ONCE again the many legal problems presented by war are becoming of immediate importance, and among the most interesting to student as well as professor, to lieutenant as well as Commander-in-Chief, are those involving the arrest and detention by the military of persons suspected of disloyalty or hostility to the government.

This involves the privilege of the writ of *habeas corpus* and the power of the military forces in the exercise of what is commonly known as martial law. So thoroughly has the latter subject been discussed in recent years that a brief review is here presented only because any unusual detention of a civilian's liberty by the military may be characterized as an exercise of "martial law," and, if such detention involves a refusal to recognize a writ of *habeas corpus*, probably will be thus characterized.

**Martial Law**

Martial Law is the law of necessity in national emergency. It is not statutory, nor is it expressly authorized by the Constitution. More accurately expressed as martial rule, it means "the temporary government of the civil population through the military forces as necessity may require in domestic territory." It involves the exercise, by the Commander-in-Chief or his representative in the field, of discretionary power over private persons and property, including that which is ordinarily vested in civil officials. Although it is an executive function, it may include the exercise of powers ordinarily legislative, such as the promulgation of orders, or judicial, such as military trials. The exercise of this power may indirectly result in prevention of the execution of civil

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In England, martial law may be established by act of Parliament as well as by the Crown. In *re* Petition of Right, [1915] 3 K. B. 649.
process, such as the writ of replevin or of habeas corpus. The question arises as to what extent, if at all, the exercise of this power is restricted under the Constitution of our government.

The Source of Power of Martial Rule

Martial law has been declared and martial rule has been operative from time to time during the constitutional history of the United States in cases of threatened invasion and domestic disturbance, and has, in most cases, been both ardently justified and bitterly criticized. The main ground of criticism is that there is nothing in the Constitution authorizing the exercise of this power, or, more recently, as in the Milligan case, that the necessity in the particular case did not justify the action taken. In defense, there are two inconsistent arguments, one, the extra-constitutional theory of national self-preservation. General Andrew Jackson once asserted in justification of his conduct in declaring martial law when the British were attacking New Orleans, "Exigencies may sometimes arise when 'constitutional forms must be suspended, for the permanent preservation of constitutional rights . . .'." James Buchanan defended Jackson by stating that "the law which justified the act, was the great law of necessity; it was the law of self-defense. This great law of necessity—of defense of self, of home, and of country—never was designed to be abrogated by any statute, or by any constitution.

The better theory is that this power is implied by the constitutional provisions vesting the executive power in the President, and making him Commander-in-Chief of the armed forces, and placing the entire war power in the national government.

When Lord Dunmore issued his proclamation of intention to execute martial law in Virginia, in 1775, the validity of this was not argued; the Continental Congress merely expressed a determination to retaliate for any undue severities against persons aiding the cause of American Liberty.

Later, the Continental Congress, which had assumed both legislative and executive power during the Revolutionary War, recognized martial law by authorizing courts-martial in certain instances.

Brief History of the Writ of Habeas Corpus

We refer hereafter only to the writ, habeas corpus ad subjiciendum—the usual writ issued by a court of competent jurisdiction on petition

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4 Wall. 2 (U. S. 1866).
5 Rankin, When Civil Law Fails (1939) 16.
6 designed at 20.
7 Elliott, Debates on the Federal Constitution (2d ed. 1834) 50.
8 Underhill, Law of Domestic Disturbances (1936) 95.
of a person in custody of another, where it is alleged that such person is unlawfully held. The writ directs the production of the person before the court at a certain time to determine the legality of the detention. Thus, it involves a summary trial as to the validity of the restraint of the petitioner’s personal liberty. If lawful the writ is dismissed, but the prisoner can be admitted to bail, providing the offense for which he is held is bailable.

While found, in substance, in the Roman Law, its present place in our Constitution involves its re-creation in the stirring development of the common law—the essence of the entire struggle for freedom and liberty of the English speaking people—the Magna Charta, the beheading of Charles I, the American Revolution. In the Great Charter, the nobles and bishops won the substance of the writ, and under Charles II the Habeas Corpus Act was passed providing the procedure concerning the writ, which has varied but little to this day. In 1692, South Carolina re-enacted the British statute and retained this law, and the colonists generally managed to obtain the benefits, since the local courts considered the writ to be a part of the common law. However, Parliament did not extend the writ to our colonies, and when Massachusetts passed an act asserting the privilege of the writ, it was held that the Habeas Corpus Act did not apply to the colonies. The Declaration of Independence inferentially denounced the “Quebec Bill,” which refused the privilege of the writ in certain western territories. Since the Revolution, there has never been any question about the issuance of the writ. The problems involve suspension of the privilege or refusal to comply with the writ when issued.

Suspension of the Privilege of the Writ of Habeas Corpus in the United States

In England, the privilege of the writ of habeas corpus can be suspended by Parliament and, indirectly, by the exercise of martial rule when the military commander refuses to recognize such a writ served upon him. After the writ was established by statute, Parliament frequently suspended it, sometimes without justification, and this was one reason for the anxiety of the framers of the Constitution to check the legislative body for which they were planning.

The first references in the Federal Convention to the writ of habeas corpus are found in Charles Pinckney’s “Draft of a Federal Gover-

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6 Ex parte Tom Tong, 108 U. S. 556 (1883).
ment,” presented at the opening of the convention, and in a subsequent resolution which was referred to the Committee of Detail, then engaged in preparing a draft of a constitution in conformity with resolutions adopted by the Convention. Both of these were limitations on legislative suspension of the privilege of the writ. Pinckney’s resolution on habeas corpus was that “the privileges and benefits of the writ of habeas corpus shall be enjoyed by those governed in the most expeditious and ample manner, and shall not be suspended by the Legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding . . . months.” The committee did not report this provision so he raised the question again, urging that the writ should be suspended only on the most urgent occasions, and then only for a limited time. John Rutledge was for declaring the writ inviolate, because “He did not conceive that a suspension could ever be necessary, at the same time, through all the states.” Gouverneur Morris then moved for the adoption of a provision in the form finally adopted. James Wilson expressed his doubt whether “in any case a suspension could be necessary, as the discretion now exists with judges, in most important cases, to keep in gaol or to admit to bail.” The first part of the motion was approved without objection, and the exception passed, by vote of seven states to three.20

The verbose Attorney General of Maryland, Luther Martin, who is now best remembered as the constitution’s bitter opponent, explained that he voted for a denial of the power to suspend the writ and against any exception permitting a suspension by the “general government,” because he feared “it would give them [Martin does not say “him”], a power over citizens of particular states who should oppose their encroachments.”11 Martin also argued that since the states had this power of suspending the writ on invasion or rebellion, there was no reason to give it to the new government.12

The only other reference to the writ of which we have record is in James McHenry’s advocacy of the proposed constitution, in which he merely stated that “Public Safety may require a suspension of the Habeas Corpus in cases of necessity: when those cases do not exist the virtuous citizen will ever be protected in his opposition to power.”13

Clearly, by “suspension of the writ,” the framers of the constitution had in mind a law, general in nature, which would deny to all persons

9 Elliott, op. cit. supra note 4, at 445.
20 Id. at 484.
12 Id. at 219.
13 Id. at 149.
in this country the privilege of the writ. Moreover, the power of a military commander in national emergency to ignore the writ in particular cases was not even discussed. Obviously cases might arise where the courts would not be functioning, but the arguments concerning emergencies were those which favored no suspension of power whatever in the legislature, either because the courts had certain powers to hold individuals in jail or because no situation could arise where the privilege should be totally suspended throughout the country.

The Constitution, as finally drafted, provided (Art. I., § 9): "The privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it". The above provision is in the article on legislative powers, and in the section restricting the exercise of legislative powers. Thus, Congress can, at certain times, legislate generally to suspend the writ. "There may be times . . . when . . . the atmosphere may become pestilent with reasonable sympathy. . . . There may be no martial law prevailing, no military exigency which would deprive the officer of time to make return to a writ and await trial. . . . It was to meet this necessity that the Constitution allowed the writ to be suspended in cases of invasion or rebellion when the public safety required it."14

When Congress by law suspends the writ of habeas corpus the responsibility of the Commander-in-Chief or his representative to determine the necessity for ignoring such a writ no longer exists. Congress also, in effect, approves the setting up of other courts for the trial of civil offenses within the limits prescribed by such law. It must be kept in mind that it is only the privilege of the writ which is suspended, and not the writ itself. In theory, when Congress suspends this privilege, the court may issue the writ, and the custodian of the petitioner may comply with it, but a return which fails to produce the petitioner and cites the suspension is final.

**Refusing the Privilege of the Writ**

Although the privilege of the writ of habeas corpus has not been suspended by Congress it does not follow, nor is it true, that all persons at all times may obtain freedom from detention by obtaining the issuance of the writ. Congress in 1867 provided a federal court procedure for this writ, and the person charged therein with improper restraint must promptly make an adequate return.16 This and state court procedure is modelled after the original Habeas Corpus Act.

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14Judge Payne, In re Kemp, 16 Wis. 382 (1863). It might be said that Lincoln was technically wrong in suspending the writ during the Civil War, but he could have authorized his commanders to refuse to comply with such writs if in any particular case this was justified by necessity, and this was probably the result of his "suspension."

16Act of Feb. 5, 1867, c. 28; 28 U. S. C. §§ 451-466 (1940). For the lawyer in the
So far as army commanders and other federal officers are concerned, if a person is held under color of federal authority, a state court cannot, by means of this writ, question the validity of the restraint. Moreover, it appears to be settled that enemy aliens as well as prisoners of war are not entitled to the privilege of the writ in any court. If the armed forces, during a state of martial law or while in the exercise of their duty in a sudden emergency, such as an insurrection, are detaining a person suspected of bringing about the emergency, it might be considered hazardous to produce such person upon issuance of the writ. But suppose the writ is issued?

