congress did not
intend to permit recovery of treble damages in a civil suit by the govern-
ment. "It is not for the courts," the justice remarked, "to indulge in the
business of policy making in the field of antitrust legislation. Congress
has not left us at large to devise every feasible means for protecting the
Government as a purchaser. It is the function of Congress to devise
means to that end. . . . Our function ends with the endeavor to ascertain
from the words used construed in the light of the relevant material,
what was in fact the intent of Congress." 45

42 Frankfurter and Landis, Power of Congress Over Procedure in Criminal Contempts in
Inferior Federal Courts (1924) 37 H. Y. L. Rev. 1010. This article was designed to show
that Congress might constitutionally regulate the exercise of the power. It deals only inci-
dentally with the problem of statutory construction involved in the Nye case. The Toledo
case is criticized because of its historical inaccuracies regarding the reason for the legislation
of 1831. In the setting of the principal case much of the criticism is inapplicable since,
as is pointed out above, this case does not involve mere criticism of the court's conduct
but an actual and flagrant interference with pending litigation.
43 312 U. S. 600 (1941).
45 312 U. S. at 606.
Mr. Justice Black, dissenting, based his argument almost entirely on the fact that the government had become the largest single purchaser of supplies in the country, and that it was necessary to permit it to exercise the remedy in question. The statute should be interpreted in the light of its purpose and that purpose would be best served by allowing the government to recover.

Thus the opinion presents a contrast between the technique of interpretation which is usually found in American cases and that which derives directly from *Heydon's case*. Mr. Justice Black is frankly concerned with getting at the general evil dealt with by the statute. Being convinced as to what it is, he is not interested in anything else. The author of the majority opinion and, in this instance at least, most of his colleagues are more inclined to discover the precise intention of Congress with respect to the specific problem at hand. The dissenting opinion, however, represents the clearest and most honest statement of the views of the "liberal" wing of the court which has been found in the cases under discussion.

V

It has been said that statutory interpretation is an art as much as a science. If the remark is intended to imply the converse, that it is as much a science as an art, it cannot be reconciled with the foregoing cases. Of the three justices whose opinions have been chiefly considered, only Mr. Justice Roberts appears to have a consistent attitude toward the devices to be used in statutory interpretation and the weight to be given the various types of evidence. This is all the more remarkable, since the justice has not been noted for his consistency with regard to matters of substantive constitutional law. As for Mr. Justice Frankfurter, like that, "demned, elusive Pimpernel," we "seek him here, we seek him there" and find it impossible to discover for him a permanent abiding place. Mr. Justice Douglas seems almost equally unpredictable.

But it should not be too readily assumed that these members of the court are open to a charge of inconsistency. In fact, in view of their eminent attainments and, particularly of course, because they have been professors of law, the contrary assumption should be made. Why, then, does Mr. Justice Frankfurter find it necessary to interpret the Sherman Law in conjunction with the Clayton and Norris-LaGuardia Acts when he refuses to consider the Interstate Commerce Act when a provision of the Federal Trade Commission Act is under discussion?

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46 *Cf.* Emerson: "A foolish consistency is the hobgoblin of little minds."
Why is he satisfied in the Bunte case\(^6\) with "a clear eyed reading of the statute," refusing to consider "radiations beyond the obvious meaning of the language," while in the Hutcheson case\(^7\) he finds it necessary to extend the scope of the Norris-LaGuardia Act far beyond its terms. In the Columbia Broadcasting case, "primarily our task is to read what Congress has written,"\(^8\) while in the Phelps-Dodge case, "of compelling consideration is the fact that words acquire scope and function from the history of events which they summarize."\(^9\) Instances might be multiplied, but to no good purpose.

In the case of Mr. Justice Douglas, specific phrases are not so aptly illustrative. However, the contrast between his methods of approach in the Reynolds\(^5\) and Nye\(^5\) cases is significant. In the former he disregards evidence of specific intention in order to give a broad interpretation to the act, while in the latter he relies on evidence supposedly derived from history to interpret the statute restrictively.

Two elements seem present in most of the cases which have been discussed. In the first place, the recently appointed justices seem to pay little if any attention to the effect of judicial decisions. Particularly in the Hutcheson case was this true. In spite of the fact that the Sherman Law had consistently been interpreted to include labor organizations and in spite of the fact that, beyond the shadow of a doubt, members of the judiciary committees were aware of this interpretation, the court was willing to find that Congress was so inept that it failed specifically to provide for the exemption of labor unions from criminal prosecution although it intended to do so. If the decision is correct, it is a shocking reflection on the capacity of congressional draftsmen. The disregard of judicial interpretation of the contempt statute is only less flagrant. To ignore the effect of well known judicial decisions on the interpretation of an unamended statute is to close the eyes to reality.

More significant and on the surface less objectionable is the indication running through the opinion that the purpose of Congress is being sought. As a statement of a general proposition this is scarcely subject to attack. But the purpose of Congress must, presumably, be discovered from what it has said and done, supplemented, perhaps, by other evidence of an objective character. And yet, it is difficult to see from the opinions considered that objective evidence is given particular effect, or, at least, that it is used in a consistent manner. Purpose is treated as something given and various devices are then used to make the interpretation

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\(^7\)United States v. Hutcheson, 312 U. S. 219 (1941).
\(^8\)311 U. S. at 135.
\(^9\)313 U. S. at 185, 186.
\(^5\)Helvering v. Reynolds, 313 U. S. 428 (1941).
accord with the assumed purpose. This is perhaps put most straightforwardly by Mr. Justice Black in the *Cooper case.* "It would require clear and unequivocal statutory language to persuade me that Congress intended to grant a remedy to all except one of those who were injured by trust prices. . . . No such clear and unequivocal statutory language exists."58 In other words, the justice, having decided in some way not indicated in the opinion what the act was supposed to accomplish, now puts upon the legislature the burden of convincing him that he was wrong.

This indicates the fundamental consistency running through the cases. Statutory interpretation is clearly not a science in the view of the judges. It is the art of getting places through the manipulation of language. All of the cases, with the possible exception of those involving procedural matters, where the difference is simply between Tweedledum and Tweedledee, may, it is believed, be reconciled by the assumption of a few main postulates of judicial decision:

1. Labor organizations are to be favored whenever possible.57
2. The government should generally prevail over the taxpayer.58
3. The use of the equity power by federal courts should be restricted.59

For the sake of argument, let it be granted that the postulates are sound and that they are shared, in general, by Congress. Does it follow that the decision of a particular case should accord with the postulate rather than the words of the act? Can it be assumed that Congress always intends the main purpose of the act to prevail against a literal interpretation? The answer clearly should be, no. All important legislation is the result of the interplay of conflicting interests which must be adjusted by the legislature in preparing a bill for enactment. The conflict between employer and employee, the treasury and the taxpayer, the advocate of regulation and the victim is real and strenuous. It may often happen that Congress, in an effort to attain a general objective, may be forced to compromise with respect to minor points. In such cases, it does not intend that the general purpose shall prevail over the precise language. It desires exactly the opposite. For a court to indulge in the gratuitous assumption that the general purpose is to control in all cases may thus be to do violence to its basic premise of carrying out legislative intention.

57 See cases cited II, supra.
58 See cases cited III, supra.
Parenthetically, it may be noted that the judges who indulge in loose interpretation when the meaning of words is at issue are quite likely to adopt exactly the opposite technique when the existence of constitutional power is at stake. Here, although the "purpose" of a statute may be unconstitutional, it will be sustained if the words used indicate that an appropriate power is being exercised. Thus the same court which looks beyond the language of a statute to discover its purpose when meaning is sought will refuse to do so when power is involved.

VI

The foregoing review of the decisions does not indicate that the opinions are necessarily wrong in terms of the result reached. It merely shows that legislative intention is an untrustworthy guide to him who seeks to reconcile the cases or to predict the course of future decision. To one who has previously minimized the importance of legislative intention the conclusion is not surprising. However, it does indicate that the new court is on no higher a plane than was the old as far as the extent of its exercise of judicial power is concerned. Both courts have shaped legislation to accord with judicially held preconceptions. The difference is in the character of the postulates rather than in the techniques employed.

The difficulty with the decisions, treated as statutory interpretations, is that they introduce a standard of interpretation which renders prediction difficult. Instead of an objective standard by the use of which meaning is discovered from the words alone, or a subjective standard actually based on extrinsic evidence of legislative intention, a subjective standard which is found in the minds of the judges is employed. "When I use a word, it means what I want it to mean," said Humpty Dumpty. "When we interpret words they mean what we want them to mean," says the court.

Of course, this is not interpretation in a true sense, but merely the expression of judicial policy under the guise of interpretation. In effect, it constitutes an exercise by the court of a common law power of expanding precedent, the precedent in this case being legislative rather than judicial. However much may be said for the process when employed by

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*E.g.* Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381 (1940); Carmichael v. Southern Coal & Cke Co., 301 U. S. 495 (1937); Osborn v. Ozlin, 309 U. S. 53 (1940). In these cases, the court took the perfectly sound position that the objective evidence of the statute indicated its field of operation, irrespective of the "ulterior" motives which may have induced the enactment.


*See* Pound, *Spurious Interpretation* (1907) 7 COL. L. REV. 379.
a court concededly possessing common law jurisdiction, its use is somewhat anomalous in the case of a tribunal which has gone far in asserting that it has none. Fundamentally, the power exercised in the _Hutcheson case_63 is the same as that which was denied to exist in _Erie Railroad v. Tompkins_.64 While refusing to recognize the existence of common law jurisdiction the court in effect exercises it in determining the policy to be followed in labor and tax matters.

Thus the old court and the new are fundamentally alike in their attitude toward the use of the judicial power in framing policy. The ideals of the new day are making themselves felt because they are shared by the justices now on the bench. But they find their realization, not in mere passive acquiescence by a judiciary shorn of power, but in active advocacy by judges conscious of their power and determined to exercise it to the full.

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64 304 U. S. 64 (1938).
DEPENDENCE OF LAW AND LAWYER

WILLIAM F. CLARKE*

THE fatal results of a characteristically modern legal education can be judged pretty accurately if one will but examine a phrase which comes readily to those who have adopted the modern attitude in its fullness. And the need of reform, that is, of getting back to the original form, can in no wise be more positively expressed than by saying that the modernist is often not at all aware that he is modern. He seems to be under the impression that his attitude toward law is simply the right attitude—not, as it is, simply a new attitude. He is not aware that he subscribes to a fundamentally new approach, one which is the creation of modern times; and that when he speaks of the function of the law he is really talking about the use to which it is put today.

The phrase which reflects this modern attitude is: "law is purely remedial." It is the phrase which is too often on the lips of the alert student of law and too often descriptive of the approach of the practicing lawyer. It is offered as an answer to the critic who complains of a too particular, temporary or selfish approach in litigation, and who insists that both the student learning the law and the lawyer practicing it should cultivate a habit of looking beyond the case even when he reasonably looks closely at the case in the interests of a client.

Now we do not deny that law is remedial. But we will not concede that it is "purely" remedial. Or, to put it with more exactitude, we do not accept the statement when all that is meant is the application of the particular rule of law in the particular case so that the case may be successfully closed. When understood in this sense the law is not, in the larger and more satisfactory sense, remedial. Settling the case does not always mean settling the business. And it may mean the beginning of a great deal of serious thought which will end in revising the law. Thus the term remedial implies more than is evidently appreciated by those who resort to the phrase as a defense for looking no more deeply into the matter than particular and present litigation requires. And if nothing can be done at the instant of trying a case but to seek to apply the law (and thus to offer an immediate remedy), what is then accomplished is not to be taken as a remedy which will satisfy society—though it may satisfy even the party who loses the case.

The reader will probably be astonished here at the sudden introduction of "society" into our argument. If he is one of thousands of lawyers whose thoughts about law are, naturally enough, limited to the business

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of his law office he may ask how the lawyer can be expected to speculate as to society at large, and its interest in litigation, when that lawyer is pursuing a case. He may tell us that there are agencies at work within the profession whose business or inclination it is to work toward remedies which will "satisfy society," and that the work should be left to such agencies. And he will likely give as his reason for saying so that dealing in the inner workings of the law requires a doctor of jurisprudence, not an attorney at law.

No doubt the deepest speculations about law are material of jurisprudence; and not every lawyer can approach the scholar either in profundity of thought or in the ability to express himself. But our complaint is that the chasm between the two is far too wide; and our contention, that the right understanding of law as a profession will diminish the distance between the scholar at the one extreme and the practicing lawyer at the other. Even the rank-and-file lawyer ought to desire the best remedy at law, and to desire it because he seeks the best remedy for social ills. Should his comparative social obscurity disqualify him from thinking in terms of the social good and from being heard within the limited space of his own office?

It is not unreasonable to expect of the university-trained lawyer that he think in terms of legal values; and the legal cannot be fully evaluated if it is not considered in the light of a greater need, that is, the social need. Whenever the lawyer is able to express himself, at the same time that he expresses an opinion as a lawyer, he should reveal a knowledge of law in its relationship to the things for which law came into being as a form of control. He should look at the individual not merely as a potential client but also as a better citizen, potentially, than that prospective client may appear to be when he seeks counsel. And for the lawyer to look at the individual in this way is for him to be encouraged to review more than his knowledge of law. It is to engender some serious thought about this whole business of living together in a society.

Now the practical-minded lawyer will argue that our recommendation is misguided; for (he will say) to think along such lines would not help with the progress of the case and it would not be thinking and acting as a lawyer. But what, we ask, is "a lawyer's thinking"? Is the lawyer arbitrarily to scorn all thought but what pertains to the case with an almost violent pertinency? Is the great wealth of knowledge, much of it truly liberal, which he gained while preparing for a career, to be rejected as having nothing to do with John Doe's case?

There is something eminently unreasonable in an insistence upon calling law a profession unless the knowledge of philosophy, ethics, history and sociology, which the law student is told he must acquire, is to be brought into play somehow and to some degree when it is needed. Will anyone
seriously maintain that a liberal arts education is intended for one's hours of relaxation? Is the lawyer to give evidence of his university training only when he reads the profession's literature or when he attends conventions and hears legal problems discussed in the grand manner? May he justifiably lapse again into the purely "business" frame of mind when he returns to his law office and interviews a prospective client?

In a recent issue of *Harper's Magazine* there appeared an extremely intelligent and provocative article entitled "I Would Not Divorce Him Now", written by a woman who looked upon the divorce of her husband as tragic, not because she had made a mistake about her husband when she divorced him but because she now believes she made a mistake when she thought she had grounds for divorce. Her case, or even her argument, need not be considered here. But something she had to say about the aid of the lawyer in such matters—something she said in passing, as it were, and without an awareness of its implications as touching the lawyer himself—appears to us to fit in neatly and properly with our thesis. At the same time with granting that the lawyer may be "wise and sympathetic," she held (properly enough) that the father and not a lawyer should be the "audience" to a woman's hopes and fears about the child's development.

It was her expression, "wise and sympathetic," as applied to a professional man, which interested us and sent our thoughts coursing along a line which has engaged our attention and encouraged serious speculations very much of late. What is meant by "wisdom" and "sympathy" in a professional man? Is he wise because he suggests the most practical course, and one which most likely insures immediate success? Is he "sympathetic" simply because he agrees? We once knew a doctor of medicine whose professional success may be deduced from the fact that his knowledge of medicine and his skill in surgery saw him, at the time of his death, head of staff at a large hospital. But he is still remembered by patients, and others who knew him, as a wise and sympathetic man; and the incidents which are recounted as illustrative of this generally have to do with *his refusal to act as a doctor* because he knew the patient's real wants better than did the patient himself.

Let us, then, put this question to the lawyer: do you think it is the business of the lawyer to be "wise and sympathetic"? Is it his business to attempt to think and feel like a father when he is consulted about a child's development? The answer which comes back to us is that no lawyer who had respect for himself and his profession would allow himself to fail in giving the soundest advice of which he was capable when consulted by a client in such a case.

But (to return to the case of the divorcée) suppose that the client is consulting him about her divorce before she has taken any steps to secure
it and that he knows she has legal grounds for it? Should he not show his wisdom and sympathy by attempting to dissuade her from instituting proceedings?

A lawyer should be a good man, and a good citizen, before he is a good lawyer. We go further and say that he is not a good lawyer if he does not put the welfare of the client and society before his own interests or the misguided interests of the client himself. We believe he fails in his duty as a practicing attorney, presumably informed of the law, if he does not make clear, when consulted, that one has grounds for a civil suit (if such be the case), even though the law should not, in the best interests of the individual or society, have allowed for it. But we believe he fails in a higher duty if he does not employ his knowledge to dissuade the client from what he believes is against the client's own (truly) best interests and the interests of others concerned. He should reveal the best remedy—not merely be ready with a remedy under the law for an unpleasant situation now being suffered.

If the lawyer insists upon taking the first way out, under the law, he is merely fulfilling his function as a lawyer to point out that way—as the judge is fulfilling his function under the law when he grants a divorce, though his personal convictions may rebel at the necessity of performing his judicial act. But we do not know how a man can be said to rise to his full professional stature if he enjoys the greater knowledge of fundamental right and of social needs, yet permits himself to act within the narrow limits of the "musts" defined under civil law. Do the ethics of professional conduct impose silence on fundamentals, or forbid a public servant to act from a higher sense of duty than that of a particular agent or instrumentality?

We have heard this question answered by an emphatic No, by those who immediately suggest that she should properly get such a wise answer only from her pastor. This is not an intelligent suggestion of an alternative; and we can bring objection to it on purely practical grounds. The complaint of pastors is that they are not consulted. By the irony of fate, pastors, who should in justice be considered specialists or professionals in their own line (in this day of the deification of the particularized means), have been robbed of their own work by specialists in other lines who wish to show that they are not "narrow," but can safely be consulted by "the whole man." We ourselves do not believe that the lawyer (for example) is appropriating anything when he does step out of his narrow province in the interests of a client. But according as he advises in a broader sense he assumes responsibilities in a broader sense. And he must take care that he is not magnanimous only when it is to his own interests or the selfish interests of his client.

The evil which is contained in this new idea of "greater social service" runs through our whole civilization. And, if something is not done to eradicate the evil by correcting the notion, we shall end up by seeing each one appropriating more and still escaping the corresponding responsibilities. The horrible prospect which faces us, if we allow individual groups, corporations, professions—or the State—to "serve" us in our varied needs is that we will relinquish to them our person, and will have no assurance that we are being served beyond THEIR best interests.
We find ourselves unable to explain, sufficiently, the too common indifference to high, but not unreasonable, professional demands. There is too great a difference between what the professional man lauds and what he does. The man who is apt at defining the difference between a profession and a mere trade is strangely slow to represent the difference, save in the refinements and elegancies which distinguish the one from the other. Yet the first, if not the sole, reason for learning philosophy, ethics, history and sociology is that one may apply them in one’s work. To discuss the intellectual and moral superiorities of the professional life and not to exemplify them is to prey on the society which, though it recognizes the difference of rank, is not encouraged to profit by it.

It will be argued that the profession should distinguish itself in terms of the profession itself: that lawyers should be better lawyers. And the average lawyer is reluctant to go beyond conceding that, after he is a good lawyer, he should have “a social consciousness,” that he should be able to think in terms of “larger social issues.” But this is not enough, even for the average lawyer. Thinking will render no service to society unless it results in action. And the action is best performed in every individual law office.

Considering his interest in social problems, his intellectual background and his ability to express himself with clarity and force, an acquaintance of ours was strangely reluctant to offer his services to an organization recently formed for the purpose of instilling a better ideal of professional conduct among professional men. When asked why he could display no interest in the organization’s activities he replied, in substance, “I have wearied of organizations whose officers, lecturers and publicity managers talk in platitudinous language about ‘the evils of our times’, who appoint committees to make surveys or exhaustive research into the problems of democracy, totalitarianism, communism, fascism, socialism, etc., etc. To me, this is profitless professional activity. If an organization is necessary in the first place, should it not be as a means of providing a time and a place to men who will talk over their professional problems, and then return to their offices to put their findings into practice on the first customer, client or patient who walks in? The organization should exist to enlighten and strengthen the individual professional man.” We think it cannot be disputed that he has cause for complaint here. The tragic mistake is that the individual professional man often seeks the immediate remedy in practice but in defiance of principle, or discusses the right principle without seeking to put it into practice as a lasting remedy.

\[^{2}\text{We are not speaking, necessarily, of moral principles—certainly not of what is commonly meant when it is said that someone “violated moral principles” where a question of money or truth was involved. We are thinking of the marked discrepancy of tone between a man’s speech when he philosophizes (correctly) about law on the public platform and when he}\]
We ourselves are of the opinion that understanding of the true remedy is lost, and the means to apply it not employed, because there has been a radical departure in modern times from the truth about the real unifying principle. The unity which we know today is artificial; and the organization by which we seek to bind together both ideas and individuals cannot secure results because it recognizes no binding force beyond that of mutual agreement. This is the age of "contacts"; and we do not recognize interdependencies either among men or among ideas. In this state of affairs no lasting remedy can be applied; for while there is much activity, pointed toward a "correlation of the sciences" (to use a phrase recurring often in the literature of the movement), we do not recognize what gives real binding force in the order of thought. Thus the energy from the original source does not flow through the things which are only artificially put into relation with each other. But there was a time when jurists saw the real and necessary relationship between law on the one hand and theology, philosophy and ethics on the other; and when they sought a remedy in law beyond what the particular law, or the developed stage of the law, seemed able to apply, they naturally turned to that on which law depends directly, namely, jurisprudence. But they did more than this; or—to speak more truly—in their very thinking about jurisprudence they thought of metaphysics (and revelation) which gave it character in turn. In a word, they really comprehended the unity of the sciences. They naturally thought in relationships. They did not merely ask what "cue" theology, or philosophy or ethics or sociology (as they knew it) or canon law supplied—they asked what these of their nature demanded.

We have entitled this discussion, "Dependence of Law and Lawyer"; and we have already expressed the conviction that the lawyer, in applying a remedy in law, may not consider himself bound to function only as a lawyer. But his dependence ought to be explained not alone (as we have already done) by the fact that he is a professional man but also by showing in what sense law itself is dependent.

Now it would only be covering familiar grounds to summarize, even as briefly as limited space dictates, the history of our own legal tradition. The reader of these pages knows that our law did not spring full-grown contents himself with the "well, I can't turn back the tide alone" solution of a problem when approaching a case.

"In observance of the logic which we ourselves insist upon, we ought not to distinguish between ethics and philosophy, as if they were altogether distinct. Ethics, in so far as it is based on reason rather than on revelation, is a branch of practical philosophy. But to make the practical distinction we do make is to write in terms which the modern mind can more readily appreciate. And thus our meaning is that the jurists consulted ethical rules as these rules were already laid down, and also pursued their speculations even more deeply into philosophy."
from the brain of a divinity. He knows that it drew from sources. He
is, in other words, acquainted with the history of our law. But we trust
it is not an injustice to him to say that he is not as surely acquainted with
the reason of the law as that reason was known in the days of our law’s
beginnings. For he lives in a civilization which does not think in the same
manner. The educational system of which he is a product had long ago
begun to live on its own. The vital principle was (and is) still there, as
something which somehow survived. But the schools have not reflected on
it or really recognized it; so that, while it has not altogether ceased to
function, its partial results are ascribed to other causes, and its failure
to succeed is due to the individual’s or the group’s unwillingness to
recognize it for what it is, and abide by it. Our law had its beginnings
in the days before the disruption of unity, caused by the Renaissance and
the Revolt (with their promotion of an ideal of nationalism now seen in
all its sordid monstrousness). Whatever the good which came from the
individualism of the New Learning, there was encouraged a fatal in-
dividualism of the sciences and arts themselves. The greatest intellectual
misfortune which Europe suffered was a loss of the understanding of
unity. There was not only a divorce between religion and science
(knowledge). There was a further division of the sciences (knowledges).
And this was but a natural consequence of the repudiation of the concept
of unity held as a matter of course by the medieval mind.

With the destruction of unity, that material of thought which enjoyed
the particular patronage of the medieval scholar suffered neglect or was
given a new application which was nothing short of a misapplication.
Consider the case of canon law, for example. There were canons which
involved civil matters, since the Church had to legislate with an eye to
the civil-religious; but, however secular these canons might appear in
tone, they were suggested by what the Church believed were the claims or
needs of religion in a civil society. It was religion, not civil government,
which was first being safeguarded; and, ultimately, all canon law had its
justification in revelation and the natural law. But what happened
when the State took over canon law—as England did, after the schism?
Legislators realized that such a great and influential body of law should

'We think this difficult abstraction can be illustrated in the case of unity and ‘contacts,”
to which we have already referred. We get somewhere in our organized activities because
there is a semblance of unity in the loosest organization. But we get only as far as we do
because there is only a semblance. Thus we accomplish a little when we “submerge” in-
dividual differences of race and creed for a common cause. But (in the case of creed
particularly) we do not get the perfect and desired result because a perfect idea of creed
will not allow for the submerging of some things. It is not that the unification is im-
possible in principle but that it is often impossible in practice because we seek the wrong
unity and the wrong end. We work for a “common cause”—but it is not a good cause,
and it cannot serve a common good.
have to be retained, since it too surely formed a part of the legal mind and the social need, as well as the religious tradition. Indeed, it would be truer to say that they "realized" nothing at all, but that they naturally followed the course they did in respect to canon law. For, however strong (and reasonable) the antipathy to the Papacy, early post-Reformation England still had the pre-Reformation mode of thought regarding the ultimate foundation for the religious and secular alike; and if the civil authorities retained the canon law in essence, because it was actually civil in appearance and in its readiness of application at many points, they retained it also because, if Henry VIII would no longer tolerate what he might call the political philosophy of Rome, his judges could not tolerate any other kind of fundamental thinking about philosophy itself than was cherished by Rome. English thinkers simply did not know any other kind of thinking.

This illustration will make clear what we mean by "dependence of law and lawyer." There was, and is, a real dependence in the order of reasoning; and, in different periods of history, there can be no difference in this respect. But we may do violence to the reasoning by a departure in practice. Consider what is done today in respect to marriage. We have, perhaps, nowhere borrowed so much from canon law as we have in respect to this institution. But the State now considers marriage from the civil point of view—though it took its legislation originally from the Church, who considered it after a chain of reasoning which did not stop short of the natural law. In the case of the State there is an affection for successive immediate analyses of conditions; in the case of the Church there is (excepting what is considered plainly and properly subject to time and circumstance) a chain of dependencies. Where the civil has been able to propel itself, without the old and obvious dependence in fact, it has done so because there is a real dependence in truth—though the civil authorities may not recognize it. But we might quickly renew our hopes for a better civil order if there were a recognition of the real dependence and a greater readiness to unite—not merely "collaborate."

That we have generally cast ourselves off from our moorings is perhaps nowhere better shown than in the field of international legal relations. We have no international law, in any reputable sense of the word, because we recognize no international, no super-national, sovereignty. There is nothing upon which international law itself can depend. According to some reports from abroad, there was not general satisfaction in England on the publication of the Churchill-Roosevelt Eight Points. The common sense of the English people could make a distinction between platforms and principles. They know that even statesmen of the highest calibre cannot insure "a better world to live in," "international justice," "world peace" and the like, because these are values, not political platforms. All decent
peoples want these values; but they know that these values result not
from civil law but from the civil conscience—and the civil conscience is
instructed and strengthened, not by civil law, but by that upon which the
civil law depends. Civil law, whether within the nation or among nations,
may be the instrumentality, but it cannot be the motive.

William Francis Roemer said that international law "lost its soul" at
Westphalia in 1628. The truth could not be more effectively expressed.
By the year 1628 jurists had already "freed" international law from the
"bondage" of natural law and revelation. Jurists were now consulted
because they were authorities on international "relations"—not because
they were (sound) philosophers who knew international relations as well. Henceforth a Grotius, a Hobbs or a Bentham would be substituted for a
Victoria, a Suarez or a Bellarmine. Henceforth we would have a *jus inter
gentes* (a law among nations), not a *jus gentium* (a law of nations).
Great "bodies" of international law would now develop—but there would
be no "soul" in those bodies.

Anyone who says that the international situation is so infinitely more
complex today that we need well-informed authorities, not philosopher-
jurists, is supposed to utter a truism against which there is no answer.
The consuming ambition, therefore (and this is true of the professional
in all fields) is to become so thoroughly well-informed on particular
circumstances and technicalities that the layman will entrust the lawyer
with the solution of the problem. But is not the layman himself gradually
awakening to the possible truth of our own contention: that a professional
knowledge of particular circumstances and technicalities is not getting
results? It is certainly not getting results in the international order.

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6The Ethical Basis of International Law (1929) 4.

7That the modern mind is surprisingly unable to think philosophically is indicated by the
fact that it never seems to occur to the modern student to question the logic of the statement,"Grotius is the father of international law." If Grotius had wished to disdain the
philosophers who were his predecessors in the field of international law he could not
actually have done so without writing something which would be a mere exposition of a
state of international affairs. This "starting off afresh" of which there is so much talk today
is something which only the modern theorist has the ambition to attempt. Grotius did not
"originate" international law, as Adam Smith did not originate Political Economy or
Francis Bacon the inductive system of reasoning.

Now we know that if no attempt were made to solve the problems of international law
save by arguments from theology and philosophy the study would be unscientific. For
this would be to refuse to make use of the knowledge and accept the aids which come from
particulars and from experience. There are those who make this mistake when they teach
a philosophy of education (for example) which is only a philosophy of religion. (Education
should be religious; but science—which means systematic knowledge, properly classified and
diversified—recognizes a distinction between religion and education.) The fault peculiar
to our own time, however, is the stressing of the particular and experience to the neglect of
fundamental principles of philosophy and natural theology. International law, common law,
sociology, education, etc., are not philosophy; but they ought to be philosophical.
The laymen of the world have despaired of the trained international jurist. Their hope for the nations is bound up with a hope for a return to common sense and common decency; and, when they speculate about what the world decided to call useless abstractions, they hope for a return to a sound philosophy of national government and international law.

It is time now for the specialist to get in line with such people as these. After that he may do his specializing. But he may not at any time ambitiously suppose that, out of his own particular knowledge or experience, or out of any one profession, tradition or civilization, he has "created" a jus gentium.

It is this common logic which explains equity jurisprudence and keeps active and alert a kind of Old Guard who will not suffer a merging of equity and common law to the disappearance of the essence of equity. It must be remembered that equity in itself, like stare decisis, is as ancient as human society. As men always had respect for previous judgments in like cases, so men always recognized the difficulty, and even the injustice, of applying a universal law in every particular case. Attention to practice demands of the lawyer a knowledge of equity law, of the technical and procedural difference between equity and common law. But if there is a crystallization of practice in equity which loses sight of the very reason for introducing "super-legal justice" into English legal practice, there is bound to be a decadence of the idea of equity—and not merely a (desirable) systematization and simplification. The thing of greatest importance is that we avoid a systematization which would retain the "legal" but take out the "super."

It is on this note that we should like to conclude our discussion of the dependence of law and lawyer. And the phrase "super-legal justice" symbolizes our whole contention. The lawyer is concerned with the "legal"—but also with the "super." The former signifies what he should know and do according to the peculiar knowledge and conduct of his profession; the latter, what he should respect as lying beyond what is peculiar, but not beyond what is proper, to his profession. It is out of the "super" that the legal grew; and neither layman nor lawyer may ever develop to a point where there is independence of this source and defense. For the profession to suppose—or to act as if it supposed—that this independence is possible or desirable is for the profession to court eventual correction by a simple and non-professional society.
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ADMINISTRATIVE LAW

JUDICIAL REVIEW OF DRAFT CLASSIFICATIONS

IN times of swiftly changing national emotions, such as are now experiencing, it is easy to overlook the fundamental safeguards and rights of our system of government, which we are striving so vigorously to protect, because they present occasional and temporary obstacles in the path of national preparedness. Undoubtedly many of our peacetime procedures, and especially our bureaucratic red tape and judicial delay, are unfitted in their present forms for the quickened pace about them. That they must change is admitted, but in changing they must not discard the hard-earned liberties they were designed to protect. They must be streamlined, but not circumvented. That this change is possible without a loss of our constitutional guarantees has been proven by the Selective Training and Service Act of 1940.

The Selective Training and Service Act provides that “...such local boards ... shall have power ... to hear and determine, subject to the right of appeal to the boards herein authorized, all questions or claims with respect to inclusion for, or exemptions or deferment from, training and service. ... The decisions of such board shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe.”1

It is significant that no statutory provision is made for judicial review of the determinations made by the draft boards. Instead the action of the appeal board is definitely made final, except in certain cases where an appeal to the President may be had. Of course the reason for this omission lies in the nature of military service. The national interest in present world conditions requires prompt and drastic action. To superimpose a statutory judicial review upon the right of appeal allowed under the Act would seriously retard the development and training of an army. Civil rights have always been subject to military exigency and summary action is necessary, especially in times when these rights “are more violently assailed from without than within.”2


This does not mean that civil rights are not protected from arbitrary and oppressive action by executive authorities. Despite the omission of statutory review, there are judicial remedies available to prevent unwarranted conduct by executive officers.\(^3\) The extraordinary legal writs have always issued to review determinations clearly beyond the grant of authority.\(^4\) However, this does not mean that the courts will substitute their judgment for that of the administrative agency. Generally what is within the jurisdiction of the administrative agency is beyond the jurisdiction of courts; it is only when acts are clearly beyond the grant of executive discretion that they come within the judicial influence.

The limitations on judicial review of draft board determinations are clearly demonstrated in United States ex rel. Pascher v. Kinkead,\(^5\) a habeas corpus proceeding, wherein the court had occasion to determine the extent to which it would review a determination of a local board. The court said:

"The next question is whether their decision may be reviewed in this proceeding. The act provides that decisions of the district boards shall be 'final,' save only as the President may see fit to modify or reverse them. I think that it may be considered as settled beyond all question that Congress may make the decisions of the executive department or subordinate officials thereof, to whom it has committed the execution of acts similar in their general nature to this, final on questions of fact which arise in administering such acts; and when it has done so, the courts may disturb such decisions only when it appears that the party involved has not been afforded a full and fair hearing, or that the

\(^3\)Draft boards belong to the executive branch of the government, since the powers and duties relate exclusively to the efficient raising and composition of an army. United States v. Stevens, 245 Fed. 956 (D. Del. 1917), aff'd, 247 U. S. 504 (1918). Since no judicial function is involved in classifying registrants, the ordinary powers of judicial review do not exist. "The act of the respondents in classifying the petitioner involved no judicial function. It was purely an administrative act. Now it may well be that if as a result of undue process the petitioner were in the custody of the armed forces of the United States, a writ of certiorari might issue in support and aid of a writ of habeas corpus. Thus there would possibly be presented a review of the proceedings which led to the induction. Such circumstances do not exist here, and until they do, this court is without power to grant the relief sought." Petition of Soberman, 37 F. Supp. 522 (E. D. N. Y. 1941) (holding that the ordinary methods of judicial review are not available to review the determination of a draft board.)

\(^4\)Only where it is clear that no legislative disposition of the appropriate appellate procedure has been made can recourse be had to such remedies as injunction, mandamus, habeas corpus, and certiorari. For where the statute has indicated the methods by which and the circumstances in which administrative action is to be subjected to the scrutiny of judges, the use of other devices for securing judicial examination is not likely to be permitted by the courts. See e.g., Securities and Exchange Commission v. Andrews, 88 F. (2d) 441 (C. C. A. 2d, 1937); Calf Leather Tanners Ass'n v. Morgenthau, 80 F. (2d) 536, (App. D. C. 1935), cert. denied, 297 U. S. 718 (1936). And see McAllister, Statutory Roads to Review of Federal Administrative Orders (1940) 28 CALIF. L. REV. 129.

\(^5\)248 Fed. 141, 143 (D. N. J. 1918).
executive officers have acted contrary to law, or have manifestly abused the
discretion committed to them by the statute.\textsuperscript{86}

Thus the determinations of the local boards are final unless the rights
of the selectees are arbitrarily invaded. It is not the province of the
court to review the evidence, but only to review the record to determine
if there is sufficient evidence before the board to substantiate its findings.

The requirement of exhaustion of administrative remedies is definitely
to be observed in the selective process.\textsuperscript{7} Premature resort to the courts
is usually rebuffed either on the ground that the action sought to be re-
viewed is not final in character or that a remedy still remains under
the statute.\textsuperscript{8} The necessity of this rule is obvious. Review of intermediate
orders would afford opportunity for constant delays for the purpose of
reviewing mere procedural requirements or interlocutory directions
However, since the rule is one of convenience intended primarily to
accelerate administrative action, it is not applied when the reasons for
its exercise do not appear. In Ex parte Green,\textsuperscript{9} the inductee sought a
writ of \textit{habeas corpus} to stop his induction on the grounds that he was
not a citizen of the United States, but a member of the Indian tribe of
Six Nations. The district court denied the writ and Green appealed. The
government contended that an appeal should have been taken from the
draft board's action in the manner prescribed by the Selective Service
Regulations, rather than proceed by writ of \textit{habeas corpus}. The court
recognized that Green’s failure to claim exemption before his local draft
board and to appeal its decision might be enough to justify the dismissal
of the writ, but it declined to dispose of the case on so “narrow a ground”
for the question presented was one of importance to other members of the
tribe. The decision is undoubtedly correct in view of the broad impor-
tance of the question presented.

Exceptions to the rule, however, should be few and only for substan-
tial reasons. During World War I several cases were reviewed where the
administrative remedies were not completely exhausted for what now
appear to be inconsequential reasons. For example, in Ex parte Cohen,\textsuperscript{10}
decided in 1918, the court determined that the failure to appeal to the
district board should not deny the right of \textit{habeas corpus} because to
have appealed “would have been an act of folly.” It sees safe to predict,
in the light of recent Supreme Court cases,\textsuperscript{11} that the courts today will

\textsuperscript{86}Id. at 143. (Italics supplied).
\textsuperscript{7}Baldinger, The Constitutionality and Operation of Certain Phases of the Selective Serv-
ice System (1941) 136.
\textsuperscript{8}Ex parte Tinkoff, 254 Fed. 222 (N. D. Ill. 1918); Summertime v. Local Board, 248 Fed.
832 (E. D. Mich. 1917).
\textsuperscript{9}123 F. (2d) 862 (C. C. A. 2d, 1941).
\textsuperscript{10}254 Fed. 711, 713 (E. D. Va. 1918).
\textsuperscript{11}Federal Power Commission v. Metropolitan Edison Co., 304 U. S. 375 (1938);
not be willing to overlook the long settled rule of judicial administration on such flimsy grounds as the "folly" of exhausting the available relief before appealing to the courts.

Of the available common law methods of obtaining judicial review, those of *habeas corpus*, injunction, *mandamus* and *certiorari* have been given almost exclusive use. Of these, the only one which has met with any degree of success has been *habeas corpus*. Injunction, *mandamus* and *certiorari* are not suited to the type of determination made by a draft board. However, since they have all been used at one time or another, brief consideration may be given to the suitability and effectiveness of each.

The writ of *habeas corpus* is available to a person whose bodily liberty has been unlawfully restrained. The relief granted is an order to release the party affected. While in some cases courts have reviewed the merits of the case on writ of *habeas corpus*, as a rule only questions of deviation from the statutory authority, the fairness of the hearing, and the absence of any substantial evidence to support the finding may be raised. Thus relief will be given only where the investigation has not been fair, or where the board has abused its discretion by a finding contrary to all the substantial evidence. The determination made greatly resembles that of a board of inquiry in an immigration hearing, and, as a usual rule, will be given the same review.

While the selectee must wait until he has been presented for induction before he applies for a writ of *habeas corpus*, it is not necessary for him to decline induction and submit himself to charges of desertion by the military authorities before he can appropriately contest his restraint. All that is required is a protest of the unlawfulness of the restraint.

Although several cases involving petitions for *habeas corpus* have been decided since the Act became effective, it is significant that in only one was the determination of the local board overruled. In this case the selectee contested his induction on the grounds that both the local board

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14 *Ex parte* Platt, 253 Fed. 413 (E. D. N. Y. 1913).

15 United States *ex rel* Filomio v. Powell, 38 F. Supp. 183 (D. N. J. 1941). Moreover, it appears that the writ of *habeas corpus* will issue even after the selectee takes his oath of enlistment. United States *ex rel* Errichetti v. Baird, 39 F. Supp. 388 (E. D. N. Y. 1941). However, the writ will not lie to release a voluntary enlistee, since his detention results from the enforcement of a valid contract and is not unlawful. McCord v. Page 124 F. (2d) 68 (C. C. A. 5th, 1941).
and the appeal board erred in classifying him in Class I-A. He contended that he was entitled to be classified under Class 3-A by reason of the fact that his wife was entirely dependent upon him for support at the time of his classification. The appeal board defended its classification on the ground that the selectee was not married until January 4, 1941, one day after he had taken his physical examination. It also contended that the selectee had an interest in a dry-cleaning business which would enable his income to continue irrespective of induction and that his wife had been living with her family until her recent marriage, and could return. Despite this weighty evidence, the District Court of New Jersey determined that the board acted arbitrarily in its failure to conclude that the wife was a *bona fide* dependent. Although this appears to be an unreasonable intrusion into a draft board's determination, the court found sufficient reasons for its interference. The facts showed that the selectee and his wife had been engaged since 1939 and that the date of their wedding, January 4, 1941, had been selected because it marked the fiftieth wedding anniversary of the selectee's grandparents and the twenty-fifth anniversary of his parents. The court also found that there was no evidence to support the local board's conclusion that his income would continue, since his interest in the dry-cleaning business was only a minor one and his main source of income had been his salary, which would stop once his services ended. It dismissed the contention that the wife could return to her parents because "the Selective Service Act neither contemplates a disruption of domestic life nor a moratorium on marriage after its enactment." But this case is not typical. Courts have not been reluctant to find that marriage entered after classification have been for purposes of evasion. In these cases the importance to the national well-being of the maintenance of the family as a unit has not been allowed to obscure the real purpose of the marriage, especially when the Benedict urge appears to be of recent origin. Moreover, claims of dependents other than a newly acquired wife have also been closely scrutinized and found lacking, especially where there are others who are capable of assuming the burden.