Even after the British withdrew from the siege of New Orleans, General Jackson continued martial rule and exercised rigid control over the city. An article appeared in the Louisiana Courier criticizing his policy, and the author was promptly arrested and placed in confinement by Jackson's soldiers. A judge of the United States District Court granted a writ of habeas corpus, and Jackson not only paid no attention to the writ, but imprisoned the judge. Subsequently both author and judge were released. The judge exercised the court's power when writs are not recognized—punishment for contempt—by fining General Jackson one thousand dollars, which was immediately paid. The case is frequently cited to indicate the danger resulting from failure to recognize the writ. What should be emphasized is that General Jackson made no effort to cooperate with the judge either by interview or by formal return to the writ explaining the reason for the action, and that General Jackson refused immediate reimbursement from private sources and from the Federal Government, insisting that Congress first approve his action and its validity, which involved a long political fight before his vindication.

This problem involves, ultimately, the powers of the executive. These are granted by the Constitution to the President generally, and this is not by chance. It becomes more evident, as Madison's notes on the constitutional debates are re-read, that the framers were deeply concerned with armed forces, an exhaustive special text on habeas corpus is now being prepared under direction of the Judge Advocate General.

58 Tarble's Case, 13 Wall. 397 (U. S. 1871); Ableman v. Booth, 21 How. 506 (U. S. 1858); Robb v. Connally, 111 U. S. 624 (1884).


60 Rankin, op cit. supra note 2a, at 1-25. In State ex rel. Roberts v. Swope, 28 P. (2d) 4 (N. Mex. 1934), petitioner was arrested for fomenting insurrection, on order of the Adjutant General. A petition for the writ of habeas corpus was denied when return was made stating intent to release the prisoner as soon as it safely could be done.
limiting the legislative powers, for Parliament's actions with respect to the colonies were not forgotten. So the leading figures sought to create a strong and independent executive as a check. Not only is the executive power vested exclusively in the President, but he is also specifically enjoined to see that the laws are faithfully executed. This implies that the courts, the marshals, and other civil officers, may not be able to fulfill their duties. In certain cases of national emergency or danger he has authority to execute the full force of his power to the extent necessary to accomplish the purpose, which ultimately is the preservation of the nation. As the United States Supreme Court said in the case upholding executive action in furnishing armed protection to Justice Field,19 the duty of the Executive to see that the laws are faithfully executed is not limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, but includes the rights, duties and obligations growing out of the Constitution itself, and international relations, and "all the protection implied by the nature of the Government under the Constitution."

This involves the use of all means at his command, including the armed forces. The detention of persons, the seizure of property, even the trial of violators of orders which he has issued, are proper if justified by the emergency. The exercise of this power over persons and property, like the court's power to punish for contempt, is inherent in the executive power. Unfortunately, this question has received influential consideration only when the country has been engaged in bitter political controversy, as in the Jackson and Lincoln episodes, so that reasoning has been colored by partisanship. But in those cases the executive accomplished his purpose and ultimately his conduct has received the approbation of history.

**Conclusion**

Throughout our constitutional history, numerous cases, textbooks and commentators have insisted that only Congress can suspend the writ of *habeas corpus*, and that the power to declare martial law does not include the right to refuse to recognize the writ.20 Generally, however, these authorities fail to distinguish between a general suspension of the writ and a temporary refusal in individual cases to recognize the writ

19*In re* Neagle, 135 U. S. 1 (1890).
20A few of the many writings, pro and con, follow: BIRKHEIMER, MILITARY GOVERNMENT AND MARTIAL LAW (1914); FAIRMAN, LAW OF MARTIAL RULE (1930); GLENN, ARMY AND THE LAW (1918); HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTIES AND ON THE WRIT OF HABEAS CORPUS (1876); KLAUS, THE MILLIGAN CASE (1929); JOEL PARKER, HABEAS CORPUS AND MARTIAL LAW (1861); WOLTERS, MARTIAL LAW AND ITS ADMINISTRATION (1930). A very complete bibliography of texts, articles and cases is presented in RANKIN, WHEN CIVIL LAW FAILS (1939).
during the existence of martial rule, or fail to distinguish between "power" and improper exercise of power.

Finally, the question whether the executive can answer a writ of *habeas corpus*, by refusing to produce a person in custody, involves a conflict between executive and judiciary powers, and there can be only one answer. If the emergency justifies the action the president, or his responsible commander, must act, even if he believes, as did Lincoln and Jackson, that the judicial representative will be hostile. A simple illustration will suffice. Assume an actual invasion of Oregon. A large number of persons of enemy ancestry in the vicinity are seized and removed, and held away from the area of hostility on suspicion of aiding the enemy. A local federal judge, embittered politically, personally antagonistic to the commanding officer, or actually hostile to the government, issues a writ of *habeas corpus* for each person. The commanding officer confers with the judge to explain the necessity for his action, but the judge insists that his duty is to preserve the forms of law. In the last resort, it is the executive, not the judiciary, which is charged with the preservation of the state in national emergencies.21

21The *Merryman case*, 17 Fed. Cas. 144, No. 9487 (C. C. Md. 1861), involved a similar situation, at least in the view of the Army and President Lincoln. It will be recollected that General Keim arrested John Merryman, a lieutenant in a Maryland reserve company which was threatening "armed hostility against the government"—apparently planning to join the Confederate Army. General Keim turned Merryman over to General Cadwallader at Fort McHenry, where he was kept in confinement notwithstanding the writ of *habeas corpus* issued by Chief Justice Taney of the United States Supreme Court. When a deputy marshall attempted to serve the writ, he was refused entrance to the fort. Justice Taney then expressed his views that the executive always should come to the aid of the judiciary, and that a citizen could be arrested only in aid of the judicial power. But Justice Taney was constrained to admit that he could do nothing further than to order the proceedings and his opinion filed in the United States Circuit Court, and direct that a copy be sent to the President in the hope that the President would comply with the writ. See also *Ex parte Benedict*, 3 Fed. Cas. 159, No. 1292 (N. D. N. Y. 1862).

The substance of this article was prepared before the writer was called to active service. The conclusions herein are those of the writer and are not to be construed as necessarily expressing the views or policies of the War Department.
WHY PUBLIC ORGANIZATION OF ELECTRIC POWER?

John Bauer*

INFLEXIBLE FACTORS IN THE PRIVATE SYSTEMS

ELECTRICITY is now generated and distributed predominantly by private corporations. Roughly 90 per cent of total electric power is furnished by private companies. Only about 10 per cent is supplied through public systems, mostly by municipally owned and operated plants.

The question, therefore, arises, why disturb the status quo? Why substitute public organization for private? Has the industry not furnished electricity as needed? Has it not adopted technological advances, and so effected economies and reduced rates to consumers? Has it not furnished the basis of great production advances for the country? Why not continue the kind of organization under which electric power has become the number one public utility of the country, practically within a lifetime?

These are challenging questions. The electric industry has made the greatest advances that any industry ever did. It serves the most fundamental function in the economic and social life of the country. It has attained this position primarily through private organization. It has an extraordinary record of accomplishments. The burden of proof certainly rests definitely upon those who propose extensive displacement of private with public organization. The shift must rest upon solid facts and upon clear objectives of national advantage. It cannot be justified merely by emotional or dogmatic appeal.

EARLY DEVELOPMENT PRIVATE

I personally concede that during the early developmental period, the industry advanced faster privately than it could have through public organization from the outset. The first generating plant was built in 1881, barely a lifetime removed. Electricity was new. The people were already served with light, heat and power, according to then prevail-

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ing standards. Only enthusiasts had a glimpse of the future position of the new energy.

The application of electricity to industrial, commercial and domestic uses was confronted in 1881 with inertia that could be overcome only by individual initiative and persistent effort. The new energy had to fight its way against entrenched interests. Its most immediate field was that of lighting; it had to compete with gas in the cities and with improved kerosene lamps in the smaller communities. The competitive displacement required shrewd organization and untiring zeal. This was distinctly a job for private enterprise, and not for public undertaking.

Likewise in the other fields in which electricity has come to dominate, initial establishment and advancement were highly competitive. In manufacture and other industrial production, existing steam power had to be displaced. And the present almost general industrial use of electricity must be acknowledged as the product of effective private enterprise. The same is true with regard to the vast expansion and application to other ranges of economic and social uses.

In its initial and principal developmental stages, the industry doubtless achieved its competitive advancement best through private organization. During that period it had not attained the position of a general public utility; it was competitive business. Its status, however, has shifted as it gained in importance, eliminated competition, established monopoly, and became a necessity for practically all ranges of important economic and social life. What was once competitive business has become a fundamental public utility. And with this shift in the character of the industry, there has come also the need of transforming the organization best suited for the future advantage of the country.

The question whether there should be comprehensive displacement of private organization by public must be answered in the light of present conditions and future needs, rather than from the standpoint of past accomplishments. The reasons for such displacement appear now (1) in the conditions within the industry, and (2) in the positive advantages of public organization for the future. This article will be concerned solely with the first factors, which will be considered with regard to three primary phases:

First, the industry has practically left behind its competitive aspects, and has become predominantly monopolistic.

Second, the character of the industry changed, its private organization was transformed; it has become badly distorted, and its structure stands in the way of further progress that should be available for the country.

Third, as the industry has assumed the status of a public utility, public regulation was instituted, but this has been largely ineffective and cannot be satisfactorily applied for the attainment of public objectives.
THE INDUSTRY A NATURAL MONOPOLY

Private enterprise is suited to the economic fields where competitive conditions prevail, at least it appears so to me. Where actual competition exists, each business unit is subjected to constant pressure for efficiency in organization and management. It seeks to expand its activities as much as possible, to produce as cheaply as possible, and to earn the maximum aggregate profit through competitive prices charged to the public.

There is thus constant spur to push economy and efficiency, and constant force to convey the benefits to the public. The successful competitor may make large profits, but he also furnishes large public service. Private enterprise involves not only profits, but also losses. Its public justification rests upon the stimulation to progress transmitted to general welfare.

As the competitive forces are restricted, the public advantages of private organization disappear. First, there is reduced pressure for progressive economy. Second, prices are fixed with the object of bringing maximum profits; automatic price protection for the public against exploitation is eliminated. Third, earning power as developed under monopoly is converted into fixed charges through corporate and managerial readjustments. These basic circumstances must be regarded in the formulation of public policy in dealing with the organization and control of an industry to keep it properly directed to public objectives.

Efforts to evade competition have always existed and have invaded practically all lines of private enterprise, but mostly in manufacturing and commercial industries have not succeeded sufficiently to warrant serious consideration. But electric power is different. This has come to be a natural monopoly, which cannot be kept effectively within the competitive norms.

The inherent monopoly factors in the electric industry are mainly threefold. First is the large capital requirement and the consequent waste of property duplications. Second, there is the difficulty, and usual impossibility, of making any operating unit financially successful in any community, with the division of total available business. Third, it is physically impracticable to permit two or more sets of properties in the streets and public places for the distribution of electricity. These basic factors must be properly regarded in the adoption for protection and advancement of public interest.

ELIMINATION OF COMPETITION

The electric power industry was initially competitive. Furthermore, it was organized in small units. In the larger cities there were usually
several local electric companies that obtained franchises and competed for business.

But as time went on, the competitive position gradually was changed and each business unit obtained practically a monopoly within its franchise territory. Furthermore, the several units in a community were gradually combined within a single organization, and so extended the area of monopolized service. With further advancement, the consolidations extended over increasingly wider areas so that an individual company sometimes covers an entire state and spreads into adjoining ones, or a single system controls service territories scattered through many states in all sections of the country.

At the present time, the electric industry is predominantly monopolistic. In most instances the scope of monopoly extends widely over the nation. Practically all competitive features have disappeared. Each company or system has a monopoly within its own service territory. This is the fundamental condition that characterizes the industry today.

For all practical purposes, every business concern or private individual in any community is dependent upon the local company for electric service. While there are other sources of light, power, heat and refrigeration, they are mostly so inferior that electricity holds an effective monopoly. No family today really could resort to kerosene lamps, candles, or even gas for domestic lighting. Stores and offices depend upon electricity for light, power and refrigeration. Large industrial concerns can produce their own electricity at lost cost, and so furnish a competitive area within the monopolized organization. But even here central station electricity has basic advantages, and mostly industrial power rates have been reduced sufficiently so as to eliminate the competitive force of any other power supply.

For further rate reductions for any economic or social purpose, the competitive factor has practically disappeared. If rates are to be reduced substantially for any important service, the chief impelling force must be other than active competition. It may be appeal for further enlargement of consumption, or outlook for public benefit, or regulation imposed by government, but it will not be direct competition. While this has been powerful in the past, it is no longer potent for the promotion of public interest depending upon further cheapening of electricity. Service monopoly must be recognized in the future development of power policies, organization, control and management.

Restricts Transfer of Progress to the Public

Not only has the competition ceased to be a vital force for public progress in the electric service industry, but the conditions of monopoly
interfere with transmittal to the public of favorable developments which do not depend upon competitive organization.

Technological progress is taking place constantly outside of the monopolistic service organization. Improvements in plant units are developed primarily in the electric manufacturing industry or in research laboratories. They are largely competitive and are attained principally outside the monopoly area of the electric service systems. While mostly they do not originate with the service companies, they become available for the more economical generation, transmission and distribution of electricity, and thus increase the efficiency and earnings.

Despite monopoly conditions that have existed for considerable time, there have been continuous advances in plant efficiency, and there has been enlargement in utilization due to the inherent advantages of electricity. These two factors together have gradually reduced the basic cost of service and have made operation increasingly profitable, notwithstanding the lack of competitive pressure for progress. But, through lack of competition, the companies have been largely able to divert the expanding earnings to their own advantages, without passing them adequately to the public at large. They have mostly embodied the expanding earnings in reorganization and recapitalization, and in maintaining extravagant overheads and managerial elaborateness, as brought out in the next sub-division which presents the distortions of the private power systems.

Distorted Private Organization

Along with (and because of) the establishment of monopoly, there has been distortion of organization, which for the future largely precludes the attainment of sufficiently low cost power and low rates for the various economic and social purposes. The distortions appear mainly in (a) the capital structure of the systems, (b) the disconnected service areas, and (c) the extravagant managerial set-ups.

Inflated Capital Structures

The worst characteristic of private power organization is the gross over-capitalization imposed upon the operating properties. As a rough average, the capital structure is about 2.5 times the reasonable investment required to establish equivalent properties and service at the present time on an economical basis.

While there is great variation between companies and systems, the average capitalization stands in the way of progress. As long as it continues, it will practically make unavailable the low rates that could be reached under proper organization and management. It has come about through the methods and processes of consolidation that took place under
the impetus of private initiative. As technology advanced and as utilization increased, the original small companies became profitable at the prevailing high rates; there were then advantages and immediate profits in consolidating neighboring companies into larger operating units. Such consolidation promoted further economies and business enlargement, and led to still greater and successive combinations.

The active processes of consolidation took place particularly during the 1920's up to the financial collapse in 1929. The initiating individuals or groups usually consisted of engineering, financial and legal interests. There were many such groups, and they competed with each other in the acquisition and assembly of properties to be brought under the successively enlarged organization units. Mostly they made their profits through merger financing. The competition resulted in bidding up prices paid for the properties to be consolidated, and so in increasing the securities issued. At each step, the new issues provided for the purchase price and the profits of the promoters.

In the development of the systems, there were successive consolidations and combinations. Each step produced an enlarged capitalization, which absorbed the earning power of technological progress and expanding utilization, plus buoyant expectations. Consequently, the systems in 1929 consisted mostly of fantastic corporate and capital structures. The capitalization embodied not only the earning power that had been developed during the decade of rapid technological advance and growth in utilization, but also future expectations, hopes and dreams of empire expansion.

All this came to a sharp halt with the financial collapse in 1929, but the corporate and financial structures have remained. Some systems have broken down and have been reorganized, but their over-capitalization has largely continued. The other systems have remained intact, and so maintain in full the financial monstrosities erected during the halcyon 1920's.

**Extent of Over-Capitalization**

The extent of over-capitalization can be shown approximately through the figures published by the Federal Power Commission in its Power Series No. 2. This presents the principal financial data for 57 private systems which represent about 90 per cent of the electric business of the country. Of the 57, the 22 largest constitute approximately 75 per cent, and can thus be taken as typical of the industry.

The pertinent figures for the 22 systems have been tabulated and

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1 *Principal Electric Utility Systems in the United States*, published in 1939, reflecting mostly data for 1933. The results remain applicable for the present purpose of considering capitalization with relation to future rates.
Their aggregate capitalization, including reported surplus, amounted to $13,367,000,000, with corresponding plant accounts of $13,258,000,000. Most of the systems were not devoted exclusively to electricity, but the property figures were not directly segregated by kind of utility. As an average, 72 per cent of the gross revenues were electric; hence a like proportion of the plant totals are here allocated to electric. This comes to $9,543,000,000, which served 17,086,000 electric consumers. The average is thus about $560 per customer.

This ratio of $560 of electric property valuation per customer furnishes an approach for estimating the existing over-capitalization. While no exact yardstick of reasonableness can be established, and the proper amount varies with the conditions of construction and utilization, as a broad average $250 is liberal. This provides roughly $100 per customer for generating plant, and $150 for transmission and distribution. While in some instances of costly hydro plants in thinly populated territory, $250 may be too low, for most of the systems it is more than would be required to construct the properties efficiently under present conditions.

On the basis of $250 per customer, the system average of $560 is about 2.35 times too high. The highest of the 22 systems is $887, or 3.5 too high. Another one has $816; three between $700 and $800; seven between $600 and $700; three between $500 and $600. The lowest is $303, which comes moderately close to the standard, but there are only three under $400.

This condition of over-capitalization came through past dealing with the properties. It is due to three main circumstances. The first is past piece-meal construction when the companies and properties were small. Second, the continuance of old, obsolete and even discarded units in the property accounts. Third, write-ups during the successive stages of combinations and consolidations, mainly during the era of high finance in the 1920's. The property accounts are the controlling basis of the securities issued.

Each system must naturally endeavor to preserve its corporate and financial structure, and so will strive to maintain rates high enough in its service territories to cover all operating costs, together with fixed charges and other returns on the securities outstanding. The high capitalization will thus operate permanently to maintain higher rates than justified under attainable efficiency and proper organization. As long as the capital structures continue, they will stand in the way of rate reductions and will thus hamper economic and social advancement of the country.

It is true that the operating companies are subject to rate control by utility commissions or other regulatory bodies. In theory, the rates fixed

*Bauer & Gold, The Electric Power Industry (1939) c. viii, ix.*
by public authority disregard capitalization, and are predicated upon the "fair value" of the properties as duly determined. In principle, the existing over-capitalization may thus be argued as not standing in the way of future rate revisions justified by attainable efficiency and expansion in utilization. Actually, however, as brought out later, the regulatory standards do not protect the public against overcharges. As a practical matter, the gross over-capitalization under existing organization stands firmly in the way of reducing rates to the extent that would otherwise be available for national progress.