The writ of *mandamus* is used to direct the performance of a ministerial act, but not to control discretion. Unlike *habeas corpus*, there is no general power in the federal courts to entertain an original action of *mandamus*. It is not an action at law or a suit in equity and hence does

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19 Id. at 15.
23 However, it has been held that the District Court for the District of Columbia has
not come within original federal jurisdiction. Thus mandamus will not issue to require a draft board to perform a purely ministerial act, such as changing the erroneous date of birth given by a registrant on his questionnaire, even when to correct the date would place him over thirty-five years of age and beyond the provisions of the Act.\textsuperscript{20}

This lack of power in the federal courts is also true in the case of certiorari. By this writ, a superior tribunal orders an inferior to send up the record so as to allow the superior court to examine the record for errors of law. The Supreme Court has held that it cannot be used to review ruling made by executive officers of the United States Government.\textsuperscript{21} Similar cases hold that it will not lie to review the action of a draft board, since there has been no exercise of judicial functions:

"The draft boards are purely executive agencies, and their error, committed against those who are within the draft law, is executive error in the enforcement of discretionary regulations, and I do not believe that it was or could be the Congressional intent that these executive agencies, constituted, as observed, to carry out an unlimited discretion, were or are to be considered in the light of quasi judicial tribunals, discharging functions which pertain to every day legal rights of a citizen."\textsuperscript{22}

While the lower federal courts have usually been able to evade restrictions on their powers to issue writs of mandamus by using the injunctive process to achieve the same results,\textsuperscript{23} this permissive alternative does not appear to be available to review draft board classifications.\textsuperscript{24} Besides the necessity of satisfying the ordinary requirements of equity jurisdiction (irreparable injury and inadequate remedy at law), there is the further obstacle that an injunction ordinarily will not be given to protect personal rights. Accordingly, in a recent case, it has been held that an injunction will not lie to restrain the induction of a college student

\textsuperscript{21}Degge v. Hitchcock, 229 U. S. 162 (1913).
\textsuperscript{22}In re Kitzerow, 252 Fed. 865, 867 (E. D. Wis. 1918); see United States ex rel. Roman v. Rauch, 253 Fed. 814 (S. D. N. Y. 1918); Shimola v. Local Board No. 42, 40 F. Supp. 808 (N. D. Ohio 1941); cf. Angelus v. Sullivan, 246 Fed. 54 (C. C. A. 2d, 1917), wherein an injunction was refused, but the court indicated that certiorari was the proper remedy.
\textsuperscript{23}Note, Mandatory Injunctions as Substitutes for Writs of Mandamus in the Federal District Courts: A Study in Procedural Manipulations (1938) 38 Col. L. Rev. 903.
\textsuperscript{24}Angelus v. Sullivan, 246 Fed. 54 (C. C. A. 2d, 1917); Bonifaci v. Thompson, 252 Fed. 878 (W. D. Wash. 1917); Local Draft Board No. 1 v. Connors, 124 F. (2d) 388 (C. C. A. 9th, 1941).
into the army until he has finished school, since no cause was stated for which equitable relief could be given.25

It is apparent, therefore, that the interference by courts in the business of raising an army is of a very limited nature. The writ of habeas corpus is the only practical way of obtaining court assistance and this is available only where the action of the draft board is highly arbitrary and capricious. The necessity of this very limited review is evident; on the other hand, the fact that relief from oppressive action is available not only protects the individual whose liberty is unlawfully restrained, but also acts as a superior sanction to guarantee a fair hearing in the borderline cases wherein the actions of the draft board are not likely to be reversed.

JAMES A. McKENNA, JR.

GREATER FREEDOM OF SPEECH FOR EMPLOYERS

The National Labor Relations Board has adopted an unfriendly attitude toward the independent union on the ground that such an organization is seldom, if ever, the free choice of the workers as their bargaining unit, a right guaranteed them by the National Labor Relations Act.1 Therefore, whenever an independent union has demanded recognition as the bargaining unit of the majority of the employees in a particular industry, the Board has generally refused to certify the union. Upon petition of interested parties, usually an affiliated union, the Board has reviewed the acts leading to the establishment of the independent union in order to determine whether coercion by the employer led to its creation. The history of the independent union is examined and the acts and words of the management carefully scrutinized. Usually the Board has found coercion and has ordered disestablishment of the independent. If substantial evidence is marshalled to support such an inference, the order of the Board is sustained.2 Where the circuit court is unable to find substantial evidence, enforcement of the orders is refused.3

In most of the cases in which domination or coercion of the unaffiliated union has been a factor, the union had existed in some form prior to the adoption of the Wagner Act. After the constitutionality of the National Labor Relations Act was sustained,4 many of these independent units were reorganized in order to divorce them from the

25Local Draft Board No. 1 v. Connors, 124 F. (2d) 388 (C. C. A. 9th, 1941).


4Jones & Laughlin Steel Co. v. N. L. R. B., 301 U. S. 1 (1937).
control or influence of the management. The rule has been laid down
that the divorce between management and the unaffiliated union must
be complete and publicly announced so that the employees will be free in
their choice of a collective bargaining unit. What acts are sufficient to
mark a complete break is for the Board to decide and if the decision is
supported by substantial evidence it will be upheld by the courts.5

A recent decision6 handed down by the Supreme Court limits this
doctrine. In that case the management had posted on the bulletin boards
a notice to the effect that the company could not deal with individual
employees, but only with a union of their own choosing. The notice
outlined the amicable relations existing between the management and
employees; explained that the employees could choose as their bargaining
unit an unaffiliated union, an affiliated union or none at all; and explained
that it made no difference to the company what form of representation the
employees chose. Speeches in similar vein were made by company
representatives in the various plants. Subsequently an independent union
was formed which demanded recognition as the bargaining unit of the
industry. The unsuccessful affiliated local petitioned the Board for a
hearing. This was granted. The Board found that the bulletin and
speeches were coercive in character and ordered the company to withdraw
recognition from and disestablish the independent. The company ap-
pealed and the circuit court of appeals set aside the Board’s order. In
the Supreme Court the company relied strongly upon the right of freedom
of speech. A unanimous court, speaking through Mr. Justice Murphy,
held that the bulletin and speeches, upon which the Board based its de-
termination of coercion, were not, standing alone, sufficient to support the
findings. In such a condition these words were held to be properly within
the right of free expression. If the spoken and written words of an
employer are to constitute acts of coercion, they must be a part of the
totality of the coercive transaction. On the surface this rule appears
to limit the scope of the Board’s powers in the determination of what
constitutes coercion. But this conclusion does not necessarily follow.
The scope of the Board’s power remains the same when the facts alleged
to be coercive are supported by substantial evidence. The only limitation
is that coercion cannot be found on the basis of isolated words. The
Board henceforth must find coercion in the totality of the words and acts
of the employer.

In the cases decided prior to the Virginia Electric and Power Company
case,7 the independent union had existed in some form prior to the passage

5Western Union Telegraph Co. v. N. L. R. B. 113 F. (2d) 992 (C. C. A. 2d, 1940). See
(1940) 29 GEORGETOWN LAW JOURNAL 183.
7Ibid.
of the Wagner Act. The subsequently created independent was therefore strongly suspected of being company dominated or coercively formed. In the Virginia Electric and Power case⁸ no union of any sort had existed prior to the passage of the Wagner Act. However, this distinction is probably not the basis of the ruling in this case. The fact that no union existed prior to the National Labor Relations Act serves only to make it more difficult for the Board to find coercion. If a company-formed and dominated union is succeeded by another independent organization, the burden of proving the free choice of the workers will fall most heavily on those alleging it.

The employer's right to express opinions concerning unions in general, his preference as to the kind of union he would like in his plant, and the employees right to refrain from joining a union have been mentioned in several cases.⁹ In some of the cases these opinions have been held coercive;¹⁰ in others not.¹¹ In the Humble Oil case¹² the Board admitted, as part of the record certified to the circuit court of appeals, a letter from one of the vice-presidents to the members of the independent union during a strike called by the C.I.O. local, wherein he suggested that outside influences were at work and promised an open shop. This act occurred prior to those acts upon which the local based its complaint. The only reason why this evidence was reviewed was that the Board admitted the letter without giving the respondent an opportunity to explain the attenuating circumstances, such as the importation of pickets, beatings, and the obvious hostility of the workers to the C.I.O. local. The Court in a dictum said: "We do not think that the law, any more than common sense, would require the employer to stand as a sheep before his shearers dumb, not opening his mouth. The right of free speech touching his own interests was involved."¹⁸ One of the acts to which the affiliated local excepted was a notice similar to the one in the Virginia Electric and Power case¹⁴ wherein it was said that the employees were free to join any kind of union or none at all and that the determination of a bargaining unit was to be decided by the employees themselves. The company did not participate in any of the employee meetings and held itself strictly aloof. In ruling that this notice was not coercive the court said: "The National

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⁸Ibid.
¹¹Humble Oil and Refining Co. v. N. I., R. B., 113 F. (2d) 85 (C. C. A. 5th, 1940); Magnolia Petroleum Co. v. N. L. R. B., 112 F. (2d) 545 (C. C. A. 5th, 1940).
¹²113 F. (2d) 85 (C. C. A. 5th, 1940).
¹³Id. at 89.
¹⁴62 Sup. Ct. 344 (1941).
Labor Relations Act does not undertake to restrain it [the right of free speech] except to forbid employers, including persons acting in their interest, . . . to try to control what does not concern them.\textsuperscript{15}

In \textit{National Labor Relations Board v. Union Pacific Stages},\textsuperscript{16} it was held that an employer had the right on the ground of freedom of speech to express an opinion that an employee would find it to his advantage not to belong to a union.

How far may an employer go in expressing opinions concerning unions which will not amount to coercion? The cases are not at all clear. In the \textit{Virginia Electric Power Company case}\textsuperscript{17} the court makes no attempt to set a line of demarcation between certain words which are permitted within the right of free speech and words which are coercive in their nature. The only norm given is that the words must be weighed in relation to the web of circumstances in which they occurred. Whether the words are coercive in fact must be decided by the Board, subject to the requirement that the fact of coercion must be buttressed by substantial evidence. In the \textit{Union Pacific Stages Company case},\textsuperscript{18} the court seems to hold that the employer may indicate his opinion concerning the advantages or disadvantages of unions, provided he performs no overt acts which would tend to restrain or coerce an employee from exercising his free choice. In \textit{Westinghouse Electric and Manufacturing Company v. National Labor Relations Board},\textsuperscript{19} the statement of the employer referred to the type of union he would like his employees to choose. Such a preference on the part of an employer has been generally held to to deprive the employee of his freedom of choice, especially, if the background is tainted with unfriendly acts against unionism. The \textit{dictum} in the \textit{Humble Oil Company case}\textsuperscript{20} seems to permit the employer to defend himself against acts of a union which tend to injure his business, provided he does not by his statements interfere with his employees in their right of free organization. In the same case the court seems to limit the right of free speech to those words which in their nature will not tend to coerce an employee in the selection of a bargaining unit.

Several tests\textsuperscript{21} have been suggested as to whether a statement is a mere expression of opinion or constitutes a threat. One consists in weighing the statement against its general background.\textsuperscript{22} If the background is com-

\textsuperscript{15}113 F. (2d) 85, 92 (C. C. A. 5th, 1940).
\textsuperscript{16}99 F. (2d) 153 (C. C. A. 9th, 1938).
\textsuperscript{17}62 Sup. Ct. 344 (1941).
\textsuperscript{18}99 F. (2d) 153 (C. C. A. 9th, 1938).
\textsuperscript{19}112 F. (2d) 657 (C. C. A. 5th, 1940).
\textsuperscript{20}115 F. (2d) 85 (C. C. A. 5th, 1940).
\textsuperscript{22}This is the test suggested in the Comment in (1938) 48 \textit{Yale L. J.} 72.
posed of anti-union activities, the statement is probably no longer a mere expression of opinion but an implied threat. The probable effect of a statement can be measured by the circumstances in which it is made. This test is simple and appears effective on the surface, but it seems that the real test, as indicated in the *Virginia Electric and Power Company case,* is whether the statement is a link in a chain of coercive acts. Not every background, even if anti-union in character, is sufficient to taint such statements, innocent or mild in themselves, with coercion. The statements should be part and parcel of the entire coercive circumstances before a threat may be implied from these expressions of opinion.

A second test consists in defining what kind of statements should be permitted without necessarily relating them to the background from which they spring. It is argued that statements of employers should be accorded the same protection under the right of free speech as that given under the right to picket, even when no labor dispute is involved; that expressions of the employer are not always coercive even when directed to the employees; that the right of free speech gives the employer the right to convince his employees of his views if he can; and, that the freedom of choice of the workers is amply protected by the Board. The conclusions that necessarily follow are that (1) all statements of fact if true or reasonably believed to be true should be permitted the employer unless they are defamatory; (2) statements of opinion if made to convince and unaccompanied by threats should be permitted; (3) statements which are not made in an attempt to convince should be considered as collateral evidence to determine whether anti-union bias exists; and, (4) if the statements are not accompanied by threats but are made in such circumstances that they amount to coercion they should be condemned. It may be suggested that this test does not take into consideration sufficiently the situation in which these statements are made. Facts which are linked with a coercive transaction become a part of the transaction and therefore are part of the coercive acts. True words should not be privileged if from the dramatic background it is discernible that coercion in fact existed. This test gives a large play to the *bona fides* of the actor. A *bona fide* attempt to convince, if made in circumstances not necessarily amounting to anti-labor activities, should be permitted. If the background is one of hostility to unionism, the fact that the particular statement is not designed to coerce will not *ipso facto* free the statements from the taint of objective coercion but must be weighed in the balance with other coercive acts.

These tests are rather vague and will require further clarification by the courts. Nevertheless the doctrine remains that unless the words of

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23 *62 Sup. Ct. 344 (1941).*
an employer can be linked with other acts tending to show domination or coercion, these words or opinions are justified as an exercise of freedom of speech. It is certain that the Board in finding coercion can no longer rely upon isolated words or opinions of an employer.  

In all of the cases the courts are faced with the problem of reconciling two fundamental rights, the right of free speech and the right of free organization. Probably in the protection of the employees' right to free organization, the employers right of free speech has in the past been overlooked. The Supreme Court has reaffirmed this right and has clearly indicated that no one right is so over-powering as to extinguish other equally fundamental liberties.

LEO C. LORD

\[\text{\textsuperscript{25}}\text{This seems to be the tenor of an article by Kellingsworth, }\textit{Employer Freedom of Speech}\text{ (1941) 41 Wis. L. Rev. 211.}\]
FEDERAL LEGISLATION

PROFITEER STATES

A bill recently reported to Congress

"to promote the prosecution of war by exempting from State, Territorial, and local taxes the sale, purchase, storage, use, or consumption of tangible personal property and services for use in performing defense contracts, and for other purposes"¹

if enacted into law may resolve an important conflict currently present in federal-state tax relations, and speed up the defense effort. The bill, as now drafted, apparently goes far beyond the problem of taxation of the cost-plus-a-fixed-fee contractor presented in the King and Boozer decision² to extend sweeping exemptions to the entire defense program.

The past decade has brought serious inroads into the traditional exemption of the Federal Government from state taxation, which found its inception in the "inter-immunities" doctrine into which McCulloch v. Maryland³ was distorted through the century that elapsed between that decision and its reaffirmation in the New York Port Authority case.⁴ This trend lay along two principal lines. The first, the tendency of both courts and legislatures to narrow the immunity of federal instrumentalities⁵ and employees⁶ and of areas over which the United States exercised exclusive jurisdiction;⁷ the second, efforts of states to tax govern-

¹H. R. 6750, 77th Cong., 2d Sess. (March 7, 1942), was introduced by Mr. Doughton (N. C.), Chairman of the House Committee on Ways and Means, and reported favorably to the Committee of the Whole House on March 10, 1942.
²Alabama v. King and Boozer, 62 Sup. Ct. 43 (1941).
³4 Wheat. 316 (U. S. 1819).
⁵Brush v. Commissioner, 300 U. S. 352 (1937); Graves v. O'Keefe, 306 U. S. 466 (1939), 120 A. L. R. 1466. It has been said the last gasp of inter-immunity was breathed by Mr. Justice Sutherland in Brush v. Commissioner.
⁶Conflicts as to tax exemption of income of federal officers by states were resolved in the express approval to tax extended in the Public Salary Tax Act [53 Stat. 574 (1939), 26 U. S. C. § 22 (1940)]. By the Buck Amendment [54 Stat. 1059 (1940), 25 U. S. C. § 403 (1940)] Congress not only extended the authority of states under the Public Salary Tax but expressly withdrew exemption from all state sales and use taxes to employees in strictly federal areas. The effect of this has been that some officers are forced to pay state income taxes in as many as three states.
⁷The immunity from taxation for Army post exchanges was established by Dugan v. United States, 34 Ct. Cl. 458 (1899) for forts, arsenals, and other federal areas, by Standard Oil Company v. California, 291 U. S. 242 (1934); Surplus Trade Company v. Cook, 281 U. S. 647 (1930); Ft. Leavenworth Railroad Company v. Lowe, 114 U. S. 525 (1885). One of the first encroachments on this wall of inter-governmental immunity, the imposition of the Minnesota gasoline tax on an Army post-exchange in that state, appears in Minnesota v. Ristine, 36 F. Supp. 3 (D. Minn. 1940); this was followed by United States v. Query 21 F. Supp. 784 (E. D. S. C. 1937) (C. C. C. Post Exchange) and by

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ment purchases and government contractors. The New Deal growth of administrative agencies of the Federal Government presented serious problems to both federal and state taxing authorities, but these are dwarfed by comparison with those arising more recently in connection with the defense program.

The drastic change, in applying the test, as to which taxes of one sovereign impose an unconstitutional burden on another sovereign, may be attributed to the growth of the sales and use taxes as a major item in many states’ income, largely a depression phenomenon. As early as 1922, Mississippi had enacted a sales tax on gasoline, imposed on the seller for the privilege of doing business in the state but measured by the number of gallons sold. When in 1928 an effort was made to apply this tax to sales for use by the United States Coast Guard Fleet, the Supreme Court in Panhandle Oil Co. v. Knox held that to impose a tax measured by the number of gallons sold to the United States was in effect to tax the sale and thus impose an unconstitutional burden on the Federal Government.

Before James v. Dravo Contracting Company was decided in 1937 there was little doubt that direct government purchases were not subject to state taxes, but in that case the Court refused to hold the contractor, building locks on a West Virginia river for the Army, a federal instrumentality exempt from the State gross income tax. Although the attempted separation of activities was relitigated no understandable test was forthcoming which could be used to determine when government purchases are or are not subject to state taxes.

United States v. Query (E. D. S. C. 1940) (Army). For an interesting exposition of this, see “State Taxation of National Defense Activities” an address by Lt. Col. Ernest M. Brannon, Judge Advocate General’s Department, United States Army, before the Taxation section of the American Bar Association on February 14, 1942.


Miss. Laws 1922, c. 116; Miss. Code. (1930) c. 119.

277 U. S. 218 (1928); but note the strong dissent of Justices Holmes, Brandeis, and Stone. Also see Indian Motorcycle Co. v. United States. 283 U. S. 570 (1931), and Graves v. Texas Co. 298 U. S. 393 (1936).

302 U. S. 134 (1937).

Dravo Contracting Co. v. James 114 F. (2d) (C. C. A. 4th, 1940), cert. denied, Jan. 13, 1940.

Subsequent decisions upheld the validity of state taxes on federal purchases. Just prior to the most recent and notable of these, the King and Boozer and Curry decisions upholding the Alabama statutes, some 13 of 22 states imposing sales and use taxes voluntarily exempted sales to the United States from taxation, either for patriotic reasons or to prevent attractive government business from going to other states which had lower taxes. The remainder, however, strictly enforced their sales and use taxes against the United States, taking a rich harvest from increasing federal activities within their borders.

Since the Alabama test cases, more than half of the states that were voluntarily exempting the United States from their sales and use taxes, have withdrawn the exemptions. Most states in taking this action indicated that they had delayed the withdrawal as long as possible in the expectation of enactment of immunizing legislation by Congress but when it was not forthcoming, one state apologized that it had no alternative but to proceed with the enforcement of existing regulations. There were also express disclaimers of any desire on the part of the states to enrich themselves by exacting tribute from a program designed for the common defense. Unfortunately, the rise in federal income tax rates has virtually preempted that area as a potential source of expansion of revenue for states and one may expect an increasing number of states to modify their laws to take advantage of the expressed approval by the Supreme Court of state taxes on government contractors.

15Western Lithograph Co. v. State Board of Equalization, 78 P. (2d) 738 (1938); Federal Land Bank of St. Paul v. De Rochford, 287 N.W. 522 (1939). After the latter case, the Comptroller General gave instructions that when it was necessary to purchase gasoline in North Dakota the tax should be paid, but to execute the usual tax exemption certificates and file them at the General Accounting Office where they would be charged in set-off against any money that might be due the state from the Federal Government.

16314 U. S. 52 (1941).

17Those exempting the U. S. Government and the cost-plus-a-fixed-fee contractor from substantially all such taxes were Arizona, Arkansas, Colorado, Illinois, Ohio, Kansas, Michigan, Missouri, New Mexico, North Carolina, Oklahoma, South Dakota, Utah, and the city of New Orleans.

18Alabama, California, Indiana, Mississippi, North Dakota, Ohio, Washington, West Virginia and Wyoming.

19At the time the Committee Report on H. R. 6750 was submitted on March 10, 1942, the following had withdrawn their exemption: Arkansas, Colorado, Illinois, Ohio, Michigan, Missouri, North Carolina and the city of New Orleans.

20The Commissioner of Revenue of North Carolina so explained in a letter to the Judge Advocate of one of the Military Departments on the occasion of the withdrawal of that state's tax exemption to cost-plus-a-fixed-fee contractors executing contracts within the state.

21Recognition of the nearly 400% increase in tax on the individual of $2,000 net taxable income appeared in the recent legislation of New York reducing the income tax of individuals 25% partially to relieve the hardship of dual taxation and the higher federal rate recently imposed on their residents.
Since the inauguration of the large scale national defense program, state taxes on the cost-plus-a-fixed-fee contract, now used with increasing frequency, have progressively grown as a financial burden and a source of harassing red tape and avoidable delay. Two possible avenues of escape appeared open to the federal departments, the first to procure corrective legislation, the other to fight the imposition of the taxes in the courts. The Dravo case intimated that Congress might enact immunizing legislation if it deemed the state taxes to interfere with the execution of an essential governmental function. Although national defense would seem to fall in that category, failures to obtain such express Congressional exemption in connection with Navy legislation influenced


As the name implies, the cost-plus-a-fixed-fee contract provides that the Government pay the actual cost of work plus a pre-determined fee. Conflicts arise as to what state taxes are applicable as items of cost under the terms of the contract and the interpretation made by the government contracting agencies.

\[23\] The legislative histories of the Acts of July 2, 1940 and of June 15, 1940 bear out the Supreme Court's conclusion, in the King and Boozer case that

"Congress has declined to pass legislation immunizing from state taxation contractors under 'Cost-plus' for the construction of governmental projects and contracts," 62 Sup. Ct. at 45.