Uneconomic Service Areas

Besides the corporate and capital distortions of the holding company systems, there is also the factor of disconnected service areas which precludes the otherwise available standards of management. While each system is large as an aggregate, it is usually sub-divided between a large number of states and individual operating units, so that high efficiency and economy cannot be obtained under actual operating conditions.

In most instances of wide scattering of operating units, the system has one or more areas of substantial size within which a high order of operating efficiency can be attained. In the smaller units, however, low economy is inevitable. The joint control of the several units has little operating advantage. Mostly it does not permit the coordination of generation, transmission and distribution. Each operating unit is dependent upon its own plant layout, and cannot be joined for large-scale operation with the other units under the same holding company control.

The extensive dispersal of properties is shown by the Federal Power Commission's report, Power Series No. 2, previously referred to. Of the 22 largest systems, the following operated in ten or more states:

<table>
<thead>
<tr>
<th>No. of States in Which System Conducts Electric Operations</th>
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</thead>
<tbody>
<tr>
<td>American Gas &amp; Electric Company</td>
</tr>
<tr>
<td>American Power &amp; Light Company</td>
</tr>
<tr>
<td>Electric Power &amp; Light Corporation</td>
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<tr>
<td>National Power &amp; Light Company</td>
</tr>
<tr>
<td>Electric Bond &amp; Share Group</td>
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<tr>
<td>Associated Gas &amp; Electric System</td>
</tr>
<tr>
<td>Standard Power &amp; Light Corporation</td>
</tr>
<tr>
<td>Cities Service Company</td>
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<tr>
<td>Stone &amp; Webster, Inc.</td>
</tr>
<tr>
<td>Middle West Utilities</td>
</tr>
<tr>
<td>Utilities Power &amp; Light Corporation</td>
</tr>
<tr>
<td>United Light &amp; Power Company</td>
</tr>
<tr>
<td>Commonwealth &amp; Southern Corporation</td>
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</tbody>
</table>

The Electric Bond and Share group, consisting of four holding compa-
nies and representing about 12 per cent of the industry, operates in 31 states. While it has some large and well integrated territories where high economy can be reached, mostly the units are small and preclude modern efficiency.

The system with greatest dispersal is the Associated Gas and Electric, which spreads over 23 states. In New York and Pennsylvania it has large territories, but they are not all connected and fully integrated properties.

In other states it has mostly small units for which reasonable efficiency cannot be attained. The same is true of all the systems which operate in two or more states and contain units which are too small for economical operation.

The extensive dispersal and separation of properties within the existing private systems fix a serious restriction to lower rates in the future. While, as brought out later, the federal government is striving to bring about improved territorial integration, the efforts will be opposed by the private systems, and their success will be hampered by the conditions in the industry. Some improvements can be made, but publicly effective territorial combinations cannot be built around private organization. While this may be adaptable for particular circumstances, it will not meet satisfactorily conditions for the country at large.

**Elaborate Officialdom**

Along with their over-capitalization and disconnected territorial grouping, the existing systems have created an elaborate, extravagant and over-costly managerial structure. Each system is tied in with a financial group whose importance is evidenced by the imposing appearance of its officialdom.

As normally constituted, each large holding company system has a central official layout commensurate with the pretensions of the controlling group. It has elaborate home offices in New York or Chicago, or other financial metropolis. Its top company has a board of directors who represent large and far-flung industrial and commercial interests. It has expensive housing and corresponding trappings. There is usually a chairman of the board, who receives at least $50,000 a year. There is a president paid a minimum of $75,000, with appropriate offices and secretariat. There are vice presidents to correspond, and high officials to fix the show of bigness and importance. There is an empire, and there is imperial feel and display.

This empire psychology and elaborateness reach down to the operating companies, and to the sub-divisions within individual communities. The president of an operating subsidiary is a duke, and must have ducal quarters, with a retinue of high attendants and servitors. The commu-
nity manager must be a marquis who outranks and outlusters the local business lords. All this involves build-up of elaborateness, extravagance and expense. It reaches even the department heads and technical staffs. It characterizes practically all holding company systems in the country. They are loaded down with useless overheads, and so cannot attain the economy which could otherwise be directed to public benefit.

Theoretically official and managerial overheads could be stripped off the private systems, and costs reduced on the basis of efficiency. Actually, however, they are an inherent part of the holding company organization. While some stripping may take place, it can hardly remove all the superfluous and splendorous vesture and leave only bare efficiency. Here is mostly a rigid factor of private organization, which stands in the way of otherwise realizable economy and low rates to serve the general advancement of the country.

**INEFFECTIVE REGULATION**

In broad legal theory, the conditions in the private power systems which stand in the way of progressive public interest are subject to governmental control. Electric companies are recognized as public utilities, and practically since the turn of the century have been subject to public regulation.

The purpose of regulation is to protect the public. Because of the conditions in the industry, there is recognition of special public interest within the private organization. The law recognizes absence of competition and the possibilities of abuse. Regulation is intended to keep the companies directed to public objectives, and to assure consumers reasonable rates based upon due operating economy and efficiency, with allowance of a fair return on the properties used in public service.

Regulation is excellent in theory, but its realities have been disappointing. Actually it has been quite ineffectual. It has not furnished protection to consumers as intended. It has not provided for progressive efficiency as available through advancing technology. And it has permitted the distortions of private organization which now obstruct further realization of economies and low rates for general public advantage.

Public regulation involves three governmental levels; local or municipal, state and federal. Its principal impact has been that of the states which, with some exceptions, have enacted special regulatory statutes and created commissions for the purpose of carrying out regulation in the public interest. The three levels of control, and the reasons for their ineffectiveness, will be briefly summarized.

**LOCAL CONTROL**

The origin of public utility regulation was local or municipal. This
was due primarily to the fact that of physical necessity the properties were extensively constructed in the streets and other public places. For such occupancy, special municipal consents were required. These are known as franchises, and are usually under state constitutional and statutory provisions.

Municipal franchises, as mostly granted prior to the advent of state regulation, not only gave consent for construction, maintenance and operation of properties in streets and public places, but also prescribed conditions under which such occupancy was to be exercised. The conditions usually included safety devices, provisions for adequacy of service, reservations for changing locations, and restrictions upon the rates charged for service.

The rate restrictions have been particularly significant with relation to the efforts to protect public interest against monopoly power. Mostly they fixed maximum rates beyond which the grants could not charge. Such ceilings were intended to protect the public against possible exploitation by the grantees of the franchises.

The experience with the efforts to regulate rates by franchise was disappointing. The defect consisted in the rigidity of the restrictions. While the terms in any instance may have corresponded reasonably with conditions at the time of the grant, their continued reasonableness was inevitably affected by subsequent developments. With increasing efficiency, and with expanding service volumes, the rates fixed in the franchise became increasingly excessive, and there were no provisions for subsequent reductions. If, however, reverse conditions were encountered, especially increases in operating costs, there were no means for raising rates according to the basic changes. In the face of such shifts, rates once fixed by franchise normally would not remain reasonable for any long period of time.

The original method of fixing rates by franchise has largely gone overboard as futile for the protection and advancement of public interest. Its disappointing results were largely responsible for the substitution of state regulation, which in principle could alter rates notwithstanding the terms of the franchise. Rate control to be effective must be in position to revise rates with changing conditions. This applies to increases as well as decreases.

For the future, however, there is considerable possibility for readjustment and revitalization of municipal control over rates and conditions of service. In any large or substantial city, the forces requiring reasonable rates are essentially local. Community advancement depends upon low rates consistent with basic cost of service, and responsibility for progress impinges most directly upon the local governing body.

Partly through newer types of franchise provisions, but within the
existing state regulatory provisions, municipalities could re-establish local regulation and make it more effective than the prevalent state systems. If the local authorities assumed definite responsibility for the consumers and for conditions of community advancement, they could develop policies and programs through which much better standards and procedure of regulation could be established than prevail generally throughout the country.

Any city of substantial size, say 50,000 population or over, could readily place responsibility upon some municipal department to represent the utility consumers in the community. Mostly within the existing regulatory statutes, such a body could bring about quite definite provisions for systematic rate adjustments. Representing the consumers and the interests of the community at large, it could bring about reasonable property valuations, obtain determinations of the facts that pertain to cost of service and a fair return, make annual or other periodical surveys and analyses, and bring action for rate revisions before the state regulatory authorities. Through definite standards and procedure, it could bring about much more effective protection of consumers and advancement of public interest than have been provided under the prevalent methods of control.

While better regulation could be obtained through municipal assumption of responsibility, there is little probability that this will be extensively undertaken. The obstacles are manifold. They include fundamental inertia, lack of broad grasp of the public interest that is involved, rapid turn-over of municipal officials, lack of legal duty, entrenched private interests, together with financial and political involvements.

While there have been many instances of municipal authorities assuming responsibility for the public, mostly the efforts have been spasmodic, have depended upon special circumstances, and were not carried out systematically as a matter of regular administration. There have been a few instances where continuity of responsibility and control has been moderately maintained. For the most part, however, the prospects for extensive assumption of regulatory functions by municipal officials do not appear bright to those who realize the significance of electric power in the economic and social advancement of every community.

STATE SUPERVISION

Public regulation of utilities has centered principally in state regulation, based upon special statutes and creation of administrative commissions. This system of control had virtually its origin in the states of New York and Wisconsin, in 1907 and 1908. At the present time most states have established state commissions that have the power to fix reasonable electric rates and otherwise to protect the public interest.
State regulation arose out of the unsavory conditions that developed in the utility organization and management during the 1890's and the first decade of the new century. First, there were the orgies of franchise consolidation and financial manipulation, especially street railways in the larger cities. Second, with technical improvements and growth in business volume, utilities became highly profitable but rates were not reduced. State regulation was established to meet prevalent abuses, and particularly to furnish means for rate reductions.