The Act of June 11, 1940, 54 Stat. 265, was the Naval Appropriation Act of 1941 which in part authorized the Navy to negotiate cost plus a fixed fee contracts for certain projects within the United States. The Senate Committee on Appropriations introduced an amendment to the bill which subsequently became the act, providing that the holders of cost plus contracts as authorized by the bill could, in the discretion of the Secretary of the Navy, be designated as agents of the United States, and that upon such designation their purchases under cost-plus-fixed fee contracts would be exempt from all (federal, state and local) taxes. The inclusion of the amendment was disagreed upon in conferences and Mr. Vinson of Ga. was instrumental in its rejection when presented on the floor of the House. He argued that to exempt contracts from federal income taxes and payroll taxes and to use the agency mechanism would involve the government in troublesome litigation. Others concurring in his views suggested possible invasion of states rights. 86 Cong. Rec. 7533-7536 (1940).

The second statute, the Act of June 15, 1940, 54 Stat. 400 was an Act of Authorize the Construction of Naval Aircraft and Public Works. The Bureau of Aeronautics requested the addition of a provision "that all contractors who enter into contracts authorized by this act shall be held to be agents of the United States for the purposes of such contracts." The House, however deleted the clause despite the pleas of Admiral Towers who appeared before the Senate Committee on Naval Affairs, and strongly recommended the provision to prevent diversion of the government's money to the States and to put the maximum amount into construction of air-stations and planes. Hearings on S. 4024, 76th Cong. 3rd Sess. (1940) 47-48.
the Army to seek a clearcut court test of the imposition of such taxes.24

The unsuccessful conclusion of this litigation was, that the court held a state tax is valid if the legal incidence falls on the vendor or contractor, even though the economic burden of the tax is placed almost directly on the federal government.

Despite the Navy's failure to procure suitable legislative exemption, the Army after their failure to win by litigation, sought relief by legislation. Acting at the suggestion and with the advice of the Office of the Judge Advocate General of the Army, Congressman Cochran of Missouri, Chairman of the House Committee on Accounts, on Nov. 18, 1941, introduced a very brief bill28

"to exempt from State and local taxes the sale, purchase, storage, use, or consumption of tangible personal property for use in performing defense contracts."

This bill was referred to the Committee on Ways and Means and seemed destined to die there. Then the Japanese attack on Pearl Harbor and the immediate increase in the tempo and size of the war program26 made arguments of representatives of the Departments that the bill would "help speed up the war effort and protect national defense appropriations from being diverted from their intended purpose"27 sufficiently persuasive to induce the committee to accept a substitute bill.28 The earlier act was implemented by a proviso expressly excluding from exemption, taxes on the contractor's fee or net profit, and employees' wages or salaries. Also excluded were payroll taxes for unemployment compensation and social security, and lump sum contracts except to the extent the contractor passes the saving on to the Government. The unduly broad definition of what constitutes a "defense contract" and a "defense contractor", should invite opposition because of the pros-

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24Two cases were brought in Alabama, where it was thought the law would provide a clear cut test. The first suit was Curry, Commissioner of Revenue v. Dunn Construction Company, an effort to resist the application of the state use tax to materials purchased by a fixed-fee contractor and imported into Alabama. The other, Alabama v. King and Boozer tested the sales tax on materials purchased in Alabama. The state circuit court sustained the imposition of the tax in both, but the State Supreme Court reversed. 3 So. (2d) 582 (Ala. 1940), reversed 3 So. (2d) 572 (Ala. 1940). The United States Supreme Court granted certiorari and on November 10,, 1941 reversed the Alabama Supreme Court and upheld the validity of the taxes. Note 2 and 16, supra.


26Marcellus C. Sheild, Clerk of the Appropriations Committee, at the request of the writer, made the estimate that from July 1, 1940 to Nov. 1, 1941 Congress had appropriated or authorized $58,000,000,000 for the Defense Program. By March 15, 1942 this total had increased to $124,000,000,000, with $18,000,000,000 additional, pending before the Committee.

27Hearings before the House Committee on Ways and Means on H. R. 6617, 77th Cong., 2nd Sess. (March 4, 1942) 9.

28H. R. 6617, 77th Cong. 2d Sess. (February 17, 1942).
pect that the bill if enacted into law as now proposed might be extended to virtually all industry throughout the United States.

After abbreviated hearings on the substitute bill, the Chairman of the House Committee on Ways and Means, Representative Doughton on March 7, 1942 introduced a bill\(^2^9\) which the committee reported favorably to the House three days later.\(^3^0\) The latest bill added a more express proviso to exclude ad valorem and real estate taxes from exemption\(^3^1\) and a clarification of intention that the exemption should not be construed to operate to the benefit of any individual, but shall inure solely to the benefit of the United States. Provisions were also inserted to prevent claims for refunds of taxes already paid, which complemented the prohibition against collection by the states of taxes not previously claimed but which could be supported under the *King and Boozer decision*.\(^3^2\)

Principal proponents before the Committee were from the Services and they made three arguments in the bill's favor: (1) Savings in cost to the Government; (2) avoidance of delays in war production from harassments of contractors; (3) relief from heavy administrative burdens imposed on the War and Navy Departments because of the complexity of the tax problems which must be handled.

The Delegate from the Hawaiian Islands, where litigation had been extremely bitter, appeared and expressed a desire in the people of Hawaii to cooperate with the U. S. in saving cost of local taxes on the much-needed defense program.\(^3^3\)

The principal opponents appearing on the bill were, as one might expect, representatives of those states whose operating revenues depend heavily on sales and use taxes.\(^3^4\)

Impressive figures were presented in refutation of the sponsors' estimates as to the Government's savings that might be realized from the enactment of the bill.\(^3^5\) The opponents contended that elimination of

\(^{29}\)H. R. 6750, see note 1 *supra*.


\(^{31}\)Even those states which by legislative or administrative acts exempted the United States from sales and use taxes, did not as a rule immunize the Federal Government from this type of tax.

\(^{32}\)In 1939 and 1940 the War and Navy Departments (upon recommendations of their Judge Advocates) ordered their disbursing officers to withhold payment of such taxes to conserve vitally needed appropriations from unexpected and what was thought to be illegal depletion. In appearing before the Committee, their representatives indicated that the administrative burden on both the contractors' and the Service personnel would be materially reduced if this provision were enacted. *Hearings on H. R. 6750 supra* note 1, at 12.

\(^{33}\)Hearings on H. R. 6750 supra note 1, at 8.

\(^{34}\)For the amounts and proportions of states revenue derived from sales and use taxes *Hearings on Revenue Revision of 1942 supra* note 9, at 380, 381.

\(^{35}\)The estimates of leading proponents of the enactment of H. R. 6750 as to the amount
sales taxes would not speed up the program materially and that various contracting agencies could accelerate the program by decentralization and use of form of contract which would elect either to take the advantages of having the contractor their agent and save taxes or to disavow the agency and have protection from any liability for his acts.36

It is interesting that the Treasury opposed the bill, despite the arguments that its enactment would save the Government money. This is understandable in light of long standing plans to seek legislation specifically withdrawing the exemption from federal income taxes now existing on income from state and municipal bonds. The Treasury might find it difficult indeed to support this bill and later come before the same Committee using exactly converse arguments in favor of their own proposed legislation.37

The growing sentiment38 appears to be that H. R. 6750 will work a hardship and create a fiscal problem for certain states and would be an invasion of states rights, and a discrimination against those states having sales taxes.39

It would now appear that the Judiciary Committee, by control of

of the cost of the defense program (about $144,000,000,000) that would go to the states for use taxes was as follows:

<table>
<thead>
<tr>
<th>Representative Cochran</th>
<th>1,500,000,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Admiral Moreell</td>
<td>1,250,000,000</td>
</tr>
<tr>
<td>Admiral Robinson</td>
<td>2,000,000,000</td>
</tr>
<tr>
<td>General Reybold</td>
<td>1,500,000,000</td>
</tr>
</tbody>
</table>

These may be compared with the figures advanced by the opponents, representatives of certain states who presented estimates on the over-all cost to the Federal Government of states sales and use taxes on the defense program, as follows:

<table>
<thead>
<tr>
<th>Arkansas</th>
<th>140,000,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illinois</td>
<td>213,000,000</td>
</tr>
<tr>
<td>California</td>
<td>180,000,000</td>
</tr>
</tbody>
</table>

It was the contention of some of the opponents that they would suffer a reduction in tax conversion of private business activities to war purposes that would far exceed any added revenues from the operation of state taxes on the increased federal defense expenditures in the state. *Hearings on H. R. 6750 op. cit. supra* note 27.

*Hearings, op. cit. supra* note 27, at 75.

*Hearings, op. cit. supra* note 27, at 102. The pros and cons of removal of tax exemption status from municipal securities, are well set out in *Tax Exempt Securities and National Defense*, and address delivered by Edward H. Foley, Jr., the General Counsel of the Treasury Department, to the National Institute of Municipal Law Officials, on December 6, 1940, and there is attached thereto an excellent bibliography on the subject.

*See* statement of Congressman Ford (Cal.) on the Floor, 88 Song. Rec., March 27, 1942 at 3163, 3164.

*Although the Judge Advocates of the Army and the Navy insist that the constitutionality of a bill such as H. R. 6750 is clearly supported by Federal Land Bank of St. Paul v. Bismark Lumber Co., 314 U. S. 95 (1941) and U. S. v. MacIntosh 283 U. S. 605, 622 (1931) and the “necessary and proper” clause, of Art. I. § 8, 18 of the United States Constitution, some have grave doubts as to whether H. R. 6750 is sufficiently restrictive to insure against successful attack by affected states.
the calendar, may leave H. R. 6750 to die uncalled. There is no equity in the situation which permits a small group of states, already enjoying disproportionate advantages from large defense expenditures, to superimpose an added benefit by levying sales and use taxes which fall on the common defender. If this act does not reach the problem, another must be drafted which does.

WILLIAM BLUM, JR.
NOTES
RECENT DEVELOPMENTS IN THE TAXATION OF SHORT-TERM IRREVOCABLE TRUSTS

In the field of taxation few cases have achieved the prominence and the significance of Helvering v. Clifford,¹ none has been the center of more litigation² and confusion.³ Reduced to its simplest terms the Clifford case stands for the proposition that the income from an irrevocable short-term trust may, under certain circumstances, be taxed to the grantor. Prior to this decision it had been thought that no statutory authority existed for the imposition of such a tax.⁴ Justice Roberts, dissenting from the majority opinion, declared, "The decision of the court disregards the fundamental principle that legislation is not the function of the judiciary but of Congress."⁵ That the Court to a degree invaded the province of the legislature cannot seriously be doubted,⁶ and it must be conceded that when the judiciary so acts, uncertainty usually results. To appreciate the holding of the Supreme Court in this case one must know the circumstances that evinced it; to judge the wisdom of such action, the results which it produced.

The debut of the first statutory provision taxing the grantor on the income of a revocable trust was made in 1924.⁷ Prior thereto trust taxation had been restricted to the trust and beneficiary,⁸ the reason being

¹309 U. S. 331 (1940) rev'g; 105 F. (2d) 586 (C. C. A. 8th, 1939).
²Between Feb. 1940 and Dec. 1941 not less than seventy-five cases came to the federal tribunals for decision upon the law it established.
³"Few decisions have provoked such intensive controversy as has Helvering v. Clifford. Some agree that the decision is sound. The criticism is freely offered, however, that this decision and certain other recent decisions are the end of certainty in tax law." Paul, Studies in Federal Taxation (3rd Series, 1940) 502. "It had been hoped that the decision in Helvering v. Clifford would blaze a path through the tax jungle known as 'revocable trusts'. The hopes were in vain, however since the problems now confronting the government and the taxpayer are even greater in number." Ray, The Income Tax on Short Term and Revocable Trusts (1940) 53 Harv. L. Rev. 1322.
⁴In 1933 the Acting Secretary of the Treasury in a statement made to the sub-committee of the Committee on Ways and Means recommended among other things that "(6) The income from short-term trusts and trusts which are revocable by the creator at the expiration of a short period after notice by him should be made taxable to the creator of the trust." Hearings before Committee on Ways and Means on H. R. 7835, 73rd Cong., 2d Sess. (1934) 151. The Committee rejected the portion of the recommendation referring to short-term trusts.
⁵309 U. S. at 338.
⁶The Supreme Court by its decision declined to say, "We see what you are driving at, but you have not said it, and therefore we shall go on as before." Johnson v. United States 163 F. (2d) 30, 32 (C. C. A. 1st, 1908).
that after the execution of the trust the corpus and the income therefrom were considered no longer the property of the grantor.9 This concept permitted the wholesale evasion of income taxation through the use of the multiple trust device.10 By the apportionment of large incomes over several taxable units surtaxes could effectively be reduced and additional personal exemptions gained.11 In this manner the wary tax-payer endowed himself with the pleasant capacity of escaping the "embarrassment of ownership"12 while retaining substantial dominion over and the benefit of the trust property.13

The existing statute14 is designed to remedy this situation.15 "Legal sanction for such schemes would result in both serious loss of revenue and an impairment of the accepted ability-to-pay rationale."16 The statutory provisions now place the onus of the tax upon the grantor where he sets up a trust revocable at will17 and where he reserves to himself the benefits under it.18

The effect of this specific congressional action met with considerable success. Coupled with a sympathetic treatment accorded by the Supreme Court it has diminished the measure of evasion formerly achieved. However the Court has indicated its intention to adhere strictly to the letter of the taxing statute.19 A typical decision is that of Helvering v. Wood.20

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10The creation of a revocable trust constitutes nothing but an assignment of the right to receive future income.

11For example, the tax on earned income of $50,000 would be cut in half by the division of that income into two taxable units. See Note (1941) 50 Yale L. J. 513, 514.


13Upon the most superficial investigation of the legislative history of taxation one becomes convinced that the "taxpayers and their counsel have not been found wanting in mental fertility and subtlety" in the development of what has now become the fine art of tax avoidance. See, Paul, The Background of The Revenue Act of 1937 (1937) 5 U. of Chi. L. Rev. 41, 44. For a treatise on the growth of trusts in the United States, see, Smith, Trust Companies in the United States (1928).


15Under § 166, prior to 1934, the tax fell upon the grantor where he retained the power to revest title in himself "At any time during the taxable year." This permitted tax avoidance by the use of the so-called "year and a day trust", as where the power of revocation was conditioned upon notice given "a year and a day" precedent to revocation. In conformity with the clear language of the taxing provision the courts held the power to tax did not exist at any time during the taxable year. This loophole was eliminated when Congress in 1934 omitted the phrase "during the taxable year."

16See Note, supra note 11. at 514.


19Helvering v. Wood, 309 U. S. 344, 347 (1940). The Court through Justice Douglas, said: "We have only the responsibility of carrying out the Congressional mandate. And where Congress has drawn a distinction however nice, it is not proper for us to obliterate it."

20Ibid.
There a short term trust was set up. The settlor reserved no power of revocation but did provide for a reversion to himself upon the expiration of the trust. Section 166 was held inapplicable. "A power to revest or revoke may in 'economic fact' be the equivalent of a reversion. But at least in the law of estates they are by no means synonymous."21 The effect of this pronouncement was to reaffirm the court's long-continued stand—that is, that income from irrevocable short term trusts could not be taxed to the grantor.

This "loophole," long foreseen by the Treasury Department, was the taxpayer's "ace in the hole." Congress had declined to stop the gap and the Department was at a loss to know where to turn.

The decision of Helvering v. Clifford22 came therefore as a bit of "divine revelation"23 from the lords of the judiciary. Banishing "Technical considerations, niceties of the law of trusts or conveyances, or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes,"24 the Supreme Court held certain irrevocable short term trusts taxable to the grantor under the broad sweep of the language of Section 22(a)25 defining taxable gross income.

In Helvering v. Clifford a short term trust was set up, irrevocable for a term of five years, after which time the corpus was to revert to the settlor. Clifford appointed himself trustee and reserved broad powers of control and management over the trust property. He named as beneficiary his wife. The question which the Court took upon itself to solve was whether the grantor after the trust had been executed could nevertheless be treated as the owner of the corpus upon the basis of ownership, which for taxing purposes is defined by 22(a). The Court looking to all the circumstances surrounding and involved in the execution of the trust found the grantor liable to pay the income tax.26

21Id. at 347.
22309 U. S. 331 (1940).
23This despite the fact that as an alternate ground for its decision in DuPont v. Commissioners, 289 U. S. 685, 688 (1933), the Court held the grantor of an irrevocable short-term trust liable where, "he did not divest himself of title in any permanent or definitive way, did not strip himself of every interest in the subject matter of the trust estate."
24Id. at 334.
2552 Stat. 457 (1938), 26 U. S. C. § 22(a) (1940): "Gross Income. (a) General Definitions. Gross income includes gains, profits, and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from vocations, trade, business, commerce, or sales, or dealings in property, whether real or personal, growing out of ownership or use of or interest in such property; also from interest, rent, dividends, securities or transaction of any business carried on for gains or profit and income derived from any source whatever."
26Peterson v. Commissioner, 42 B. T. A. 102, 107 (1940), sets out as the fundamental concept of the Clifford case that "substance and reality shall prevail in tax matters over form and unreality."
For an intelligible review of the cases decided under the rule of the Clifford case it is necessary to treat in order each of the several elements which taken together embody the substance of the rule. To be considered are, (1) The length of the term, (2) The retention of control by the settlor, (3) The identity of the reversioners and (4) The character of the beneficiaries appointed to take under the trust. Are they members of the settlor's "intimate family group?"

It has been repeatedly asserted by the courts that the terms of the particular trust and all the circumstances attendant upon its creation must be analyzed in order to determine the tax liability of the settlor. A question which necessarily involves the consideration of four variables, whose weight is to be determined by the degree in which they are present, does not lend itself to easy solution. In each case the triers of fact must determine anew from the facts presented whether or not the grantor remains the owner for purposes of 22(a). The problem is more appreciated when one undertakes to analyze the more important cases decided under the rule of Helvering v. Clifford.

In Commissioner v. Woolley the settlor established a short term trust irrevocable for a period of three years. All parties concerned were of the "intimate family group." The grantor retained the power of management of the trust property and the right to appoint a successor trustee. The court held him clearly taxable under 22(a). Quoting from the opinion of Justice Douglas in the Clifford case it said, "We have at best a temporary reallocation of income within an intimate family group. Since the income remains in the family and since the husband retains control over the investment, he has rather complete assurance that the trust will not effect any substantial change in his economic position. It is hard to imagine that the respondent felt himself the poorer after the trust had been executed or if he did that it had any rational foundation in fact. The trust set up in Helvering v. Elias was similar to the Woolley trust. The departure was in that the settlor retained no express powers of control and further the trust was to continue irrevocable for a term of six and one-half years. The court found little difficulty in holding the settlor liable.

28Judge Learned Hand states in E. R. Squibb & Sons v. Helvering, 98 F. (2d) 69 (C. C. A. 2d 1938): "But in any event it seems to us that the uniform interpretation so long place upon Section 22(a) . . . by the regulation and confirmed by the inaction of Congress, was embedded in the statute so deep that only legislation could dislodge it."
30122 F. (2d) 167 (C. C. A. 2d, 1941), cert. denied, 62 Sup. Ct. 361 (1941).
The failure on the settlor's part to reserve control or management was not an important factor, for where the term is short, legal powers of management add little to the reversioners' actual control over the fund.\textsuperscript{31} The control factor is sufficiently present because the grantor will soon acquire complete dominion upon the expiration of the term. It naturally follows that under similar circumstances the fact that the trustee is not party to the family group is of little consequence.\textsuperscript{32} Though the term of the Elias trust exceeded that of the Clifford case by eighteen months the difference was held not sufficiently substantial to foreclose application of the rule. Where the term is in considerable excess of that of Helvering v. Clifford, the amount of control retained becomes of paramount importance.\textsuperscript{33} Thus where a settlor retained full control over a ten year trust\textsuperscript{34} he was held liable while the court exonerated from taxation a settlor, who having created a trust\textsuperscript{35} for a like period, reserved to himself no powers of management or control. No case as yet has laid down as law the term beyond which the rule will not apply. Though the court held a grantor not taxable on the income of a trust which he set up irrevocable for twenty years\textsuperscript{36} it nevertheless indicated a disposition to entertain such long term trusts and to extend the Clifford rule much beyond the confines of its original limits.

The rule of the Clifford case definitely contemplates the return of the corpus to the grantor after the termination of the trust. The absence of that element is sufficient to support a distinction where the rule applies in one instance and not the other.\textsuperscript{37} It was a decisive factor in the case

\textsuperscript{31}See, Commissioner v. Buck, 120 F. (2d) 775 (C. C. A. 2d, 1941).
\textsuperscript{32}See, Commissioner v. Barbour, 122 F. (2d) 165 (C. C. A. 2d, 1941) cert. denied, 62 Sup. Ct. 361 (1941). The settlor appointed his lawyer trustee. The court in its realistic approach found that the attorney would naturally observe his client's "reasonable wishes as to investment and management." But see, Lamont v. Commissioner, 43 B. T. A. 61 (1940), where the settlor appointed as trustee an "intimate friend and attorney" yet succeeded in avoiding taxation. See also, Branch v. Commissioner, 114 F. (2d) 983 (C. C. A. 1st, 1940). The Clifford case demands "an analysis of the terms of the trust and all the circumstances attendant on its creation and operation." The courts as a whole have been consistent in observing this mandate, especially in the cases of strict family trusts. "Hence the appointment of a wife or husband (as trustee) will be presumably treated as what it almost invariably is, an empty gesture." Pavenstedt, supra note 31 at 227.
\textsuperscript{33}Commissioner v. Berolzheimer, 116 F. (2d) 628 (C. C. A. 2d, 1940).
\textsuperscript{34}Fahnestock v. Commissioner, 43 B. T. A. 569 (1941).
\textsuperscript{35}Commissioner v. Jonas, 122 F. (2d) 169 (C. C. A. 2d, 1941).
\textsuperscript{36}Jones v. Norris, 122 F. (2d) 6 (C. C. A. 10th, 1941).
\textsuperscript{37}See, Commissioner v. Branch, 114 F. (2d) 985 (C. C. A. 1st, 1940), where grantor appointed himself trustee, reserving broad powers of management over the trust property, the income of which was to be paid to his wife, the court held him not taxable on that part not being applied in satisfaction of his obligation to support his wife. The grantor had stripped himself of beneficial ownership of the corpus which in all probability will never revest in him.
most recently discussed and it must be considered if a valid decision is to be attained.

Will the court apply the doctrine of the Clifford case to trusts which have as their beneficiaries parties not members of the "intimate family group?" The courts more often than not pass with silent grace over the problem. Suffice it to say that degrees of relationship are not stressed where the court can base its decision on the term element and the quantum of control reserved. A few cases will serve to illustrate the confusion.

In Commissioner v. Chamberlain the beneficiary under the trust was an eleemosynary corporation. The rule was held inapplicable and the court said, "No interfamily distribution of income" was here present and therefore no authority to tax the settlor exists. Yet where the income was devoted to the maintenance of a servant with a reservation of power in the grantor to return it to the family group, the settlor was held taxable on the income so expended. However the case was remanded to give the taxpayer an opportunity to be heard on that issue. The requirement that beneficiaries be "intimate members of the family group" was not satisfied where sister-in-law and uncle, and first cousins were appointed to take. But with like facility cases holding directly to the contrary may be cited. Attempted reconciliation is futile.

Helvering v. Clifford tells the story of a judiciary which has wearied of seeing the efficacy of taxing statutes neutralized by the interposition of established statutory interpretation and meaningless technicalities.

The Court by its decision has voiced a determination to parry every thrust made by the taxpayer in his never-ceasing quest for the perfect tax-evasion technique. By disregarding the "elegantia of the trust

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38Jones v. Norris, 122 F. (2d) 6 (C. C. A. 10th, 1941), cited supra note 36.
39121 F. (2d) 765 (C. C. A. 2d, 1941).
40Commissioner v. Brown, 122 F. (2d) 800 (C. C. A. 3rd, 1941). This decision is notable in that it refused to recognize as law Chief Justice Stone's statement in Helvering v. Horst, 311 U. S. 112 (1940), relating to the taxability of assigned income to the grantor. "The power to dispose of income," Stone wrote, "is equivalent of ownership of it. The exercise of the power to procure the payment of income to another is the enjoyment and hence the realization of the income by him who exercises it." Upon the interesting subject of assigned income, see Lowndes, Tax Decisions of the Supreme Court, 1940 Term (1941) 90 U. or PA. L. REV. 1, 190: "No matter how craftily a plan to reduce taxes is constructed, no matter how impressively it is buttressed with ingenious legalistic argument, if in practical substance it is a device to escape paying a tax which the court regards as justly due, it will receive rough treatment."
41Milbank v. Commissioner, 41 B. T. A. 1014 (1940).
42Lamont v. Commissioner, 43 B. T. A. 61 (1940).
44"There is more than an indication in the decisions of the present term that the Court is itself willing to supply deficiencies in the statute, indeed, that in at least some circum-
device” and seeking out the substance, the taxpayer will fail at the outset. Formerly, specific congressional action was necessary to defeat his claim.

But sound as the Court’s philosophy in the Clifford case might appear, it is not without certain definite disadvantages. Case analysis has shown that confusion and uncertainty have been left in its wake. Is it judicious to sacrifice certainty, in the interest of maximum pecuniary return and economy of legislative action?

JAMES R. HIGGINS

stances it believes the judicial method to be better adapted to cope with the situation than the legislature. It may come to pass that a legislature eager to rid itself of the laborious task of attempting to write an air tight statute will abandon the job to the courts, contenting itself with a simple declaration that it wishes to tax income of certain individuals at certain rates. . . . ‘The inevitably empiric' nature of the judicial process may be superior to legislative methods in dealing with cases like Griffiths v. Helvering, but what in such cases appears to be an advantage, must in most situations prove to be an insurmountable handicap. The outcome of the Clifford case may in time prove the fact of this proposition, but the proof, if any be required, need not be left to the future.” Nash, What Law of Taxation (1940) 5 Ford. L. Rev. 165, 190.
THE PINK CASE*, THE RECOGNITION OF RUSSIA AND THE LITVINOV ASSIGNMENT

Survey

In 1918, Russia nationalized, i.e., confiscated, corporations owned by Russian nationals by decrees which purported to vest title in the Government. In compliance with New York law¹ Russian insurance companies with branches in New York had deposited large funds there to secure creditors. The effect of the nationalization decrees on these deposits presented a difficult question. The New York courts held in a score² of cases that the decrees were not enforceable because they contravened the public policy of the state. On November 16, 1933 the United States by an executive compact³ accorded recognition to the Union of

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¹On February 2, 1942 the Supreme Court decided the case of United States v. Pink, 62 Sup. Ct. 552 (1942), (1942) 55 Harv. L. Rev. 864. The majority held that the Russian nationalization decree was intended to have extraterritorial effect; that whether it had the effect of transferring title of New York assets to the Russian Government was not a question exclusively for the New York courts to decide; that a federal question was thereby raised; that the compact by which the Soviet Government was recognized, and the Litvinov Assignment, contemplated an acknowledgment by this country of the extraterritorial validity of the Russian decree; that this title was transferred to the United States by the Litvinov Assignment; that the policy announced in the recognition compact was within the President's discretionary powers and established principles which the New York courts could not disregard. Chief Justice Stone dissented on the ground that the mere act of recognition and making an assignment of the claims of the Soviet Government to the United States can only be regarded as intended to override state policy if that purpose is made evident by the terms of the instruments and no such intention appears here. Justice Roberts concurred in this view. See Note (1942) 51 Yale L. J. 848.

²Foreign insurance corporations were authorized to transact business in accordance with Insurance Law § 27. The section provided, "no insurance corporation organized and existing under the government or laws of any state or country outside of the United States" shall conduct business in New York unless it "shall have securities or property within the United States, deposited with insurance departments or state officers and held in trust by a trustee or trustees as hereinafter provided, for the protection of all its policyholders and creditors within the United States. . ." The question then was whether 'or not the confiscatory decrees should affect local creditors' rights to the deposit or foreign creditors' rights to any surplus.

³For a list of cases dealing with the problem, see United States v. Director of Manhattan Co., 276 N. Y. 396, 403, 12 N. E. (2d) 518, 521 (1938).

Soviet Socialist Republics. Contemporaneously Russia made an Assignment\(^4\) of Russian claims to the United States. The question was then what effect did the Recognition and the Assignment have on the body of New York law which denied enforcement to the 1918 confiscatory


On November 16, 1933 President Roosevelt wrote to Maxim Litvinov: "I am happy to inform you that as a result of our conversations the Government of the United States has decided to establish normal diplomatic relations with the Government of Soviet Socialist Republics and to exchange ambassadors.

"I trust that the relations now established between our peoples may forever remain normal and friendly, and that our nations henceforth may cooperate for their mutual benefit and for the preservation of the peace of the world." (1934) Am. J. Int. L. (Supp.) 1, 2. Pages 1 to 24 contain the official documents concerning the Recognition and material pertaining thereto.

Some of the advantages of recognition are: capacity to make treaties, right to sue in the courts of the recognizing state, immunity from suit in the recognizing state, and the right to demand property of the prior government situated within the borders of the recognizing state.


"Through Mr. Litvinov the Russian Government made the Assignment on November 16, 1933. It stated in part, "... the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decision of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due. ... The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claims with respect to: (a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest." President Roosevelt replied in part, "... I shall be pleased to notify your government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics. ..." For the complete text of these documents see (1934) 28 Am. J. Int. L. Supp. 1, 10."
decrees? Two conflicting views\(^7\) prevailed concerning the proper interpretation of these documents: (1) the intention of the United States and Russia was to sweep away law in the states which prevented effect being given to the Russian confiscatory decrees when they conflicted with the public policy of the state; (2) the intention of the United States and Russia was to transfer to the United States claims which were provable by Russia without altering the then existing interpretation of state law.\(^7\)

Three cases, United States v. Belmont,\(^8\) Moscow Fire Ins. Co. v. Bank of New York & Trust Co.,\(^9\) and United States v. Pink,\(^10\) show the conflicting views of the members of the Supreme Court. In the Belmont case decided in 1937, Mr. Justice Sutherland stated by way of dicta that the Recognition and the Assignment were intended to override state decisions which rendered the Russian decrees unenforceable and which thereby denied the United States any greater rights than those of a mere assignee of Russia. The then Mr. Justice Stone wrote a special opinion in which Mr. Justice Cardozo and Mr. Justice Brandeis concurred. This opinion pointed out that under the Assignment there was nothing

\textit{to suggest that the United States was to acquire or exert any greater rights}


\(^10\)Note (1939) 49 Yale L. J. 324.
than its transferor, or that the President, by mere executive action, purported or intended to alter the laws and policy of any state in which the debtor of an assigned claim might reside, or that the United States, as assignee, is to do more than the Soviet Government could have done after diplomatic recognition—that is, collect claims in conformity with these laws.  

In 1939 the New York Court of Appeals relied on this language of Justice Stone in deciding the Moscow case.  The Supreme Court was equally divided when the case was argued before it. In February of 1942 the Supreme Court decided the case of United States v. Pink which settled the controversy. The majority held that Mr. Justice Sutherland had properly interpreted the Recognition and the Assignment in the Belmont case by stating that New York public policy deserved no consideration in interpreting the international compact because the compact overrode the state policies. Chief Justice Stone and Justice Roberts dissented on the ground that the Assignment merely transferred Russian claims to the United States and that this transfer was no license to emascul ate state public policy.

The Litvinov Assignment nowhere purported to give to the United States any greater rights than Russia had, but the words "debts to be due or that may be found to be due" showed an intention not to alter the prevailing interpretation of Russian rights. It must be conceded that if there is to be certainty, order and predictability in the interpretation of agreements, compacts and treaties the words used must be given their ordinary meaning, and the doctrine expressed by Justice Frankfurter in his additional "observations" in the Pink case rejected,

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1301 U. S. at 336-337.
13Thus the decision of the New York Court of Appeals was affirmed.
14For a more complete digest of the decision see supra note 6.
15Mr. Chief Justice Stone followed his earlier line of reasoning in the Belmont case and Guaranty Trust v. United States, 304 U. S. 126 (1937).
16See decisions and articles supra note 7.
17Mr. Chief Justice Stone wrote in his dissent in the Pink case, "Even when courts deal with the language of diplomacy, some foundation must be laid for inferring an obligation where previously there was none, and some expression must be found in the conduct of foreign relations which fairly indicates an intention to assume it. Otherwise courts rather than the executive may shape and define foreign policy which the executive has not adopted." 62 Sup. Ct. at 575.
18Mr. Justice Frankfurter stated in United States v. Pink, "The exchanges between the President and Ambassador Litvinov must be read not in isolation but as the cumulation of difficulties and dealings extending over fifteen years. And they must be read not as self-contained technical documents like a marine insurance contract or a bill of lading, but as characteristically delicate and elusive expressions of diplomacy. The draftsmen of such notes must save sensibilities and avoid the explicitness on which diplomatic negotiations so easily founder." 62 Sup. Ct. at 571.
i. e., that an international compact is such a delicate agreement that its terms do not express the intention of the nations.

The following discussion is divided into three topics: first, the arguments for sustaining the confiscatory decrees; second, the arguments for not sustaining the decrees; and third, the effect of the Recognition and the Assignment.

THE VALIDITY OF THE RUSSIAN CONFISCATORY DECREES

Three grounds are generally alleged to support the assertion that the Russian confiscatory decrees should be given extra territorial effect: (1) corporations domiciled in Russia are governed by the law of the corporate domicile regardless of where their branches are located, and dissolution or nationalization of the corporation at the domicile dissolves or nationalizes it everywhere; (2) one nation’s refusal to respect the decrees of another nation is a serious breach of international comity, and the assertion that the decrees are contrary to the public policy of a forum is unwarranted as too vague a standard; (3) after all the local creditors are paid from the local assets effect ought to be given to foreign confiscatory decrees to any surplus assets because the forum has no further interest in distributing the remainder.

THE CORPORATE THEORY

Most of the litigation in the states after the nationalization decrees involved their effect on the New York branches of insurance corporations domiciled in Russia. But the courts were unwilling to treat the problem solely as one of corporation law, i. e., that extinguishment of the corporation at the domicile, or a transfer of ownership decreed there, should be recognized at the situs of all branches. They took a realistic view of the matter and protected the creditors of the forum, placing this public policy above any corporate organization theory preventing

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19See note 1 supra.
20The mode of transferring shares of stock, and the validity and effect of transfers are governed by the law of the state or country in which the corporation was created, although the transfer may be made in another state or country, and both the parties may reside there. From the nature of the stock of a corporation, which is created by and under the authority of a state, it is necessarily, like every other attribute of the corporation, to be governed by the local law of that state and not by the local law of any foreign state."

protection to the local creditors.\textsuperscript{21} The result was proper, because the corporation entered the forum subjecting itself to the law of the jurisdiction and should not withdraw without the same compliance with local policy.

THE BREACH OF INTERNATIONAL COMITY

In \textit{Luther v. Sagor},\textsuperscript{22} Lord Scrutton said that to deny the application of foreign law on the ground of public policy is a serious breach of international comity. However, it can be replied with equal force that a foreign law contrary to prevailing public policy is in itself an infringement of the principles of international comity. When a foreign decree is a radical departure from the established law of the leading nations of the world the proponents hardly expect their revolutionary principles will be accepted. The Russians have not criticized extensively other nations for refusing enforcement of the decrees.\textsuperscript{23} International comity requires other nations to recognize the validity of the decrees regulating a \textit{res} situated in Russia, and this the various nations have done.\textsuperscript{24}

THE SURPLUS

It has been said that "New York's only possible valid objection to the confiscation was that rights of local creditors might be prejudiced . . ."\textsuperscript{25} and that once local creditors were satisfied the surplus should be turned over to the confiscating government rather than to the foreign creditors. The usual surplus was the amount which remained in a deposit account created by a foreign insurance company doing busi-

\textsuperscript{21}See cases note 2 \textit{supra}.

\textsuperscript{22}[1921] 3 K. B. 532, 558. This case is the English parallel to \textit{Oetjen v. Central Leather Co.}, 246 U. S. 297 (1918), which held that confiscatory decrees are valid as to tangibles situated within the borders of the confiscating government at the time of the decree.

\textsuperscript{23}In promulgating the confiscatory decrees Russia was bound to consider our public policy. In the official correspondence contemporaneous with recognition Russia agreed not to propagandize this country and to respect the religious liberty of Americans in Russia. But in none of the correspondence did Russia protest the non-enforcement of its decrees here. No assurance was given that in the future such confiscatory decree would be recognized, which would indicate that no change was contemplated.


\textsuperscript{25}Note (1937) 23 \textit{Va. L. Rev.} 956.
ness in New York after all the local creditors were paid from this account.26 This statement overlooks the fact that the fund was created to satisfy provisions in the New York law and that as long as any part of it was located in New York it should be distributed according to the law of that forum.27 Realistically viewed if a debt has a situs it is at the place where there is a fund to satisfy it,28 and the law of the situs of the fund governs the right to participate in its distribuion. One rule of law should not apply to a portion of the fund and another to whatever remains since the fund is a single entity created under a New York statute.29

THE INVALIDITY OF THE RUSSIAN CONFISCATORY DECREES

The enforcement of the Russian confiscatory decrees has been criticized on several grounds: (1) confiscatory decrees are not recognized in international law; (2) neither the United States nor the states have recognized confiscatory decrees; (3) Russia never intended the decrees to have extraterritorial effect; (4) the decrees of one state cannot effect property located within the borders of another.

THE INTERNATIONAL LAW

The courts have generally overlooked the established international law when dealing with the problem of what effect is to be given to foreign confiscatory decrees. There exists a convincing practice in international law that confiscatory decrees are treated as invalid.30 More emphasis

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26See note 1 supra for creation of this account.
27 In re People, Norske Lloyd Ins. Co., 249 N. Y. 139, 163 N. E. 129 (1928), a case concerning a Norwegian company, the court held that foreign creditors must look to the foreign liquidator at the domicile of the corporation, to whom the superintendent is bound to transmit the surplus. It has been reasoned from this case, "The recognition of Russia would seem to remove any objection to following the same course in the case of Russian corporations." Note (1939) 88 U. of Pa. L. Rev. 117, n. 5. Yet one writer has said that the New York courts have retained jurisdiction over the surplus not merely because of any unique quality of the insurance funds but because they remained there. Note (1939) 49 Yale L. J. 324. But these arguments do not outweigh the reasoning based on the "separate entity" concept that the whole fund, including the surplus, as well as the New York branch of the corporations, must be viewed as a unit. See Chief Justice Stone's dissent in United States v. Pink, 62 Sup. Ct. at 574.
28At least eight different theories have been advanced for the situs of a debt. Beale has candidly asserted that the situs of a debt is pure fiction, since in reality it is a relation between parties. 1 BEALE, CONFLICT OF LAWS (1935) 302.
29Chief Justice Stone points out this in his dissenting opinion in the Pink case, 62 Sup. Ct. at 574.
30Bord thereby in his article, Confiscations; Extraterritorial And Domestic, supra note 7, stated that no foreign court has given extraterritorial effect to the confiscatory decrees to property located outside Russia, citing Etat Russe v. Ropit, Court of Cassation, 52 Clunet 391; 53 Clunet 667; 55 Clunet 674 (1925-28); cf. Savatier, Le Sort des Biens des Anciennes
on this international law doctrine by the New York courts when they first dealt with the problem might have been a sounder basis for the decisions. The Supreme Court might have deviated with much more reluctance from this principle when deciding the Pink case. But the failure of the state courts to appreciate the advisability of applying international law to the problem would be no justification for the Supreme Court retaining this provincialism. The questions involved by the promulgation of the confiscatory decrees might well have been settled satisfactorily in this country by invoking international legal principles.

OUR PUBLIC POLICY

The policy of the United States has been refusal to enforce confiscatory decrees. Based not on nebulous "public policy" alone, this is a fundamental rule of common law. No title may be acquired by confiscation. Unfortunately the opinions have too infrequently cited this common law doctrine. But it has been pointed out that whenever there are conflicting claims over a fund that disbursement should be withheld until a final determination of the issues involved is made. This avoids double liability for those responsible for the corporate debts and adds weight to an argument for not enforcing confiscatory decrees.

The legal quality of every act is determined by the law of the place where the act is performed, and a state court will not enforce a foreign law contrary to its public policy. New York had a well-defined policy.


United States v. Perchman, 7 Pet. 51 (U. S. 1833); Greenwood v. Freight Co., 105 U. S. 13 (1881). New York had a large body of law to this effect. See cases supra notes 2 and 5.

Under the common law, a bona fide purchaser cannot acquire title to stolen or lost shares. The general rule relating to lost share certificates are therefore applicable (to confiscated share certificates). Thereupon, a suit in conversion lies under the rules of common law, not only against persons who knew or should have known that they acquired shares formerly confiscated, but also against bona fide purchasers of confiscated share certificates. Weiden, supra note 20 at 240.


This was the underlying reason for holding the confiscatory decrees unenforceable. "No action can be maintained upon a cause of action created in another state, the en-
relative to the Russian decrees when the *Pink case* was decided. This policy was entitled to fair consideration by the Supreme Court before it was denounced, and every effort should have been made to construe the executive agreement as not impairing state laws and rights thereunder if possible. It is doubtful that the Recognition and Assignment were intended to override the equitable and established public policy of New York.

RUSSIA'S INTENTION

Admittedly the Communist Revolution was more than a political turnover, it was a social about-face as well. The family of nations could be expected to recognize the political leaders of the Soviet and accept them into the "society," but the Communists could not expect the capitalistic countries to give effect to the Communist social system within their borders. This view is weakened only by the weight afforded to the timely Soviet declaration in 1939 of the intended effect of the decrees promulgated in 1918.

SITUS

A rule of international law as well as the common law is that the enforcement of which is contrary to the strong public policy of the forum." *Restatement, Conflict of Laws* (1934) § 612. See *Dicey, Conflict of Laws* (4th ed. 1927) 27. But this doctrine "is not to be used by the judges of one country as a convenient vehicle for pronouncing their condemnation of legislative policies adopted elsewhere." Sicel, *Problems Raised by the Holzer Case* (1936) 45 Yale L. J. 1463, 1470. In some instances the public policy doctrine has been repudiated as vague. Judge Manton dissenting in United States v. Bank of New York & Trust Co., 77 F. (2d) 866 (C. C. A. 2d, 1935), citing Hadden v. Barney, 5 Wall. 107 (U. S. 1866); Hudson, *Recognition of Foreign Governments and its Effects on Private Rights* (1936) 1 Mo. L. Rev. 312, 324; Note (1936) 36 Col. L. Rev. 1160.

*See cases supra* note 2.


*Belmont v. United States supra* note 11. "Art. 17. Recognition 'de jure' of a government implies the recognition of the judicial, administrative or other organs, and the attribution of extraterritorial effects to their acts, in conformity with the rules on international law and particularly under the customary reservation of respect for public order, even if their acts have been consummated before any previous 'de facto' recognition." Institut De Droit International, *Resolutions Concerning the Recognition of New States and New Governments*, Adopted at Brussels, April, (1936) 30 Am. J. Int. L. (Supp.) 185, 187 (italics supplied).