State regulation was based upon the sovereign right to deal with public interest. It recognized the monopoly conditions, and regarded the services furnished as basic to public welfare. The state could regulate and reduce rates through its governmental power, where the municipalities were stopped contractually by the franchise grants.

The early proponents of state regulation were enthusiastic in their expectations. They envisaged a new era in dealing with fundamental industries whose rates and services are vital to the prosperity and progressive welfare of all communities and the country at large. They thought that they had found the way to harness private monopoly for public welfare.

To large extent these expectations have been frustrated. While, of course, arbitrary managerial powers were checked, and in the main public interest has probably been better conserved than it would have been otherwise, regulation has been largely ineffectual. It has not furnished the extent and regularity of protection to consumers, as expected. It has not succeeded in keeping the private management satisfactorily directed to public objectives. It permitted the perversions of organization and management in the electric power industry during the 1920's, which now stand as rigid obstacles to effective regulation.

At best, state regulation cannot cut through the corporate and capital structures which preclude the attainment of low costs and rates. Improvements can be made, but the obstacles to basic economy are all but impossible to overcome through regulatory means. They are summarized as follows:

1. **Unclear Rate Base.** The basic defect of state regulation has been lack of appropriate standards and procedure to provide for systematic revision of rates as a matter of regular administration. Its fault has lodged principally in valuation, or the rate base, upon which the lawful returns to the private owners are predicated.

   The rate base has consisted of the "fair value" of the properties devoted to public service. Its make-up has been left obscure both under

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3For more extensive survey and criticism of state regulation, see Part III, "The Electric Power Industry", previously referred to.
legislative enactment and judicial decisions. It has not been based upon definite facts which could be embodied in exact administration. It has been a vague and variable quantity. Every effort to revise rates has practically required a re-determination of fair value, with consideration of reproduction cost valuation, and has led to renewed controversy as to its content. As finally determined it rests mostly upon expert opinion, rather than clear investment or other specific criteria. Because of its indefiniteness and variability it has created sharp conflicts between public and private interests, has stimulated litigation, and to large extent has produced a break-down or non-functioning of rate control.

2. Judicial Procedure. With lack of definite standards and procedure, the commissions have become to large extent judicial bodies, and have adopted quasi-judicial procedure. While rate making is in essence a legislative act, the processes have become judicialized. The commissions have come to sit essentially as courts, and have received evidence of value and other elements that enter into rates through witnesses whose qualifications are subjected to judicial scrutiny.

For the most part, the commissions themselves have not undertaken the responsibility of technical preparation to show whether rate changes should be made. The burden is left upon the companies and consumer representatives. With such procedure, the companies naturally have developed experts, and their side is invariably completely and effectively presented. On the public side, the preparation is either non-existent or inadequate. There have been relatively few instances when the consumer side has been prepared and presented with reasonable care and efficiency. Consequently, the commissions have normally based their decisions upon one-sided records. These have been responsible, in large measure, for the unsatisfactory public utility decisions by the courts.

3. Commissioners and Technical Staffs. There has been lack of suitable provisions for the selection of commissioners and technical staffs to carry out the purposes of regulation. First, the selection of commissioners has been made extensively through political channels, mostly without regard to qualifications for the job, and often upon suggestion by the companies. Technical appointments have been subjected to like influences. Second, neither the commissioners nor staffs have been able to devote themselves to professional careers of regulation. Mostly they have depended for personal advancement upon subsequent employment with utility companies or allied interests. Third, and the chief difficulty, inadequate means have been provided by the legislatures to do the job satisfactorily on behalf of the public. No commission has ever been able to do the work necessary for proper determination of rates and for
reasonable protection and advancement of public interest, especially under the unclear and cumbersome standards and procedure.

4. Utility Politics. Inasmuch as the regulatory system has involved and accentuated conflicts between public and private interest, the companies have naturally resorted to every available means to entrench themselves favorably. Their activities have consisted of wide ranges of efforts to influence public opinion, limit the effectiveness of regulation, control legislation, and obtain favorable consideration before the commissions and courts. They have included advertising and other publicity to align the press and readers, invasion of semi-public community organizations, and particularly participation in politics. The political efforts apply practical measures to all major parties, in promoting officials, legislators and appointments favorable to the utilities, to avoid interference with existing rates or other practices opposed to public interest. In all such matters the utilities are constantly and expertly on the forefront, while the public seldom has a representative who understands what is involved, and is competent to uphold its interests.

Under the conditions that unfortunately exist, there is little reason to expect that state regulation can be transformed so as to function satisfactorily in the public interest. While theoretically such a system could be devised, under prevailing legal, financial and political realities, there is practically no chance to bring about the transformation. Existing regulation has become virtually solidified in its present form and cannot be materially altered, just as private utility organization has attained a rigidity which cannot be satisfactorily transformed in harmony with public interest.

Federal Action

Prior to 1935 utility regulation was essentially limited to state and municipal action. In 1935 the Public Utility Holding Company Act was passed by Congress. This brought two federal agencies into the active field of electric power regulation.

This new federal legislation had two major phases. The first pertained to the perversions of the holding company systems which had interstate ramifications. The second provided for rate regulation and other control of power companies within their interstate activities; it consists primarily of supplementary control on the interstate level to fill the gaps of the individual state regulatory systems. Its administration was placed with the Federal Power Commission, which has made important contributions in making national surveys on rates and other matters of general importance, in applying new accounting standards, in providing for interstate power connections, and in fixing rates upon interstate movements of electric power.
For improvement in future functioning of the private power systems, the vital part of the Holding Company Act is the provision for simplification of corporate structures, and particularly for integration of service territory. These requirements are especially significant in the consideration of future power policies. Their administration has been entrusted to the Securities and Exchange Commission.

With respect to simplification of corporate structures, the Act requires that every holding company system be readjusted so that no more than two stages of successive control will be maintained. First, two or more local operating companies may be controlled by a holding company. Second, two or more such first tier holding companies may in turn be controlled by another company. Beyond this second stage, no further series of control can be continued. At present there are instances of five or more successions, and in all such instances there must be such corporate readjustment as to leave only two stages at most. There are also other provisions which aim at improvement, but are of secondary importance.

While the simplifications sought by the Act are desirable and will improve conditions, they cannot change the character of the corporate and capital structure sufficiently to overcome the basic defects in the present set-up. This is chiefly because they do not provide explicitly for cut-down in capitalization where the amounts outstanding exceed the underlying fair values of the properties. They will probably result in very few significant reductions, and will leave the capital structure for the industry as a whole essentially in its present inflated status.

The trouble is understandable. When the Act was drafted, there was serious doubt whether its principal provisions would pass constitutional muster before the Supreme Court as then constituted. Even now, with the new majority, the companies will probably contest the so-called "death sentence" provision, and one would doubt whether a legal mandate for comprehensive decapitalization down to intrinsic fair value would get past the Supreme Court. Yet, unless such reduction in capital structure is attained, no great public advantages toward lower rates can be expected from corporate simplification.

Integration Provisions

The integration requirements of the Act likewise aim at desirable readjustment, but this again strikes the basic defect of capitalization. The Act provides that every holding company system must so readjust its holdings that it will be in possession of a single integrated territory.

The Act furnishes some flexibility in permitting each holding company system to include one or more additional integrated areas, provided that these are located in the same or in adjoining states. While the exact
stretch of this elasticity is not clear, it appears to reach two physically
separated areas, but not more; controlled properties can not remain
scattered in small lots, over many states, in different parts of the country.

The Act seeks real integration within each holding company system,
so that maximum or a high order of economy can be attained. The
administration, however, will encounter difficulties. The chief one is lack
of adequate powers conveyed to the Commission, plus constitutional
doubt regarding those granted.

As a general pattern of territorial readjustments, the standards of
integration should be by states, and further by regions. In most instances
maximum advantages could be attained through statewide unification.
This would fit the legal sovereignties and the state systems of regulation.
If such integration could be attained, based upon proper capitalization,
the private systems might be made to work moderately for public welfare,
especially if state regulation were simultaneously reconstructed for
effective functioning.

But, the "if's" are in the way. I cannot see how statewide or effective
regional integration can be brought about by order of the Commission,
for it has not the statutory power and probably no such grant would be
held constitutional if duly conveyed by Congress. Moreover, such inte-
gration is not enough without thoroughgoing capital reconstruction, and
without basic regulatory revision. All these fundamental changes in the
private systems and public regulation are not in sight. Present conditions
cannot be materially altered to make low cost power available for the
country through the continuance of private organization.

THE ISSUE OF PUBLIC ORGANIZATION

The requirements of the Act furnish particularly an immediate and
pressing occasion for the consideration of public ownership. Wherever
substantial readjustments and transfers in the present electric systems
may be necessary to comply with the Act, the question arises sharply why
the shifts should not be made on a direct public basis, rather than private
transfers in the control of the properties.

These questions will be accentuated in individual states and com-
nunities where private transfers of control will create new uncertainties
for the public and greater difficulties in obtaining low cost power for state
or community advancement in the various industrial and social fields.
Wherever transfers are involved, the public authorities become directly
confronted with the question how the state or community would be
affected by the transfer, and why replacement through public organiza-
tion would not be desirable.