*Recognition is essential for admission into the society of nations and is proof of the success of the revolution. Russian Republic v. Cibario, 235 N. Y. 255, 139 N. E. 259 (1923); Wheaton, International Law* (Lawrence ed. 1863) § 7; Borchard, *supra* note 7.

*In answer to a request by the United States, the Commissariat of Justice for R. S. F. S. R. rendered an official interpretation of the intended effect of the confiscatory Insurance decree of 1918 to the effect that the confiscation decree was intended to reach all property whether situated within or without Russia.
situs of a \textit{res} determines the law by which it is governed.\textsuperscript{41} The Soviet Government knows of this law and must have intended to be bound by it when it promulgated the nationalization decrees. Russia even applied it to property located within the borders of Russia although the owner of the property was domiciled abroad.\textsuperscript{42} Furthermore the Soviet Government never protested over the application of this doctrine to things situated in other countries when effect was not given to the confiscation edicts. The Russians knew that they could not be heard to say on one hand, we apply our law of confiscation to another's property situated in Russia but another nation cannot apply its law to Russian property situated there. If it be conceded that the Soviet Government could cancel all debtor-creditor relationships, this could not affect a fund located within a foreign jurisdiction. A fund is more than a relationship, it is a \textit{res} with a situs.

\textbf{THE EFFECT OF RECOGNITION AND THE LITVINOV ASSIGNMENT}

Recognition of Russia was brought about by exchanges of correspondence between President Roosevelt and Maxim Litvinov in November of 1933.\textsuperscript{43} The correspondence did not consider what effect should be given to the confiscatory decrees of Russia which were unenforced in the United States at that time. The Litvinov Assignment merely purports to assign to the United States whatever rights Russia had to "amounts due or that may be found to be due."\textsuperscript{44} Reading to the four corners of the instrument as well as all the correspondence between the two Governments during November there is no mention or intimation that a new interpretation of our body of confiscatory law will be initiated. An ordinary and simple assignment seems to have been intended.

\textsuperscript{41} "Every tangible thing within the territory of the state is without question in its jurisdiction and the courts of the state may, if empowered by the sovereign, deal with it by the exercise of jurisdiction by its courts." \textit{Beale, op. cit. supra} note 28, at 435.

\textsuperscript{42} The United States has recognized the right of a foreign government to confiscate property within its jurisdiction. \textit{Oetjen v. Central Leather Co.,} 246 U. S. 297 (1918); \textit{Ricaud v. American Metal Co.,} 246 U. S. 304 (1918); \textit{Underhill v. Hernandez,} 168 U. S. 250 (1897); \textit{Salinoff v. Standard Oil Co.,} 262 N. Y. 220, 186 N. E. 679 (1933).

\textsuperscript{43} See note 3 \textit{supra}.

\textsuperscript{44} For fuller text see note 4 \textit{supra}. "No case has ever presented the question of a treaty in conflict with the Constitution, but numerous \textit{dicta} have conceded the possibility of such a conflict and have suggested that a treaty which was clearly in contravention of the Constitution would not be given effect by the courts." Tennant, \textit{The Judicial Process of Treaty Interpretation in the United States Supreme Court} (1932) 30 \textit{Mich. L. Rev.} 1016, 1017. \textit{See also Burr, Treaty-Making Power} (1912); \textit{Butler, Treaty-Making Power} (1915); \textit{Devlin, Treaty Power} (1908); \textit{Wright, The Constitutionality of Treaties} (1919) 13 \textit{Am. J. Int. L.} 243. Mr. Justice Douglas stated in the \textit{Pink} case that there was no conflict with the Constitution, especially the Fifth Amendment, because the Federal Government may secure to itself and to its nationals priority over foreign creditors. 62 \textit{Sup. Ct.} at 564.
The decision of *United States v. Pink* is unfortunate. The long established principles dealing with the Russian confiscatory decrees in this country, in foreign countries and under international law have been rejected. The Supreme Court has injected an exception into the international harmonious view that confiscatory decrees are not recognized outside of the confiscating state. Giving the ordinary meaning to the words used in the Recognition correspondence and the Assignment, the settlement of Russian claims was to proceed under the same laws by which Russia proceeded with the United States placed in the shoes of Russia. An important matter such as "validating" the Russian decrees should have been set out in the correspondence and not left to implication. State courts and interested private parties in the future will be confused and confounded by simple terms in all international agreements if an ordinary reading of the instruments will not disclose their full terms. If executive compacts are to be favored they must contain all the elements of the agreement in writing and not be transmuted by intentions expressed orally behind closed doors.

LEWIS A. MCGOWAN, JR.

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RECENT DECISIONS

CONTEMPT—Administrative Body May Punish for Contempt Without Jury Trial.

An order of the Corporation Commission of Oklahoma issued under authority of a statute, provides that it shall be a misdemeanor punishable by a fine or imprisonment, or both, to sell or use fuel products which do not comply with the rules of the Corporation Commission. It further provides that such an offense will be a contempt of the regulations of that body punishable by a fine imposed by it. (Order No. 13,205 of the Corporation Commission, issued under authority of 52 Okla. Stat. Ann. (Supp. 1940) § 346). The petitioner after receiving a citation accusing him of three violations was denied a jury trial on the charge of the contempt of the Commission on appearance before it. In this original action of prohibition, he claims a jury trial of right on the issue of contempt, basing his contention on the state constitutional guarantee of trial by jury. Okla. Const. Art. 2, § 20. Held, writ denied. Contempt proceedings are sui generis. They are not “crimes” within the meaning of that term in constitutional guarantees of jury trial. Hence there is no right to jury trial except to the extent granted by statute. An administrative body may be given power to punish for contempt. Vogel v. Corporation Commission of Oklahoma, 121 P. (2d) 586 (Okla. 1942).

The decision raises the question whether due process of law is denied by giving an administrative body power to punish for contempt. The federal rule is that administrative agencies must appeal to the courts to punish contempt. As a result of this dictum in I. C. C. v. Brimson, 154 U. S. 477 (1894), legislation of Congress has always refused to give administrative agencies the power to punish contempt directly. See, Albertsworth, Administrative Contempt Powers: A Problem In Technique (1939) 25 A. B. A. J. 954. The greater number of the state courts follow the federal rule prohibiting the delegation of powers to punish for contempt, but some do not, notably California and Oklahoma. Standard Oil Co. of California v. State Board of Equalization, 6 Cal. (2d) 557, 159 P. (2d) 119 (1936). North Carolina also follows the minority rule. In re Hayes, 200 N. C. 133, 156 S. E. 791 (1931). To vest such power in another body than the court does not violate the due process clause of the 14th. Amendment. Dreyer v. Illinois, 187 U. S. 71 (1902). Neither is there any ground to believe the Supreme Court would decide differently “on the basis of a resulting federal question.” Albertsworth, loc. cit. supra.

Oklahoma also has a statute providing for jury trial for indirect contempt. Okla. Const. Art. 2, § 25. Under it a person accused of indirect contempt of court for violation or disobedience of “any court order of injunction, or restraint, made or entered by any court or judge of the State shall, . . . be entitled to a trial by jury.” The majority opinion dismissed this statute as inapplicable on the basis that this administrative body was not a court nor its members judges despite the fact that occasionally it exercises quasi-judicial functions. It is difficult to see why this provision does not govern an administrative body of this kind. Certainly it is hard to reconcile the statement that the Commission is not a court despite its occasional exercise of quasi-judicial functions with the fact that the Commission, to enforce its orders, rules and regulations, was authorized to exercise the powers and authority of a Court of Record, could compel attendance of witnesses, administer oaths, punish for direct contempt as well as for violation of its orders in pursuance of the statute, and compel books or records to be produced. A similar Federal statute has recently been broadly construed so as to limit the power of courts to punish summarily. Nye v. United States, 313 U. S. 33 (1941), 54 Harv. L. Rev.
1397. While it is true jury trial in a contempt proceeding, whether criminal or civil, did not exist at common law, Meyers v. United States, 264 U. S. 95 (1924) (holding that a criminal contempt is not within the Sixth Amendment), still in the principal case there was a statute to cover indirect contempts.

The reluctance of the Supreme Court to give administrative bodies power to punish for contempt is well illustrated by this case. Primarily the opinion is a collapse of all those fundamentals which Anglo-American jurisprudence believe necessary to administer justice, viz., the right of the courts to punish for contempt; trained judges (the commissioners in the instant case were not required to be lawyers though the report does not show they were not); and production of evidence to convict beyond a reasonable doubt. Secondly, the case undoubtedly shows that we are coming in time to a point where administrative bodies will administer and usurp many of the powers now thought to be solely in the province of the courts.

The dissent in holding that the offense denominated a contempt is really a "public offense or crime," and that the "punishment for the 'contempt' is simply an additional penalty for the same criminal act" has some weight when as pointed out the act complained of is against public interest and not merely private rights. The petitioner should not be deprived of a jury trial by what at the most is an oversight on the part of the legislature. And on the whole it appears that the legislature did blanket the Commission into the limitations as well as the powers of courts.

JOHN A. KOTTE

CONTRACTS—Bonus Clauses in Cost-plus-fixed-fee Contracts Are Enforceable

During World War I, Bethlehem Shipbuilding Corporation contracted to build thirteen merchant ships for the United States Fleet Corporation. The contracts were on the basis of actual-cost-plus-fixed-fee, plus half of the savings below the estimated cost. This suit involves roughly $12,000,000, which is Bethlehem's share under the half-saving clause. The government defended on the grounds that: (1) Bethlehem had failed to show that the savings were due to added efficiency; (2) the government had been under duress in making the contracts; (3) 22% profit was unconscionable. Held, the contract did not require Bethlehem to show the savings were due to their efforts; the United States, with extensive war powers, could not be coerced by a private corporation; and, 22% profit was not unconscionable. United States v. Bethlehem Shipbuilding Corp., 62 Sup. Ct. 581 (1942).

At this time, when huge government contracts are daily being placed, nothing is more important than that faith and reliance on our government's integrity in the performance of contracts be bolstered. The Supreme Court has here decided that moral or patriotic considerations will not sweep aside the settled principles of contract law, either by resorting to fictions of trusts, Note (1941) 9 Geo. WASH. L. REV. 693, or giving government contracts different treatment from that given private contracts.

The bonus for savings is clearly not divisible or severable in the sense that it is granted only for increased efficiency. The words of the contract neither expressly or impliedly stated this condition. Nor is Burke & James, Inc. v. United States, 63 Ct. Cl. 36 (1927), in point. There the estimate was made by plaintiffs on the basis of an experimental model. They estimated their total profit, including a 25% saving clause, would be about 10½%. In fact, the profit was approximately 64%. In the present case the estimate was submitted by experts of Bethlehem to government experts, who accepted them, although both parties admitted they were high. Nor can the present case be compared to F. Jacobson & Sons v. United States, 61 Ct. Cl. 420 (1926); and Cohen, Endel Co. v. United States, 60 Ct. Cl. 513 (1925), where the
bonus for savings agreement was made after the original contract, for the purpose of saving cloth in cutting. But even if the terms of the contract were uncertain on the point, the rule of construction, that where the rate of compensation is ambiguous it will be construed most strongly against the contractee in favor of the contractor, would apply. Gants v. District of Columbia, 18 Ct. Cl. 569 (1883).

That the courts will not look to the adequacy of the consideration, except where the agreement is to exchange sums of money, is fundamental. 1 WILLISTON, CONTRACTS § 115 (Rev. Ed. 1936). However, if fraud, undue influence, or mistake is present adequacy of consideration will be considered. Hume v. United States, 132 U.S. 406 (1889); Parkhurst v. Hosford, 21 Fed. 827 (C. C. Ore. 1884); E. I. Du Pont De Nemours & Co. v. Kelly, 252 Fed. 523 (C. C. A. 4th, 1918). But it is looked at from the standpoint of evidence tending to show the presence of fraud, undue influence, or mistake and if the consideration is so grossly inadequate as to shock the conscience of the court the law will presume the existence of these vitiating elements.

Because of expert representation and full knowledge of both parties no fraud or mistake could be found. The court then determined that the government of the United States, with its extended "war powers" could not fairly be considered under duress exerted by a private corporation in making these contracts. Mr. Justice Frankfurter dissented strongly on this point, advertising to the enormous practical pressure on the contracting officer to sacrifice price to speed and efficiency. 62 S. Ct. at 604. It had long been held that in private contracts, mere business necessity or financial pressure is not duress, provided no undue advantage is taken. French v. Shoemaker, 14 Wall. 314 (U. S. 1871); United States v. Huchabee, 16 Wall. 414 (U. S. 1872). The latter case is similar to the present one. It was there found that the party was not forced to sell his foundry to the Confederate government by virtue of the power of that government to require either sale of the foundry or of the iron at specified prices. United States v. Huchabee, supra.

The Supreme Court then found that 22% profit on the contract was not such inordinate profit as to shock the conscience of the court and raise a presumption of coercion. It found, rather, that not only was this profit in line with war profits generally, but was much less than many other war contracts. The government admits that it was bargaining for ships with a corporation that was the best in workmanship, speed of production, and capacity. These advantages Bethlehem traded to the United States for profit, and there is no allegation the government did not get all it bargained for.

What may prove most significant in the future is the dictum of the court which gives the "go" signal to Congress to draft productive capacity, both labor and capital. The court said in speaking of the power to raise armies and navies under the Constitution: "Under this authority Congress can draft men for battle service. Selective Service Cases, 245 U. S. 366. Its power to draft business organizations to support the fighting men who risk their lives can be no less." United States v. Bethlehem Shipbuilding Corp, supra at 590.

HARRY L. KUCHINS, JR.

DOMICILE—District of Columbia Resident Held Domiciled Elsewhere for Tax Purposes, Although Not in Federal Service.

Section 2(a) of the District of Columbia Income Tax Act of 1939 (53 Stat. 1087, 20 D. C. Code Supp. V. 1939) imposes a tax upon the income of those persons domiciled within the District of Columbia on the last day of the taxable year. Petitioner came to the District of Columbia in 1921, as a member of Congress from
Maine, remaining there in such capacity until 1935. He maintained a home for his mother in Maine until her death in 1934, and after that removed such of his personal effects as he did not have in Washington to a furnished room in a Maine boarding house. He still retains this room. In the fall of 1935 he returned to Washington to take up the private practice of law, with the avowed intention of remaining there until he "made his fortune," to such an extent as would permit him to retire from his profession and live the remainder of his life in Maine. He owned unimproved real estate in Maine and voted there. His automobile was registered in Washington, and he had a five room apartment there, furnished with his own furnishings. The District of Columbia Board of Tax Appeals found that he had a mere "floating" intention of returning to Maine at such time as he should see fit to leave the District of Columbia, and was therefore subject to the tax. Held, not domiciled within the District of Columbia, and, therefore, not liable for the tax. Beedy v. District of Columbia, App. D. C., Mar 16, 1942.

With the advent of the Income Tax Act of 1939, the question of domicile in the District of Columbia became a matter of great importance. The peculiar nature of the District of Columbia, and the legal status of persons dwelling there has long been a perplexing problem. A great number of its citizenry are political appointees or electives, and their positions depend "upon the action of a local constituency on the first Tuesday after the first Monday in November." District of Columbia v. Murphy, and District of Columbia v. DeHart, 314 U. S. 441, 451 (1941). Such persons were deemed, at least by legislative intent, to be clearly exempt from the imposition of this tax. See statements of Senator Overton and Representative Dirksen, 84 Cong. Rec. 8828, 8973 (1939). A more difficult problem, the legal status of those persons who accept employment in the Federal service but whose positions do not depend upon the vacillating favor of political uncertainties, has generally been conceded (Atherton v. Thornton, 8 N. H. 178, 180 (1835) ) and has more recently been under consideration by the Supreme Court and the Court of Appeals for the District of Columbia. Murphy and DeHart cases, supra; Sweeney v. District of Columbia, 72 App. D. C. 30, 113 F. (2d) 25 (1940) cert. denied, 310 U. S. 361 (1940). In considering the instant case, it should be noted that in the DeHart and Murphy cases, supra, the Supreme Court overruled the decision of the Court of Appeals for the District of Columbia which had held the petitioners not domiciled in the District. The Supreme Court said: "A decision that the statute lays a tax only on those with an affirmative intent to remain here the rest of their days would be at variance with the prevailing concept of domicile, and would give the statute scope far narrower than Congress must have intended. Murphy and DeHart cases, supra, at 449. But in the instant case the problem presented concerns the status of a private citizen who has come into the District of Columbia of his own volition, has engaged in the practice of law there for more than seven years, and has no intent to leave until such indefinite time when he shall have "made his fortune."

The determination of domicile of choice, depending largely as it does, upon the element of personal intent, has always been a difficult problem. It has been defined as "the place where one has his true, fixed, permanent home and principle establishment and to which, whenever he is absent, he has the intention of returning, and where he exercises his political rights." District of Columbia v. Murphy, supra at 446. See also Texas v. Florida, 306 U. S. 398 (1939); Salem v. Lyme, 29 Conn. 74 (1860); Restatement, Conflict of Laws § 9; 1 Beale, Conflict of Laws (1935) § 95; Goodrich, Conflict of Laws (1938) § 25. The burden of proof is, by the weight of authority, upon the party who alleges the change. Anderson v. Watt, 138 U. S. 694 (1891); Newcomb's Estate, 192 N. Y. 238, 84 N. E. 950 (1908); Restatement, Conflict of Laws § 12; Story, Conflict of Laws (8th ed. 1883) § 46.
There seems to be some ambiguity with respect to the intention which a person must have, either to retain his old domicile or to adopt a new one. The language used by the writers is conflicting as to whether a bare "floating intention" to return at some indefinite future time is sufficient to retain the former domicile. Compare, Gilbert v. David, 235 U. S. 561 (1915); Mitchell v. United States, 21 Wall. 350 (U. S. 1875), and Story, loc. cit. supra, with District of Columbia v. Murphy, supra; Sweezy v. District of Columbia, supra; 1 Beale, op. cit. supra § 10; Minor, Conflict of Laws (1901) § 61. While the idea that a man may have two domiciles at the same time is repugnant to long established principles of law (Williamson v. Osenton, 232 U. S. 619, 625 (1914); 1 Beale, op. cit. supra § 11.2; Kennan, Residence and Domicile (1934) § 13), this result has been approached Texas v. Florida, supra; 398 (1939); Dorrance's Estate, 115 N. J. Eq. 268, 170 Atl. 601 A. (2d) 471 (1939); In re Dorrance's Will, 333 Pa. 162, 3 A. 2d) 682 (1939). The question thus resolved in the instant case is whether or not the petitioner's intention to return to Maine at such a time when his fortune shall have been made, is sufficient to retain this domicile, and to prevent the acquisition of a new one in the District of Columbia. The case is not to be determined upon the basis of those cases dealing with Federal employees who have moved into the District of Columbia (Williamson v. Osenton, supra, 232 U. S. 619, 624 (1913); Gilbert v. David, supra), but rather on the basis of those cases governing the acquisition of domicile of a private individual, no matter what the jurisdiction concerned may be. Texas v. Florida, supra; In re Dorrance's Will, supra, 1 Beale, op. cit. supra § 9.5; Goodrich, loc. cit. supra, § 25. The place where a person lives is taken prima facie to be his home and the burden of disproving such domicile is upon the person who denies it. Anderson v. Watt, supra; Ennis v. Smith, 14 How. 423 (U. S. 1852); Restatement, Conflict of Laws, § 12. Thus there is a shifting the burden of proof heretofore indicated.

The fact that a person has maintained and exercised his voting rights in a particular state is not determinative in the question of domicile. Murphy and DeHart cases, supra. It has, in fact, been held to be of completely negative value. Gaddie v. Mann, 147 Fed. 955 (C. C. S. D. Ga. 1906); Bradstreet v. Bradstreet, 18 App. D. C. 229 (1889).

Whether the decision rendered by the Supreme Court in the Murphy and DeHart cases, supra, applies to Federal employees alone, or whether it is applicable to the determination of domicile, regardless of the occupation of the individual, is a matter of conjecture. Assuming that it is generally applicable, it would seem that the question of domicile is no longer a matter of law, but rather one of fact. Upon the basis of this reasoning, the decision of the Court of Appeals for the District of Columbia in the present case, turns on the question as to whether or not there was substantial evidence to support the findings of fact made by the Board of Tax Appeals. A review of the findings, when considered in relation to the holding of the Supreme Court in the Murphy case, supra, would seem to indicate that there was substantial evidence. Reference is particularly made to the statement at p. 450, where the Court said: "One's testimony with regard to his intention is, of course, to be given full and fair consideration, but is subject to the infirmity of any self-serving declaration, and may frequently lack persuasiveness or even be contradicted or negatived by other declarations or inconsistent act." Instead of adopting this for a guide, the Court of Appeals, in reversing the Board in the instant case, seems to have placed great faith in the sentimental pronouncements of George Elliot upon the strength of our former ties. In view of this attitude of the Court of Appeals, in seizing upon the ethereal concept of domicile and making it most forceful in arriving at their conclusions, it is submitted that an early re-enactment of the Revenue Act
of the District of Columbia is a vital necessity. The basis of the measure should be rooted not in domicile, at a place where domicile is always so debatable, but upon length of residence, or income received in the District. Such a tax would, however place a burden upon the members of the legislature, whose duty it is to enact such laws and who so carefully prevented the passage of any such measure when the bill was first being considered. At the present time the Act, as it stands under the court decisions, is hardly in condition to pay for the cost of its administration.