If private organization is to be continued indefinitely for the future,
there can be no doubt that the corporate simplification and integration
requirements of the Holding Company Act will bring about improvement in conditions. Greater economies can thus be effected than under the present corporate and territorial sprawls. For the most part, however, the basic obstacles in present organization to low cost and rates will be perpetuated. The prevalent over-capitalization will be virtually continued; reductions will be relatively insignificant. There is no provision in the Act and apparently there is no constitutional means available by which the private capital structures can be readjusted to the underlying standards of public interest.

Under these conditions, there is an inevitable and permanent conflict between public and private interest. There will always be strain for private advantage as against public benefit. There will be incessant divergence of private gain from public objectives. Because of this inherent situation, there must be open-minded consideration of desirability to replace private organization through comprehensive public ownership and operation.
BILLBOARDS AND THE RIGHT TO BE SEEN FROM THE HIGHWAY

RUTH I. WILSON*

LEGISLATION restricting outdoor advertising is usually thought to depend solely upon the police power for its validity. This brief suggests an innovation in that regard. It proposes to show that in many instances such restrictions are supported by a simple principle of real property law.

With rare exceptions judicial reasoning concerning the constitutionality of such measures has followed one pattern: This regulation interferes with the free use of private property for private profit. Is it within the scope of the police power? If not, its enforcement would work a deprivation of property without due process of law or a taking of property without compensation, in violation of the Fourteenth Amendment. But if it is a valid exercise of that sovereign power, then the incidental private detriment is beyond the reach of the Bill of Rights and must be borne. Thus the fate of each particular measure has been made to depend entirely upon whether the court's concept of the police power was broad enough to include it.

Underlying this reasoning will be seen the implicit assumption that whenever outdoor advertising is restricted a private property right is curtailed.¹

But is it always necessary to begin with this assumption? Is the advertiser who challenges the regulation always entitled to this initial concession? What is this right he asserts by hanging out a sign or emblazoning a billboard? And does not an inquiry whether this right exists and has been interfered with in the particular case logically come first, before any question of the police power? If the right does not exist, how can the regulation be held unconstitutional?

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That the customary assumption is not invariably necessary, and that some degree of restriction on outdoor advertising may—without raising any constitutional question—be justified simply by the inherent limits of any legal right to be seen from street or highway, is shown by one of the exceptional decisions in this field, a 1932 decision of the New York Court of Appeals. In that instance there was no legislative restriction but there was drastic interference with billboard advertising by official action and this was held to involve no interference with any property right. The starting point for our exploration of the outdoor advertiser's rights will be found in that case.

**Perlmutter v. Greene: The Right to be Seen from the Highway is Limited by the Public Right to Use the Highway**

To advertise their furniture store in Poughkeepsie the plaintiffs had leased a choice site commanding the eastern approach of the Mid-Hudson Bridge, and were putting up a billboard "fifty-three feet long, ten feet high and thirty-five feet from the traveled part of the bridge approach." The roadway at this point was narrow and there was a pronounced curve in it. The State owned a strip of land on either side of the bridge approach, as well as the bridge itself, and on this State-owned land the Superintendent of Public Works began to build a lattice work screen which would cut off the view of the sign from motorists on the roadway.

The plaintiffs sought to enjoin the Superintendent from erecting the screen on the theory that an owner of land abutting on a highway has certain private easements in the highway, including an easement of visibility which entitles him to have the highway kept open so that passers-by may have an unobstructed view of his property.

The Court of Appeals, reversing the lower courts, refused the injunction. The decision was based on one of the fundamental limitations to which the abutter's private right in the highway is subject—that it can never extend so far as to interfere with any legitimate public use.

The opinion (written by Chief Judge Pound and concurred in by the entire Court) explains that this limitation is inherent in the origin of the right and in the theory of its enforcement:

> "When the fee of the highway has been transferred to the State, the State may use the highway for any public purpose not inconsistent with or prejudicial to its use for highway purposes. (Thompson v. Orange & Rockland Electric Co., 254 N. Y. 366, 369.) The mere disturbance of the rights of light, air and access of abutting owners on such a highway by the imposition of a new use, consistent with its use as an open public street, must be tolerated by them and no right of action arises therefrom, although such use interferes with the enjoyment of their premises. (Kane v. N. Y. Elev. R. R. Co., 125 N. Y. 164,"

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2 *Id.* at 329, 182 N. E. at 5. Record, pp. 98, 116-117.
The highway must, however, be kept open as a public highway and not diverted to wholly inconsistent uses. This right to have the highway kept open for light, air and access as well as travel has been termed an 'easement' but it is the right deduced by way of consequence from the purposes of a public street. . . . As one of the sovereign people for whom the title is held in trust the adjacent owner may compel the State to limit the use of the highway to highway purposes when a proposed excess use would be to his disadvantage.\textsuperscript{14}

The problem was thus reduced to the single question whether the erection of the screen was an excess use of the highway. Judge Pound held it was not, and that on the contrary it was an improvement for the benefit of public travel such as the official charged with control of the Mid-Hudson Bridge and supervision of State highways generally, had full authority to make:

"In the exercise of such supervision and control doubtless he may plant shade trees along the road to give comfort to motorists and incidentally to improve the appearance of the highway. By so doing he aims to make a better highway than a mere scar across the land would be. If trees interfere with the view of the adjacent property from the road, no right is interfered with. So if the Superintendent desires to shield the travelers on the highway from obnoxious sights of public nuisances or quasi-nuisances by the erection of screens more pleasing to the eye, he still acts within his jurisdiction. He aims to make the highway free from sights which would offend the public. No adjacent owner has the vested right to be seen from the street in his back-yard privacy. Again, if the purpose is to shut out from view scenes which might distract the attention of the driver of a car, the Superintendent may aim to make the highway safer for those who use it by erecting screens to keep the eye of the driver on the road as he may erect barriers to keep the car on the road on dangerous curves. All these things are as incidental to the construction and operation of a highway as are the matters of grade, materials or drainage. . . . Enough for this decision to say that the Superintendent of Public Works may act reasonably in his discretion for the benefit of public travel in screening a billboard at a dangerous curve when by its enormity such a structure may divert the attention of the motorist from the road. He then interferes with no property right of the adjacent owner and he should not be interfered with by the courts."\textsuperscript{15}

The decision thus turned on the first principle and primary limitation of the abutter's right of visibility,—that it is a derivative right arising from the creation of a public street and therefore subordinate to, and subject to curtailment by, all the lawful public uses of the street.

But the opinion went much further in illuminating the subject. It suggested that if this right of the abutter were to be more fully examined other inherent limitations of no less importance might be found. Searching questions as to the legal basis of billboard advertising along State highways were raised by Judge Pound but left unanswered as not essential to the precise problem then before the Court, yet with the clear

\textsuperscript{14}Id. at 329-330, 333, 182 N. E. at 5-6, 7.

\textsuperscript{15}Id. at 331, 333-334, 182 N. E. at 6, 7.
intimation that in his view current advertising practices far exceed any legal right of visibility. His thought along this line will be seen in the following passages:

"The immediate question is not whether the State Superintendent of Public Works may, as an incident to his power of highway control, shut off from the eyes of the travelling public all advertising signs erected on private property nor is it whether the highway, created by public money, is controlled in part by those who desire to thrust upon the attention of the public the ostentatious display of private advertising from the adjoining premises for their own profit wherever they see fit; nor is it whether advertisers have a right, independent of environment, to have a highway 'kept open' visually so that their signs may compel the eye of the passer-by. . . .

"This court has never discussed easements of prospect or view, although it has mentioned them. Doubtless they may exist in certain cases. . . .

"From new conditions of travel new rights and obligations arise. The State creates new values for adjacent owners by building good roads. It does not then destroy old values, as happened in the case of the elevated structures, by blocking the roadway. No contract exists between the State and the owner that the latter may forever use his property to erect billboards anywhere along the highway; no right in rem exists, for the adjacent owner has no title to the highway."

This new angle of attack on the problem of curbing outdoor advertising along public highways—by first considering the limits of the advertiser's legal right—and the plain hint from so able a jurist as Chief Judge Pound that a complete determination of the extent of this right may further the solution of this problem, have prompted the present inquiry.

What have the courts held—other courts if not the New York Court of Appeals—concerning the easement of visibility?

Can any basis for billboard restriction be found in the rules and principles of this subject?

**Actions in Which the Right has been Enforced Suggest Other Limitations**

The right to be seen from the street has been enforced only as it furthered the use and occupation of the land adjoining the street.

This right of the owner or tenant of abutting property to have the street kept open so that his premises can be seen by passers-by, has been protected by injunction or award of damages in cases where encroachments on streets or sidewalks obscured the visibility of signs, window displays or show cases.7 It has also been recognized and discussed

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6 Id. at 332, 333, 182 N. E. at 6, 7.

7 Cases where the right was enforced: First National Bank v. Tyson, 133 Ala. 459, 32 So. 144 (1902); 144 Ala. 457, 39 So. 560 (1905); John Anisfield Co. v. Edward B. Grossman & Co., 98 Ill. App. 180, 187 (1901); Perry v. Castner, 124 Iowa 386, 100 N. W. 84 (1904); Stetson v. Faxon, 19 Pick. 147 (Mass. 1837); McCormick v. Weaver, 144 Mich. 6, 107 N. W. 314 (1906); World Realty Co. v. Omaha, 113 Neb. 396, 203 N. W. 574 (1925); Bischof v.
in cases where no remedy was granted because no substantial violation of the right was proved.\(^8\)

In these cases the structures complained of were privately erected. In most instances, however, they were erected with municipal permission,\(^9\) so that the same opposed claims as in \textit{Perlmutter v. Greene}\,—the abutter’s right of visibility as against the public authority in control of the thoroughfare—were involved. These structures, unlike that in \textit{Perlmutter v. Greene}, were plainly encroachments and the permission (given without any authorization from the state legislature) was held to exceed the municipality’s powers as trustee of the streets for the public.

In all cases where the right of visibility was enforced the plaintiff’s property was being used as a place of business and the sign or display of goods that the encroachment on the street obscured was for the purpose of attracting customers to the business conducted on the premises. In every instance where the right was enforced, whether by injunction or award of damages, it was clear to the court (either by express evidence of loss of custom or diminished rental value, or by necessary inference from other facts proved) that the interference with the view of the property from the street was a detriment to the business carried on there.

In no case has the right been enforced on behalf of property used

\(^8\) Other cases where the right has been recognized and discussed: Klaber v. Lakenan, 64 F. (2d) 86 (C. C. A. 8th, 1933); Davis v. Spragg, 72 W. Va. 672, 79 S. E. 652 (1913). \textit{See also} Williams v. Los Angeles Ry., 150 Cal. 592, 89 Pac. 330 (1907). Right discussed as one of the easements that abutting owners have in public streets, but injunction \textit{pendente lite} denied. Yale University v. New Haven, 104 Conn. 610, 619, 134 Atl. 268, 272 (1926). Right mentioned as one of the reasons for holding that permission from the board of aldermen must be obtained before erecting an arch and bridge over a street. \textit{State ex rel. D. A. Schulte, Inc. v. Londrigan, Director of Department of Streets, 4 N. J. Misc. 574, 133 Atl. 702 (1926).} News-stand narrowing sidewalk and obscuring relator’s show windows, declared to be both a public and private nuisance. Peremptory \textit{mandamus} denied, because the particular situation was not within the statute authorizing summary removal.

\(^9\) Of the 22 cases listed in the two preceding notes, there were only five in which the power of the city authorities to permit the obstruction was not involved: \textit{Elias v. Sutherland, Lavery v. Hannigan, Hallock v. Scheyer, Bischof v. Merchants Nat. Bank, Green & Green Co. v. Thresher.}
only for private residence. And since it is privacy, rather than visibility, that is valued for that use, the complaint that the public is prevented from looking into his windows is not likely to be raised by the owner or occupier of a private dwelling as such. Indeed, with the possible exception of name-signs to identify the property or its occupant, it is hard to see how visibility can be made to serve strictly residential purposes.

Does the right nevertheless exist, regardless of its demonstrable value in the particular circumstances?

Judge Pound thought not. "No adjacent owner," he said, "has the vested right to be seen from the street in his back-yard privacy." And another judge has defined the right as virtually an incident of the business conducted on property adjoining a street: "The right to have the street space kept open so that signs or goods displayed in and upon the lot may be seen by the passers-by, in order that they may be attracted to patronize the business carried on thereon."

Furthermore, it is settled that an abutter can have no remedy against an encroachment on the street that interferes with the visibility of his property unless he can show that it has caused him a "real and substantial special injury". For the action is a private action for a public wrong.

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10On the value of privacy to property used for private residence, see Ham v. Wisconsin, I. N. Ry., 61 Iowa 716, 17 N. W. 157 (1883); Moore v. N. Y. Elev. R. R. Co., 130 N. Y. 523, 29 N. E. 997 (1892); Anthony Carlin Co. v. Halle Bros. Co., 23 Ohio App. 115, 119, 126, 155 N. E. 398, 399, 401 (1926); In re Ned's Point Battery, [1903] 2 I. R. 192; Duke of Buccleugh v. Metropolitan Board of Works, (1872) L. R., 5 H. L. 418. In Messenger v. Manhattan Ry. Co., 129 N. Y. 502 (1892) the plaintiff's recovery included damages for obstruction of visibility and also for loss of privacy (Record, pp. 177-9), both caused by the presence of an elevated railway station in front of his property. The first floor of the building was used as a saloon and the upper floors were apartments (Record, pp. 137-138, 348, 361-362, 369).

12Perlmutter v. Greene, 259 N. Y. 327, 331, 182 N. E. 5, 6 (1932).

13Williams v. Los Angeles Ry., 150 Cal. 592, 595, 89 Pac. 330, 332 (1907). See also Kabler v. Lakenan, 64 F. (2d) 86, 90 (C. C. A. 8th, 1933).


15In order to maintain a private action for a public wrong, the plaintiff, having first proved the existence of the public wrong, must then establish that it has occasioned "a private and peculiar injury" to him. Wakeman v. Wilbur, 147 N. Y. 657, 663, 42 N. E. 341, 342 (1895); Townsend v. Epstein, 93 Md. 537, 554-555, 49 Atl. 629, 632 (1901). "A public nuisance does not create a private right of action unless a private right exists and is specially injured by it." Abendroth v. Manhattan Ry., 122 N. Y. 1, 16, 25 N. E. 496, 498 (1890). "The extent of the injury is not generally considered very important. It should be substantial, of course, and not merely nominal." Wakeman v. Wilbur, supra at 663, 42 N. E. at 342; Ackerman v. True, 175 N. Y. 353, 361, 67 N. E. 629, 630 (1903). The abutter's right of action for an encroachment on the street which interferes with the visibility of his
The enforcement of the right of visibility must thus always depend upon whether visibility is of value to the premises in question in the particular case, and that in turn must depend upon the use to which the property is being put.

Our observation—that the right of visibility has never been enforced except where the abutting property was occupied by a business that might draw customers from the street—thus gains in significance as soon as we consider it in relation to the theory of the right and its enforcement.

Another observation to be drawn from the body of decisions dealing with this right is that it has never been enforced in any case that involved a billboard on a leased site, advertising a business located elsewhere. This being the typical situation in billboard advertising, the absence of any decision sustaining the advertiser's right of visibility in this situation would seem to be significant.

At any rate, these two negative observations will at least serve to direct our inquiry to two specific questions:

1. Does the abutting owner's right to be seen from the highway include the right to advertise to passers-by a business not conducted on the premises?

2. Can the abutting owner transfer his right to be seen from the highway to an advertising company by "leasing" it the right to erect billboards on his property?

As we examine further the abutter's private rights in the street or highway adjoining his property—rights "in the nature of easements"—and then go on to refresh our recollection of the fundamental principles of easements generally, we shall find that negative answers to both of these questions are indicated.

THE PRIVATE EASEMENTS OF THE ABUTTING OWNER

The abutting owner's rights to light, air, access and view from the street or highway which his land adjoins are common law rights of
comparatively recent development.\textsuperscript{16}

In the first instance they are advantages the abutting property enjoys because of its location with reference to the public thoroughfare. "An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to, and through his property."\textsuperscript{17} These advantages, since the uses and value of the abutting land depend so largely on them and are of so much importance generally,\textsuperscript{18} as well as to the owner of the land, the law has recognized and protected as private rights in the street.

The considerations that have determined their status as rights are well explained in an opinion concerning the abutter's right to light and air from the highway, written by Judge Vredenburgh for the New Jersey Court of Errors and Appeals:

"There are, it appears to me, two classes of rights, originating in necessity and in the exigencies of human affairs, springing up coeval with every public highway, and which are recognized and enforced by the common law of all civilized nations. The first relates to the public passage, the second, subordinate to the first, but equally perfect and scarcely less important, relates to the adjoining owners. Among the latter is that of receiving from the public highway light and air.

"In the first place, has not the adjacent owner upon the 'alta regia via', the ordinary public highway, of common right the privilege of receiving from it light and air? Universal usage is common law. What has this been? Men do not first build cities, and then lay out roads through them, but they first lay out roads, and then cities spring up along their lines. As a matter of fact and history, have not all villages, towns and cities in this country and in all others, now and

Brown-Brand Realty Co. v. Saks & Co., 126 Misc. 336, 214 N. Y. Supp. 230 (1925); Bradley v. Degnon Contracting Co., 224 N. Y. 60, 72, 120 N. E. 89, 93 (1918); Wall v. Eisenstadt, 51 R. I. 339, 154 Atl. 651 (1931). The word "view" in this connection is sometimes used as meaning visibility, sometimes as meaning outlook or prospect. In Bradley v. Degnon Contracting Co. it was used in the latter sense (see 90 A. L. R. 793).

\textsuperscript{16}Yale University v. New Haven, 104 Conn. 610, 621, 134 Atl. 268, 273 (1926); Dill v. Board of Education, 47 N. J. Eq. 421, 433-434, 20 Atl. 739, 743-744 (1890); Bohm v. Metropolitan Elev. Ry., 129 N. Y. 576, 587-588, 29 N. E. 802, 804-805 (1892); 3 Dillon, MUNICIPAL CORPORATIONS (5th ed. 1911) \S 1245. In Sec. 1245 Dillon makes the following observation: "The same course of judicial decision which originated such easements or incorporeal rights will in all probability be the chief agent ultimately to define, qualify and limit them." This is in line with Judge Pound's treatment of the claimed right of visibility in Perlmutter v. Greene, and with his observation in that case that "easements of prospect and view" had never yet been definitively discussed by his court. See also Sauer v. City of New York, 206 U. S. 536, 548 (1906).

\textsuperscript{17}Rugers, Ch. J., in Lahr v. Metropolitan Elev. Ry., 104 N. Y. 268, 291, 10 N. E. 528, 532 (1887).

\textsuperscript{18}Kane v. N. Y. Elev. R. R., 125 N. Y. 164, 183, 26 N. E. 278, 281 (1891); Story v. N. Y. Elev. R. R., 90 N. Y. 122, 176 (1882).
in all times past, been built up upon this assumed right of adjacency? Is not every window and every door in every house and every city, town and village the assertion and maintenance of this right?