QUENTIN O. YOUNG

DUE PROCESs—Thrice-Convicted Criminal Waived Right to Counsel by Failure to Demand Representation

This is a petition for a writ of habeas corpus before the Supreme Court of Pennsylvania. The petitioner was convicted of "being armed to rob" and robbery in 1931, and sentenced to twenty years imprisonment. He now claims that he is innocent, that he has been deprived of due process of law under the Fourteenth Amendment because he was not represented by counsel in his trial, was not informed of his right to have counsel, did not have counsel appointed by the court, and did nothing to waive his constitutional right to be "heard by counsel." Prior to this trial he had been convicted of felonies three times. Held, writ of habeas corpus refused. Petitioner waived his right to be "heard by counsel," since he did not request it, although thrice-convicted and therefore acquainted with criminal procedure. Commonwealth v. Smith, 24 A (2d) 1, (Pa. 1942).

That a writ of habeas corpus is the proper method of determining whether a court has jurisdiction is certain. Johnson v. Zerbst, 304 U. S. 458 (1938); Re Neilsen, 131 U. S. 176 (1889). Further, the right to counsel is a jurisdictional mandate on the federal courts without which they are powerless to deprive one of life or liberty under the Sixth Amendment. Johnson v. Zerbst, supra; Frank v. Mangum, 237 U. S. 309 (1915). Since that portion of the Sixth amendment relating to the right of the accused to benefit of counsel is extended to the state courts by the due process clause of the Fourteenth amendment, Palko v. Connecticut, 302 U. S. 319 (1937); Powell v. Alabama, 287 U. S. 45 (1932), this right must also be a jurisdictional mandate on the state courts. The statement in Frank v. Mangum, supra, that "As to the 'due process of law' that is required by the 14th amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense," must be held to include the right to counsel.

Smith v. O'Grady, 312 U. S. 329 (1941), was the most recent Supreme Court pronouncement available to the Pennsylvania court dealing directly with this problem. In that case the defendant applied for a writ of habeas corpus from the state court of Nebraska on the grounds that he had been coerced to plead guilty by the prosecuting attorney and had been denied the right of counsel. The Supreme Court of Nebraska refused the writ because it failed to state a cause of action for which the writ could issue. The Supreme Court of the United States, on appeal, decided a petition in a state court for habeas corpus, by one who claims he is held on a judgment rendered in violation of the Constitution, is reviewable by it. Nor can a state say, where a constitutional right is allegedly violated, that it will afford no means of enforcing that
The Supreme Court of Pennsylvania in the present opinion, devotes some time to the discussion of the right of the federal courts to review a decision of a state court. No one challenges the right of the Pennsylvania Supreme Court to interpret its own constitution with finality. Neither can there be any doubt that if that interpretation runs afoul of the Federal Constitution, the Supreme Court of the United States has the power of review.

The only question, then, is how has the Supreme Court interpreted this section of the Sixth Amendment, relating to the right of accused to counsel; and is the Pennsylvania decision in line with this? The Supreme Court has said that courts should "indulge every reasonable presumption against waiver of the fundamental Constitutional rights." Johnson v. Zerbst, supra; Aetna Insurance Co. v. Kennedy, 301 U. S. 389 (1937); Hodges v. Easton, 106 U. S. 408 (1882). But when judgment has been rendered against an accused he has the burden of proof in showing that he did not competently and intelligently waive his right to assistance of counsel. Johnson v. Zerbst, supra; Walker v. Johnson, 312 U. S. 275 (1941). The guide to whether there has been a competent and intelligible waiver of the constitutional right "must depend in each case, upon the particular facts and circumstances surrounding each case, including the background, experience and conduct of the accused." Johnson v. Zerbst, supra at 464.

Under so flexible a principle the present case seems supportable. The peculiar facts and circumstances which the Pennsylvania court relied on were that the accused was well acquainted with criminal procedure, because he had previously been convicted three times. The stand of the court was that one who was three times convicted knew he could have counsel if he requested it, and not having requested it, waived the right.

But since the decision in this case the Supreme Court in Glasser v. United States, 62 Sup. Ct. 457 (1942), 30 Georgetown Law Journal 570 has found that a former United States attorney could not be considered to have intelligently waived his right to assistance of counsel, although he was well acquainted with criminal procedure, by submitting to the courts appointment of his co-defendant's lawyer to also represent him.

The court did say, however, that had he requested counsel, there was no obligation on it to furnish counsel, except in capital crimes. This is the limitation set down by the Supreme Court in Powell v. Alabama, supra. With the growing tendency today of a more just and fair treatment of the poor and downtrodden it is urged upon the courts that counsel be appointed in all serious criminal cases where the accused is unable to employ counsel. But the difficulty is that counsel cannot be paid and the cases are too numerous for the legal profession to handle all for charity. If the solution is to come, it must come from the legislature, by providing for public defenders.

HARRY L. KUCHINS, JR.

EXECUTORS AND ADMINISTRATORS—Determination of Domicile in Probate Proceedings.—Not Entitled to Full Faith.

Testatrix's will was probated in Georgia with all beneficiaries and heirs at law, including testatrix's husband, made actual parties by personal service, which grant of probate and special finding of jurisdiction was affirmed, upon the husband's appeal, by the Supreme Court of Georgia. Hungerford v. Spalding, 183 Ga. 547, 189 S. E. 2 (1936). Subsequently in New York, at the suggestion of the husband and the
New York State Tax Commission, the husband was there appointed administrator c.t.a. on a finding by the Surrogate that decedent's domicile was New York. Both Georgia executors and New York administrator then sued in Delaware, both seeking to obtain transfer of decedent's stock in a Delaware corporation, and both agreeing that the situs of the shares was in Delaware, which state has not adopted the Uniform Stock Transfer Act. The corporation interpled both parties and the trial court decided the issue for the Georgia executors. The Supreme Court of Delaware reversed the trial court, holding New York to have been decedent's domicile, and denied that the full faith and credit clause of the Constitution required the stock to be awarded to the Georgia executors. *New York Trust Co. v. Riley*, 16 A. (2d) 727 (Del. 1940). *Held*, The Delaware Supreme Court's failure to recognize the Georgia Court's finding of domicile in a probate proceeding where all the beneficiaries and heirs-at-law were personally served and were before the probate court was not a denial of full faith and credit to the Georgia judgment. *Riley v. New York Trust Co.*, 62 Sup. Ct. 608 (1942).

Cases are numerous wherein the courts have declared no constitutional right has been infringed by multiple death taxation of intangibles on the basis of inconsistent determinations of domicile by State courts. *Texas v. Florida*, 306 U. S. 398 (1939); *Worcester County Trust Company v. Riley*, 302 U. S. 292 (1937); *Tilt v. Kelsey*, 207 U. S. 43 (1907); In re *Dorrance's Estate*, 309 Pa. 151, 163 Atl. 303 (1932), cert. denied, 287 U. S. 660 (1932) and 288 U. S. 617 (1933). The question here was not a mere retrial of the issues of multiple domicile. The executors under the Georgia probate contended the decedent's domicil was conclusively established against all persons entitled to be heard in the succession of the decedent's state and thereby vested the petitioners with title to the stock in question for purpose of administration. *Burbank v. Ernst*, 232 U. S. 162 (1914); *Oberby v. Gordon*, 177 U. S. 214 (1900); *Thorman v. Frame*, 176 U. S. 350 (1900); In re *Fischer's Estate* 118, N. J. Eq. 599, 180 Atl. 633 (1935). They alleged that the New York proceeding, in which the administrator was appointed, was in defiance of the previous conclusive adjudication in Georgia, and that the administrator was in privity with the husband of the decedent who had been before the Georgia Court.

It is clear that the New York administrator was not in privity with the decedent's husband. Privity means mutual succession or relationship to the same rights of property. *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111, 128 (1912); *Litchfield v. Goodnow's Adm'r*, 123 U. S. 549 (1887); *Stacey v. Thrasher*, 6 How. 44, 58 (U. S., 1848); *Kenneson, The Relation to Each Other of Different Administrators of the Same Deceased* (1906) 6 Col. L. Rev. 16, 33. The New York administrator was not identified in interest with the decedent's husband. Although appointed at the husband's request, the administrator did not claim through him; their interests are entirely different. The decedent's husband represents himself. The administrator is an officer of the court; he represents both creditors and legatees. *Blood v. Kane*, 130 N.Y. 514, 29 N. E. 994 (1894). Even if the husband were himself appointed administrator in New York, he, as such, would not be bound by the Georgia decree. *Troxell v. Delaware, L. & W. R. R.*, 227 U. S. 434 (1913); *Ingersoll v. Coran*, 211 U. S. 335 (1908); *Brown v. Fletcher's Estate*, 210 U. S. 82 (1908).

The Georgia decree was in rem only as to property of the decedent located in Georgia; as to other property it was in personam and binding only as to persons served within its state limits or their privies. It does not bar litigation anew by a stranger of facts upon which the decree in rem is based. *Tilt v. Kelsey, supra; Luke v. Hill*, 137 Ga. 159, 73 S. E. 345 (1911); *Brigham v. Fayerweather*, 140 Mass. 411,
413. The New York administrator, not being a party to the Georgia proceeding, is not bound by its decree. *Hansberry v. Lee*, 311 U. S. 32 (1940); *Baker v. Baker, Eccles & Co.*, 242 U. S. 394, 400 (1917); *Penmoyer v. Neff*, 95 U. S. 714 (1877). This repels the assertion of failure to allow "full faith and credit" to the Georgia decree when it was presented to the Delaware court.

The litigation in Delaware relates only to the administration of the decedent's personal estate, not directly to its succession. Confusing the husband, a distributee, with the New York administrator was to overlook the fact that the administrator is a special temporary trustee for all interested parties, that the primary purpose of administration is to collect the assets and pay the debts and then make distribution, of which only a part would go to the husband. 3 *Schooley*, *Wills* (6th Ed. 1923) § 1392. To bind the administrator by such subterfuge would, said Chief Justice Stone in his concurring opinion, "by the simple expedient of a probate by the next of kin of the will of the decedent as the domiciled resident of another state, deprive New York from litigating its lawful right to collect taxes."

That the case involved no new doctrine but only a novel presentation of problems dependent for solution on established principles is indicated by the fact that the Chief Justice required but one paragraph to state his concurring opinion in which Mr. Justice Frankfurter and Mr. Justice Jackson joined.

Query, whether transfer of the stock should have been made, not according to determination of domicile, but in conformity with the location of the certificate, which certificate was in Georgia at the decedent's death? See Mersch, *Voluntary Payment to Foreign Administrator* (1929) 18 *Georgetown Law Journal* 130, 133.

LYNN E.MOTE

INSURANCE—Bodily Disease as a Contributing Cause under Accidental Death Policy

Plaintiff's husband accidentally slipped and fell on some rocks. Shortly thereafter he died. An autopsy revealed an *ante mortem* blood clot in the heart along with several *post mortem* clots. The *ante mortem* clot was the result of chronic cystitis. The deceased was not aware of this condition. Plaintiff seeks to recover as beneficiary of a policy insuring the deceased against death "due to accidental means alone and independently of all other causes." The trial court directed a verdict for the defendant. *Held*, verdict sustained. Insured's death was due in part at least to a bodily infirmity and not accidental means alone. *Bush v. Order of United Commercial Travellers of America*, 124 F. (2d) 528 (C. C. A. 2d, 1942).

The mere fact that the accident would not have resulted in the death of a man of normal health does not preclude recovery under a policy of this nature. While an existing disease or bodily infirmity may aggravate an accidental injury and death results, it does not necessarily rob it of its character as the sole producing cause even in those jurisdictions following a rule of strict interpretation. *New Amsterdam Casualty Co. v. Shields*, 155 Fed. 54 (C. C. A. 6th, 1907); *Freeman v. Mercantile Mutual Accident Ass'n*, 156 Mass. 351, 30 N. E. 1013 (1892); *Driskell v. United States Health & Accident Co.*, 117 Mo. App. 363, 93 S. W. 880 (1906). While the trend in most jurisdictions is toward a liberal construction of such policies, *Richards, Insurance* (4th ed. 1932) 704, the court in the instant case has, in the absence of a controlling Vermont decision, followed the rule of strict construction in vogue in the Federal courts prior to *Erie R. R. v. Tompkins*, 302 U. S. 671 (1937); *Order of United Commercial Travellers v. Nicholson*, 9 F. (2d) 7 (C. C. A. 2d, 1925); *Aetna Life Ins. Co. v. Ryan*, 255 Fed. 483 (C. C. A. 2d, 1918).
Where there is a question as to whether or not injury or death was the result of accidental means alone, there are two main divisions of authority. Under one it is incumbent on the plaintiff to show that any bodily infirmities or diseases existing at the time of the accident were in no way reflected in the result. *Kearns v. Aetna Life Ins. Co.*, 291 Fed. 289 (C. C. A. 8th, 1923); *Crandall v. Continental Casualty Co.*, 179 Ill. App. 330 (1913). The other and much more widely followed rule allows recovery where it can be shown that the accident was the proximate cause of the injury or death. *Williams v. General Accident Fire & Life Assur. Corp.*, 144 Kan. 755, 62 P. (2d) 856 (1936) (citing many earlier cases); *Richards, loc. cit. supra*. Under this more liberal rule, the question of whether the accident caused death would be one for the jury. *Scanlon v. Metropolitan Life Ins. Co.*, 93 F. (2d) 942 (C. C. A. 7th, 1937); *Fidelity & Casualty Co. v. Meyer*, 106 Ark. 91, 152 S. W. 995 (1912); *Pacific Mutual Life v. Meldrin*, 24 Ga. App. 487, 101 S. E. 305 (1919); *Continental Casualty Co. v. Lloyd*, 165 Ind. 52, 73 N. E. 824 (1905). One court has even gone so far as to hold that while death from the disease might have resulted, if it would have been deferred until a later period in life but for the accident, recovery will be allowed. *Fidelity & Casualty Co. v. Meyer, supra*. This, however, is an extreme holding and goes beyond the concept of proximate cause.

The effect of the rule of strict construction is seen when the restrictive language of the policies is read in its literal sense. "In most cases a policy of this character would be of little or no value to the insured if the limiting language be literally interpreted . . ." *Kangas v. New York Life Ins. Co.*, 223 Mich. 238, 243, 193 N. W. 867, 869 (1923). Death would have to be almost simultaneous with the accident to warrant a recovery. The rule of proximate cause is the more logical one especially as applied to the policy in the instant case which lacked the added limiting clause found in some policies expressly excluding liability where injury or death resulted wholly or in part, directly or indirectly, from bodily disease or infirmity. *Cf. Benefit Ass’n of Ry. Employees v. Armbruster*, 224 Ala. 302, 140 So. 356 (1932).

The dissent in the instant case was based principally on *Silverstein v. Metropolitan Ins. Co.*, 254 N. Y. 81, 171 N. E. 914 (1930). Although that case illustrates a policy of liberal construction it can hardly be said to be direct authority for the plaintiff in the instant case. There the insured suffered from an ulcer no more serious than a "pimple." On such a state of facts of course the decision should be for the plaintiff. The case was discussed and distinguished by the majority on its facts. It is doubtful, however, that if the majority had followed the policy behind that case that a verdict would have been directed. As Justice Cardozo there pointed out "a policy of insurance is not accepted with the thought that its coverage is to be restricted to an Apollo or a Hercules." *Silverstein v. Metropolitan Life Ins. Co.*, *supra* at 84, 171 N. E. at 915.

The greatest difficulty in cases of this nature is framing a proper instruction for the jury (if the case is allowed to go that far). A mere statement that the accident must be the proximate cause of death is unsatisfactory as being too vague. Elaborations of this rule often become slippery and have the effect of giving the jury free rein. It is conceivable that the court in the instant case took "extra-judicial" notice of the normal jury’s reluctance to find for an insurance company.

DAVID A. WILSON, JR.


Although subject to considerable supervision by the railroads operating the
terminals, "red cap" porters had not been officially considered employees, and had performed their tasks in and about defendant's terminals without compensation other than the tips of passengers. On September 29, 1938, the Interstate Commerce Commission, acting under § 1 of the Railway Labor Act, 44 Stat. 577 (1926), 45 U. S. C. § 151 (1940), ruled that red caps were employees within the meaning of that Act. The Fair Labor Standards Act, 52 Stat. 1062 (1938), 29 U. S. C. § 206 (1940), effective October 24, 1938, required that specified minimum wages be paid every employee. A plan was conceived by the terminals, known as the accounting and guarantee system, by which the red caps made a daily accounting of the number of hours worked and the amount of tips collected, and the terminals guaranteed the overall receipt of the minimum wage by paying them any shortage between the total tips and the minimum wage. The red caps operated under this plan for some time before bringing the instant suit, in which they contend that the Act requires the payment of the minimum wage without regard to their earnings from tips. Held, tips may be treated as wages under the Fair Labor Standards Act. Williams v. Jacksonville Terminal Co., 62 Sup. Ct. 659 (1942).

The dissenting opinion argues that the wages under the Act are to be paid by the employer and that, furthermore, the public in tipping does not intend to tip the railroad company-employer, but rather the red cap. No authorities are cited in the dissent and the dictionary definition of a tip is evidently relied upon. According to the dictionary a tip is described as "a sum of money given, as to a servant, usually to secure better or more prompt service." Funk and Wagnall Standard Dictionary (1898). However, this layman's notion of a legal theory is hardly beyond reproach. A tip is not a gift. A gift is a gratuity and not only does it not require consideration, but there can be none; if there is a consideration for the transaction it is not a gift. See Martin v. Martin, 202 Ill. 382, 67 N. E. 1 (1903). Thus, a tip is not a personal gift to the red cap since it is in consideration of services.

An employee's earnings in the course of or in connection with his services belong to his employer. Leach v. Hannibal & S. T. R. R., 86 Mo. 27 (1885); Reynolds v. Roosevelt, 8 N. Y. Supp. 749 (Sup. Ct. 1890); Morrison v. Thompson L. R., 9 Q. B. 480 (1874); S Labatt, Master and Servant (2d Ed.) § 2037. The Supreme Court in Standard Parts Co. v. Peck, 264 U. S. 52 (1924), held that one employed by another to develop a particular process and machinery who while in the course of his employment perfected and patented an invention, held that patent for his employer.

It has been held that an employer may require, as a condition of employment, that his employees shall turn over to him amounts received by them in the course of their employment as tips or gratuities. Lloyd v. Hotel La Salle Co., 221 Ill. App. 104 (1921). In Sloat v. Rochester Taxicab Co., 163 N. Y. Supp. 904 (3d Dep't 1917), the court decided that tips were a part of the wages of a taxicab driver in computing his weekly benefits under the New York workmen's compensation law. It was said that such an agreement may be implied from a common custom or understanding in the business. Tips received by a pullman car porter are understood by the porter and the company to be a part of his wages and can be considered as such in determining the compensation to which he is entitled for injuries. Bryant v. Pullman Co., 177 N. Y. Supp. 488 (3d Dep't 1919). Likewise, tips received by a restaurant waitress may properly be regarded as part of her average weekly wage. Powers' Case, 275 Mass. 315, 176 N. E. 621 (1931); Gross' Case, 132 Me. 59, 166 Atl. 55 (1933). Reinstatement of workers with back pay when ordered under the authority of the National Labor Relations Act (49 Stat. 449 (1935), 29 U. S. C. § 151-166 (1940)), has been held to include tips as part of the average weekly wage. Club Troika, Inc., 2 N. L. R. B. 90 (1936); Willard, Inc., 2 N. L. R. B. 1094 (1937).
A state statute which prohibited an employer from entering into a contract requiring an employee to surrender to the employer all tips or gratuities received for services rendered to the public on behalf of the employer was declared unconstitutional as depriving the parties of due process of law. Ex parte Farb, 178 Cal. 592, 174 Pac. 320 (1918). The question as to the right to "kumshaw," a present or a bonus to a captain of a ship, is to be determined according to general custom and usage. Wilcox v. Phillips, Fed. Cas. No. 17,639 (C. C. E. D. Pa. 1843).

In the absence of an agreement providing otherwise, tips given by customers to an employee belong to him rather than to the employer. Zappas v. Roumeliotie, 156 Iowa 709, 137 N. W. 935 (1912); Polites v. Barlin, 149 Ky. 376, 149 S. W. 828 (1912). However in the Zappas case it was pointed out that if the master establishes by the burden of proof an agreement on the part of the employee to turn over the tips to him, he is entitled to the same. In the instant cases, the red caps had, after receiving due notice of the accounting and guarantee plan, worked under it thereby indicating their acceptance of the contract. The Supreme Court had then to decide whether the parties could by contract provide that tips should constitute a portion of the wages. The Court decided the issue affirmatively. It is hardly conceivable that Congress in passing the Wage Act intended to favor particularly the red cap and provide that he be thrice paid the minimum wage.

JOHN R. WALL

WORKMEN'S COMPENSATION—State Liable for Negligence of its Physician Employee Aggravating a Compensable Injury

Appellant was a school employee of the State. While walking through a school building, she fell and injured her right leg. She was taken to the school hospital, staffed by full-time employee physicians and nurses. Her injury was incorrectly diagnosed as a bruise and contusion on the leg and hip. After a short period in bed the appellant was encouraged to make use of the leg, although she complained of unbearable pain. Upon returning to her home, applying to her private physician, she learned that she had suffered a fracture of the right femur and upward displacement of the shaft, and that, due to the negligence in her treatment at the hospital, there had been an extreme absorption of the neck of the right femur. As a result it was necessary that she undergo a serious operation and it appears that her right leg and hip are totally disabled. Appellant filed and was granted an award for workmen's compensation, based on the school hospital diagnosis of the injury as slight. Permission to file a tort claim against the State of New York which had not been filed within the usual time was denied on the sole ground that it did not constitute a valid claim against the State. Held, the employee is not limited to her remedy under the Workmen’s Compensation Law, but may proceed against the State for aggravation of the injury by the physician, their agent. Robison v. State, 32 N. Y. S. (2d) 303 (1942).

The problem presented is whether an acceptance of compensation for the original injury will bar an action for damages arising from aggravation of the original injury due to malpractice. If separation is possible, the further question arises whether a physician can be an agent.

In regard to the question of separability of claims, at first blush it would seem that an anomalous situation obtains in New York for there is a line of cases represented by Milks v. McIver, 264 N. Y. 267, 190 N. E. 487 (1934) which hold that full relief may be sought against the author, in the legal sense, of the original injury, while, on the other hand, there is another line of cases e.g., White v. Matthews, 221 App. Div.
551, 224 N. Y. S. 559 (1927), holding that relief may be sought independently against the author of the original injury and the physician who is guilty of negligence or or malpractice. On further consideration, however, it may be seen that no contradiction is present.

The situation is perhaps best summed up by regarding the author of the original injury and the malpractitioner as separate tort-factors, but, as far as the original author is concerned, regarding the malpractice or negligence as coalescing with the original injury and the two independent wrongs becoming concurrent causes of the ultimate result. The fact that the servant could recover from the master for the aggravation of the injury, in addition to the original injury, should not preclude suit against the physician whose negligence has caused the aggravation, where only damages for the original injury has been sought against the master. Pollock, Torts (13th ed.), 480, 485, 487.

This doctrine of separability which is followed in New York without doubt is the general rule throughout the United States. However, there is a split of opinion as to the effect of taking compensation for the original injury on a subsequent suit against the negligent physician. The majority of jurisdictions, including New York, follow the rule laid down in Vita v. Fleming, 132 Minn. 128, 155 N. W. 1077 (1917). This case held that the acceptance of compensation did not preclude the employee from recovering from the attending physician for damages arising from or as a result of negligent treatment or malpractice in connection with the original injury. See also, White v. Matthews, 221 App. Div. 551, 224 N. Y. S. 559 (1927); Pedigo & Pedigo v. Croom (Tex. Civ. App.) 37 S. W. 1074 (1931). Those jurisdictions that regard the award of compensation as a bar to a suit for malpractice base their decision on the theory that the malpractice is the proximate result of the original injury and as such that its consequences are presumed to be covered by an award under the act. Vatalaro v. Thomas, 262 Mass. 383, 160 N. E. 269 (1928); McDonough v. National Hospital Ass'n, 134 Ore. 451, 294 Pac. 351 (1931); Ross v. Erickson Construction Co., 89 Wash. 634, 155 Pac. 153 (1916).

An interesting solution to the problem is presented by Professor Leidy of the University of Michigan. He suggests that there is no reason why the physician could not be sued under the compensation act, which gives the right of action not only against the employer, but also against so-called “third persons,” since this third person clause is not limited to “first instance injuries.” If the employee learns of the malpractice or negligence after filing his claim for compensation against the employer, he should be allowed to sue the physician, being required to (1) return such compensation as was given to him for the physician’s negligence, or (2) to regard such damages as a mitigation as to the malpractitioner. Leidy, Malpractice Actions and Compensation Acts (1931) 29 Mich. L. Rev. 568, 583.

The instant case raises the added question of the state’s liability for the negligence of its employee physician. There can be no question that the State can waive its sovereign immunity. Lewis v. State, 96 N. Y. 71, 48 Am. Rep. 607 (1884); Billings v. State, 27 Wash. 288, 67 Pac. 383 (1902). Thus, as was said in Lieubowsky v. State, 260 App. Div. 416, 23 N. Y. S. (2d) 633 (1940). “The doctrine of respondeat superior does apply to the State.” It is upon this case that the principal case, in holding that the State is responsible for the negligence of its employee physicians most firmly relies.

In Lieubowsky v. State, supra, it was categorically said that the State was responsible for the negligence of its servant doctors and nurses. This holding was reached by extending the doctrine of Sheehan v. North Country Community Hospital, 273 N. Y. 163, 7 N. E. (2d) 28 (1937), which held that the hospital was responsible for the negligence of its ambulance-driver servant, reversing the established doctrine that
charitable institutions are not responsible for the negligence of their servants. In the light of the majority doctrine, held almost universally throughout the country, Hornden v. Salvation Army, 199 N. Y. 233, 92 N. E. 626 (1910); Hearns v. Waterbury Hosp., 66 Conn. 98, 33 Atl. 595 (1895); Wharton v. Warner, 75 Wash. 470, 135 Pac. 235 (1913), it would seem that such an extension is unfounded. The reason why most jurisdictions refuse to regard a physician as an agent or servant is well set out in Pearl v. West End St. Ry., 176 Mass. 177, 57 N. E. 339 (1900), where it is said, "There is no more distinct calling than that of the doctor, and none in which the employee is more distinctly free from the control and direction of his employer." Assuming a wisely-chosen physician, no sound basis for respondeat superior is present.

It is submitted that the principle case should have reversed the holding of the Appellate Court of New York in Liubowsy v. State, supra. Such a holding would by no means deny a recovery to the appellant. An acceptance of an award of compensation under the workmen's compensation act would not preclude her from recovering from the negligent physician. White v. Matthews, supra; see also, Vita v. Fleming, supra.

THOMAS P. DALY, JR.
BOOK REVIEWS

THE INDEPENDENT REGULATORY COMMISSIONS—by Robert E. Cushman.†

This is an able study of those aspects of independent regulatory commissions which are directly relevant to the theory of separation of powers. The first half of the book is a well-told historical exposition of what Congress has done in creating and adding to the powers of ten federal agencies, with stress on those questions which especially interest one who sees and thinks and writes in terms of the conceptualism of separation of powers. Reasons are carefully traced for the creation of each agency, for making it independent, for merging in it various kinds of power, and for establishing particular relations with each of the three branches of government. The presentation is thorough and painstaking.

What may be the essence of the author's thought is contained in a middle chapter on the constitutional status of the independent regulatory commissions. He begins with a flat assertion: "Although legislators and administrators would at times like to forget it, the American constitutional system rests upon the doctrine of the separation of the three powers of government." He deplores that, "By ignoring the whole question, the Supreme Court has left us without explaining authoritatively why the alleged merger of the three powers of government in a single regulatory body does not violate the doctrine of the separation of powers." He finds that the dislike for a merger of powers "has long since been assimilated to the much more flexible and practical doctrine of due process," and that "the doctrine of the non-delegability of legislative power could safely be scrapped as long as due process of law remains the effective constitutional guarantee it now is."

Then conceptualism wins a few rounds. "It would not violate the doctrine of the separation of powers for Congress to give federal judicial power to a regulatory commission, so long as it is not 'the judicial power of the United States,' but it would violate the due process clause." He cites no authority. How does he know? "The inherent attributes of a court cannot be given to a non-judicial body, especially an administrative body." Then is the Board of Tax Appeals, for instance, unconstitutional? The answer is no, because: "The functions . . . are conveniently labeled 'quasi-judicial.' . . . There can be no objection to the grant of quasi-judicial powers. . . . The application of a legislative standard to concrete

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1P. 420.

2P. 427.

3P. 438.

4P. 424.

5P. 433-34.

6Ibid.
cases involving the rights of parties and of the public is a quasi-judicial function." But, be it said to his credit, the author after many uncertain moments in wrestling with these abstract demons comes out the victor: "We may conclude, then, that the doctrine of the separation of powers has not been invoked, and will not be invoked, to prevent the delegation to the independent commissions of substantial legislative and judicial powers." Indeed, at one point the author has an exceptional flash of insight: "Nothing seems clearer from a study of this whole problem than the futility of trying to apply to the vitally important administrative development of the last fifty years any rigid concepts drawn from the doctrine of the separation of powers."

Especially revealing of Professor Cushman's technique of analysis is the following, which is probably extreme, however, rather than typical:

"Third, the writer believes that executive tasks cannot constitutionally be given to independent agencies unless they are clearly incidental to the quasi-judicial functions which justify independence. This seems to be clearly implied in the language of the Humphrey opinion and to be required by the logic of the Myers decision. Quasi-judicial functions can be and are given to executive officers. Congress is not obliged to place quasi-judicial tasks in the hands of independent agencies. But the Constitution requires that executive functions be performed under direction of the President, and the Myers case holds that Congress may not withdraw them from that direction by limiting the President's power to remove the officers who perform them. It follows that Congress may not properly give to the independent commissions functions which, separately considered, could not validly be made the exclusive job of an independent agency."10

Of course, quantities of nineteenth-century authority probably could be dug up to support this sort of analysis. Possibly a Chief Justice White or a Mr. Justice Sutherland here and there would be impressed. But what present Justice would accept a conclusion which would require invalidation of the Maritime Commission, to say nothing of the TVA, the RFC, the FDIC, and other agencies which are "independent" because they are not "in" an executive department and which exercise primarily "executive" power?11 What present Justice would not readily find a non-sequitur in the idea that invalidation of agencies "follows" from language concerning

"A commission or board is 'independent,' for our purposes," says the author, "when it is entirely outside any regular executive department." (id. at 3).

Of course, I may be all wrong because I admittedly cannot classify powers. In managing the vessels it owns and in administering the subsidy program, I assume that the Maritime Commission is exercising executive power. This is apparently what the author thinks at pages 459 and 704, but at page 9 he seems to say that these powers are "administrative or managerial." The chief types of power of the commissions, according to the author, are six: quasi-judicial, quasi-legislative, administrative or managerial, purely executive, inquisitorial, and policy planning.

"P. 439. 9Ibid.
"P. 445. 10P. 459.

11"A commission or board is 'independent,' for our purposes," says the author, "when it is entirely outside any regular executive department." (id. at 3).
the removal power? What present Justice would use the conceptualism of separation of powers as an exclusive method of approach—or even as a convenient device for opinion writing? Furthermore, I would quarrel not only with the conclusion, the reasoning, and the method of approach, but also with the very idea of raising such a broad and abstract question without tying it down to something concrete; I think more is lost than gained by making this kind of inquiry.

Despite Professor Cushman's skill, the symmetry, the logic, the blacks and whites, the prettily-arranged pigeon-holes inevitably lead to questionable conclusions. "The constitutional courts cannot review the exercise of administrative discretion, since to do so would be an exercise of non-judicial power in violation of the doctrine of the separation of powers." I think of the Phelps Dodge case, where Mr. Justice Frankfurter said for the majority: "The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness." Professor Cushman: "No administrative agency can decide finally a question of law. Any statutory attempt to permit this would deny due process of law." I think of the Lukens Steel case, and of the Veterans' Administration statute that "All decisions . . . shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision." Professor Cushman: "We may conclude that judicial review of commission findings of jurisdictional facts is required on constitutional grounds." I think of the Bassett case, where the Circuit Court of Appeals was reversed because it reviewed findings of jurisdictional facts.

The 165 pages of discussion of British administrative agencies is especially well written, interesting, and valuable. It is at the same time concise and readable, and relatively free from conceptualism. To one who is unfamiliar with the British system frequent queer quirks are fascinating. A good example is the Road and Rail Appeal Tribunal:

"Its zeal for judicial impartiality is shown by its practice of not reading the transcript of the record of a case on appeal prior to the public hearing. It was felt that if the members read the record privately before hand they might prejudge the case. The tribunal accordingly punishes itself by requiring the oral reading of the entire transcript. This sometimes takes four or five days."

212 P. 470.
213 Phelps Dodge Corp. v. N. L. R. B., 313 U. S. 177 (1941).
214 P. 471.
217 P. 474.
219 P. 526.
The chapter on merger and segregation of powers contains a good summary of reasons pro and con concerning combination of prosecuting and judging powers. Although Professor Cushman was a member of the staff of the President’s Committee on Administrative Management and a sponsor of a plan of segregation, his summary of the various views is impartial and fair. Of the plan he sponsored he says, surprisingly: “It was not intended or expected that the plan would be applied forthwith to long-established and successful commissions.”

But one of his conclusions is: “Regulatory agencies should have no extraneous duties which are clearly managerial, promotional, or executive. . . . This type of segregation of function involves no debatable principles and would promote both efficiency and responsibility.”

In his preface, Professor Cushman refers to the need for “an objective and thorough research undertaking quite unrestricted by any a priori assumptions.” I think one must begin with the a priori assumption that the theory of separation of powers, or any other theory, is sound only to the extent that it proves itself in twentieth-century practice. Professor Cushman did not begin with that assumption.

KENNETH CULP DAVIS*

CONSTITUTIONAL REVOLUTION, LTD.—by Edwin S. Corwin.† Claremont Colleges, Claremont, Cal. 1941. Pp. xiii, 121. $2.00.

The great problem both of the common law and of constitutional law has been where to draw the line between liberty and social control. Without liberty we should have regimentation, dictatorship, and autocracies (political and economic). Without social control we should have either planless liberty or liberty planned by selfish corporate and other powerful individuals. The only way to protect social interests, insure equality, plan economic affairs and even preserve liberty is to do some delimiting of liberty.

Hence it seems we must have both liberty and social control. How much of each should we have? Where should the line be drawn between personal liberty and social control? This is one of the most difficult problems of government. Probably no static line will ever be drawn. Those who drafted our original constitution and our formal amendments evidently feared government (either federal or state) and for that reason emphasized the protection of personal liberty. That part of our Con-

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P. 725.
stitution made by the Supreme Court has been constantly changing. Sometimes it has favored personal liberty and other times it has favored social control.

In the last fifty years we have been discovering that the greatest menace to personal liberty has come not from government but from corporate and other powerful individual oppressors. Yet outside the Thirteenth Amendment there is no formal limitation on the power of such oppressors. The Supreme Court has found a way to meet this situation by relaxing the limitations on social control in favor of personal liberty so as to permit social control of personal liberty.

How has the Court been able to do this? By constructing certain principles of constitutional law on the basis of general or conflicting clauses in the formal Constitution. These clauses are such that our Supreme Court has been free to do anything it has desired to do. This is why "the Constitution is what the Supreme Court says it is." But some justices on the Supreme Court have had different ideas from other justices. Hence the Constitution has said sometimes what one group of justices has wanted it to say, and at other times what other groups of justices have wanted it to say.

In the little book which is now being reviewed, Professor Corwin has again felicitously and brilliantly set forth the truth of what has been said above. In Chapter One he discusses the conflict between personal liberty and social control, and rationalizes the Supreme Court's function in connection therewith. He shows how that if we are going to have equality, we must not only prohibit class legislation by government, but we must allow government to control the liberty of powerful individuals to prevent their causing inequality. In Chapter Two he examines most of the prominent New Deal cases which appeared before the Supreme Court and shows how at first the theory of individualism prevailed, but how in the last part the theory of interventionism has prevailed. In Chapter Three he undertakes to evaluate the final results of the Supreme Court's work and comes to the conclusion that laissez faire is passing and that social control and social planning are coming to be the order of the day, and with this there is going to be more national and less state power and more legislative power and less judicial review.

Professor Corwin does not classify the justices of the Supreme Court throughout our history as they have championed either one or the other theory, nor has he classified the periods of United States constitutional history according as they have been characterized by one attitude or the other. He gives the New Deal too much credit and the United States Chamber of Commerce not enough credit for the N.I.R.A. He makes his constitutional revolution date from volume 301 of the United States Reports and the decisions of the United States Supreme Court upholding
the National Labor Relations Act and the Social Security Act instead of with volume 300 and the last minimum wage case of *West Coast Hotel v. Parrish*. He uses the word "interpretation" where the word "construction" would be more accurate. Yet he does give some hint of the personnel of the Supreme Court and the constitutional periods, and he at least refers to the *Parrish-Hotel case*.

This small treatise puts in book form three lectures delivered by Professor Corwin at Claremont, California, in January, 1941, under the auspices of Claremont Colleges, Pomona College, and Scripps College. They show the same "breadth of learning, quality of insight, and independence of judgment" which we have come to associate with the work of Professor Corwin.

HUGH E. WILLIS*


SEMIOTIC OF PATENT INTERFERENCE COUNT—by Emerson Stringham.† Pacot Publications, Madison, Wis. 1941. 191 pages.

The volume on claims is the termination of an interesting experiment in publishing. A few years ago the author published Volume One of this book without an index or a table of cases. The present volume includes a table of cases covering a hundred pages and an index of twenty-five pages, both relating to both volumes of the work. The present work continues the text of Volume One for about one hundred and forty-five pages.

Robinson's three volume classic on patent law was published in 1890. It has not been revised or reprinted and second-hand copies are scarce and expensive. Therefore the present author has reprinted in this volume, with a slight revamping, nearly forty pages covering those sections of Robinson which deal directly with claims of patents.

International comparative law is aided by the author by printing here about thirty-six pages of a rather literal translation of claims selected from German patents actually issued and arranged in accordance with the eighty-nine classes established by the German Patent Office. In addition, there is a bibliography of related works and works referred to in the text. The bibliography itself indicates one of the characteristics of the present book which is rather unusual in patent texts. There are references to books on ethics, philosophy, logic, including such well known names as Freud and Lewis Carrol, who is better known for his disclosure

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of the experiences of "Alice." The text of the book itself makes the reference to "Alice" not entirely inappropriate. The author has carefully examined the many patent decisions which have been rendered, especially in recent years, having to do with the consideration, construction, interpretation and allowance of the claims of patents. He has collected and compared various decisions and in some instances has pointed out divergencies of the courts which might almost be worthy of the activities of "Alice in Wonderland":

"Substantial" and the adverb are not forbidden in claim language. Sometimes the words are frowned upon, sometimes they are smiled upon, and the decisions give no guidance as to when one or the other of these two kinds of reception may be expected.

The Supreme Court has said that a patent specification is probably the most difficult legal document to prepare. There are two general parts of the patent paper. There is the descriptive matter in which the inventor endeavors to set out clearly the new thing he has in mind and its place in the art or its association with other scientific or industrial matters. Frequently it is difficult enough to make an adequate, clear explanation of something that is so new that it is hardly understood by the inventor himself. In addition to the descriptive matter the inventor, however, is required to point out the thing which he claims as his invention. For many years this has been done by forming in rather technical language what are known as "claims." No matter what is described in the patent no real protection is given to the inventor for anything except the specific things which he claims. If he describes something which he does not claim it is assumed that the matter is dedicated to the public. For this reason the patent lawyer, the Patent Office and the courts are interested in patent claims and devote much attention to their preparation, construction and interpretation. The present author has given, in the pages of his book, about everything which can be helpful in such activities with respect to claims.

When there is a contest with respect to the originality or priority of an invention the proceeding is termed an interference and its purpose is to determine which of two or more inventors is entitled to a patent for the particular invention which is described in the claims which issue. In interferences claims are referred to as "counts." The author's book SEMIOTIC OF PATENT INTERFERENCE COUNT, is devoted to the particular aspects and attitudes of patent claims which are of special importance only when they are counts of an interference. This volume is provided with its separate table of cases and index.

The author has done a good deal of writing and the patent profession is much indebted to him for what he has given it in the eight or ten books he has published.
The scheme already adopted in other books by the author is followed here, of quoting in full the text of many of the cases which have appeared only in Gourick's Digest, which is scarce and out of print, and also those appearing in the well-night inaccessible United States Daily before the United States Patents Quarterly was established.

There are some statements made by the author which make the book interesting to read and may appeal to the profession but which show that there is a freedom of the press which would at least be inexpedient for counsel to adopt in a brief. For instance:

"If patent specialists and judges always thought in an adult manner they would understand that the claim defines scope of protection.

"As the social need for a higher inventivlevel, recognized by the courts, becomes a greater need, the board of appeals, operating with a nineteenth century ideology, seems to be lowering its inventivlevel to zero.

"There has been a process of spinal decalcification in the board of appeals.

"The effort [of the Court of Customs and Patent Appeals] to provide a verbal formula for distinguishing efficient from nonefficient introductory expressions is the merest semantic froth.

"[The judge] writing some poetry about 'life, meaning and vitality,' also about 'absolutely essential,' uttered nonsense to the effect that the expression was 'more than merely an introductory phrase.' He could have spared the rhetoric and said simply, and properly, that he was sustaining the patent on the introductory expression.

"Both these jurists belonged to a generation of a ruling class which very largely lived easily, doing no thinking worthy of the name. The marvel is that disaster waited until 1929-1933 to replace them by men and women who try to see life whole.

Again: "[The opinion] written early in the twentieth century, marks clearer thinking than that of some earlier cases, and it marks an intellectual modesty, less blustering, more honest, than the absolutist ideology of the nineteenth century.

"That Robinson, the world’s best-known writer on patent law, was a man of profound learning, is to be accepted as axiomatic. But any modern student of him has difficulty in clinging to the axiom. The thought modes that have so stirred our own times were buried in a few obscure books when Robinson wrote; no one would expect him to understand them or even to know of their existence. Even in his day, however, scholars had achieved some understanding of the nature of abstract generalization. But Robinson section 521, on multiplicity of claims, reprinted as an appendix hereto, is one of the places where the thinking was flaccid."

In spite of the fifteen hundred pages which the author uses, many of the cases are merely referred to without much digest or statement as to the surrounding circumstances, or explanation for a particular conclusion. The book is an excellent and helpful way of finding cases on almost any matter having to do with claims of a patent. In some respects, however, it is much less satisfactory than the ordinary index digests of cases since, instead of quotations or explanations a case is frequently dismissed with a
single word or clause. This means that very little of the book is capable of quotation but that substantially everyone who uses it will have to go directly to the cited cases. In some instances this is unfortunate since it may be difficult to find the exact portion of a long opinion on which the author relies. This is not intended so much as an adverse comment on the attitude, style and activity of the author as a note that comprehensive books which endeavor to cover a field thoroughly must continuously be merely indexes, since the rapid piling up of decisions is making the examination of all the cases on any subject, no matter how narrow, well night impossible. It is this condition which has instigated the production of the restatement of the law by the American Law Institute and it is this condition which must make the profession satisfied with books of a type different from those in general use a generation ago.

One having a problem relating to a claim will find the author's detailed treatment of each phase of the matter most helpful.

KARL FENNING*

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