"When people build upon the public highway, do they inquire or care who owns the fee of the road-bed? Do they act or rely upon any other consideration except that it is a public highway, and they the adjacent owners? Is not this a right of universal exercise and acknowledgment in all times and in all countries, a right of necessity, without which cities could not have been built, and without the enforcement of which they would soon become tenantless? It is a right essential to the very existence of dense communities . . . It is a right founded on such urgent necessity that all laws and legal proceedings take it for granted."19

"Easement" is the term most often used to characterize the abutter's interest in the street or highway.20

Sometimes his several advantages of access, light, air, etc., are spoken of as distinct easements.21 Sometimes by way of emphasizing the one thing he is entitled to and the one thing from which his several advantages flow—the presence of the public thoroughfare lawfully maintained in the interest of public travel—his interest in the highway is spoken of as a single right or easement.22

An easement is an incorporeal right, an interest in land to which the owner of the easement has neither title nor right of possession. It has been briefly defined as "a privilege without profit which one has for the benefit of his land in the land of another."23

As this definition indicates, the typical easement is one that exists for the benefit of a particular piece of land,—in other words, is an easement appurtenant (as distinguished from the exceptional situation where

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23Jones, Easements (1898) § 1. See also Goddard, Easements (8th ed. 1934) 9; Gale, Easements (11th ed. 1932) 10.
a privilege in land exists for the personal benefit of an individual). "The land in favor of which the privilege exists is called the dominant tenement, and that upon which the burden or servitude is imposed is called the servient tenement. Both have reference to the land, and not to the person, of its owner."  

Applying the terminology of the law of easements to the abutter's private interest in the public way, it is said that the abutting property is the dominant tenement and the public way the servient tenement. But here a difference is to be noted. While the existence of an ordinary easement abridges the rights of the owner of the servient tenement, the abutter's rights in the highway are subordinate to the rights that the public has in it, as we saw in *Perlmutter v. Greene*.

There may be other distinctions and qualifications, but with these we are not concerned. What is important to our inquiry is that, with whatever differences, abutters' easements do unquestionably have the essential quality of easements appurtenant and also the essential quality of easements of necessity.

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24 Privileges of the latter sort are termed easements in gross: *Jones, Easements* (1898) §§ 2, 3; *Goddard, Easements* (8th ed. 1934) 9; *Clark, Real Covenants and Other Interests Which "Run With Land"* (1929) 5; 3 *Tiffany, Real Property* (3d ed. 1939) § 758. "There is a class of rights which one may have in the land of another, without their being exercised in connection with other land, and which are known as easements in gross. In these cases there is no dominant tenement. But in easements proper, it is essential that there should be both a dominant and a servient estate." Riefler & Sons v. Wayne Storage Water Power Co., 232 Pa. St. 282, 290, 81 Atl. 300, 303 (1911).

25 *Jones, Easements* (1898) § 3.


27 "Considered with regard to the servient tenement, an easement is but a charge or obligation, curtails the ordinary rights of property." *Gale, Easements* (11th ed. 1932) 12.

28 Barnett v. Johnson, 15 N. J. Eq. 488, 490-491 (1863); Reining v. N. Y., L. & W. Ry., 128 N. Y. 157, 165, 28 N. E. 640, 642 (1891); Donahue v. Keystone Gas Co., 181 N. Y. 313, 317, 73 N. E. 1108, 1109 (1905); Centebar v. Selectmen of Watertown, 268 Mass. 121, 125, 167 N. E. 303, 304 (1929); 4 *McQuillin, Municipal Corporations*, (2d ed. 1928) § 1425, n. 27 and text; 3 *Dillon, Municipal Corporations*, (5th ed. 1911) § 1124; Note (1933) 17 *Minn. L. Rev.* 334, discussing *Perlmutter v. Greene*. The real point is that conflict between the abutter's rights in the highway and the rights of the public in the highway is theoretically impossible. For what the abutter is entitled to is the benefit of the highway—the public facility—lawfully maintained in the interest of public travel. His right, as Judge Pound said, is consequential—a "right deduced by way of consequence from the purposes of a public street" (259 N. Y. at 330). This is especially clear as to the advantage of visibility which depends altogether on the public use of the highway, so that an unauthorized closing of the thoroughfare to travel would infringe this right. See Peace v. McAdoo, Police Commissioner, 46 Misc. 295, 297, 92 N. Y. Supp. 368, 370; aff'd, 110 App. Div. 13, 96 N. Y. Supp. 1039 (1905). Gaynor, J., said in that case: "Every abutting owner has a property right in the maintenance of the highway in full use.... Merchants, for instance, have the right to have their street freely open, so that they can get customers by means of their signs and the display of their goods. One may drive by today and seeing a sign or displayed goods come back another day to trade."

29 *Supra*, pp. 724, 725.
THE APPURTENANT QUALITY OF THE ABUTTER’S EASEMENTS NECESSARILY LIMITS THEIR RIGHTFUL USE

First of all the abutter’s easements are typically appurtenant rights. It is impossible to think of them otherwise. Explanation or discussion of them inevitably involves the recognition that they are incorporeal rights attaching to the land that borders on a public way and belonging to the owner of such land as an incident of his ownership.

So the New Jersey Court of Errors and Appeals said in its authoritative opinion upholding the abutter’s right to light and air: “His right is still that he owns the land adjoining upon the highway, and does not depend upon who owns the whole or fractions of the road-bed or how it was made a highway, whether by private dedication or public authority, but upon the simple fact that it is a public highway, and he the adjacent owner.” So the Massachusetts Supreme Court said in holding that an abutting owner’s private right in the street was not infringed by the installation of a fire alarm box on one side of his entrance: “Undoubtedly a right of access to and from the public way is an incident of his ownership of this land.” So the New York Court of Appeals, in sustaining an award of damages for the wrongful destruction of trees growing in the street in front of the plaintiff’s property: “It is the proximity of the street, the situation of the abutting land with reference to an open street, which gives to the abutting owner the special right to the enjoyment and use of whatever is permitted or maintained by the public authorities as a part of the street.” So the California court, recognizing the abutter’s right of visibility: “Every lot fronting upon a street has, as appurtenances thereto, certain private easements in the street, in front of and adjacent to the lot, which easements are a part of the lot, and are private property as fully as the lot itself, though exercised in the street and extending into and over the street.”

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An appurtenant easement can exist only to serve some need or further some use of the dominant tenement. It “must be connected with the enjoyment of the dominant estate and must be for its benefit.”

“A right not connected with the enjoyment or use of a parcel of land granted cannot be annexed as an incident to that land so as to become appurtenant to it.”

These elementary principles—that an easement appurtenant must be connected with the use and enjoyment of the dominant estate and that it is an adjunct of that estate, not a personal right of the owner—are especially important to our inquiry. For they necessarily have the effect of limiting the lawful uses of an easement appurtenant. Attempted uses condemned by these principles include the following:

(1) The owner of the dominant estate cannot make use of the easement for purposes that are not connected with the use and enjoyment of the dominant estate.

For instance—

A right of way appurtenant to a particular piece of land cannot lawfully be used as a means of access to other land—not even if this other land is adjacent to the dominant estate and belongs to the same owner—not even if the owner has built a single building on the two adjoining parcels.

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34 Gale, Easements (11th ed. 1932) 19; Goddard, Easements (8th ed. 1934) 18: “It is also essential that the easement shall be beneficial to the occupation of the dominant estate”; Innes, Easements (5th ed. 1903) 5: An easement “must be of advantage or convenience to the tenement of the person claiming it”; Ackroyd v. Smith, 10 C. B. 164, 19 L. J., C. P. 315 (1850); Linthicum v. Ray, 9 Wall. 241, 243 (U. S. 1869); Sullivan Granite Co. v. Vuomo, 48 R. I. 292, 295, 137 Atl. 687, 688 (1927); Todrick v. Western National Omnibus Co., Ltd., [1934] L. R. Ch. 561 (C. A.).

35 Mahler v. Brumerd, 92 Wis. 477, 484-485, 66 N. W. 502, 504 (1896). This opinion cites Linthicum v. Ray, supra, and Humphreys v. McKissock, 140 U. S. 313 (1890), and also quotes from the Humphreys case: “A thing is appurtenant to something else when it stands in the relation of an incident to a principal, and is necessarily connected with the use and enjoyment of the latter.” See also Goddard, Easements (8th ed. 1934) 385.

36 Shroder v. Brenneman, 23 Pa. St. 348 (1854); Goddard, Easements (8th ed. 1934) 383, 387; Jones, Easements (1898) §§ 360, 361; Washburn, Easements and Servitudes (4th ed. 1885) 100-101. Goddard says (p. 383): “A right of way appurtenant to a dominant tenement can be used only for the purpose of passing to and from that tenement. It cannot be used for any purpose unconnected with enjoyment of the dominant tenement, neither can it be assigned by the dominant owner to another person and so be made a right in gross, nor can he license any one to use the way when he is not coming to or from the dominant tenement.”


38 National Silk Dyeing Co. v. Grobat, 117 N. J. Eq. 156, 175 Atl. 91 (1932); McCullough
A right of way connecting two detached parcels of farmland was acquired for the express purpose of insuring communication between them. An attempt to use this pathway as part of the route of a pipeline carrying oil was held a trespass on the servient estate, although the pipeline company had become the owner of the farmland at both ends of the right of way. "The laying of these pipes in the roadway in no sense conferred a benefit on the lands to which the way was appurtenant, nor were the pipes adapted to facilitate or promote access between the two parcels of land to which the easement was appurtenant."39

A deed to part of a farm gave the grantee the privilege of taking water from a certain spring "as occasion may require." The grantee claimed that this gave her the right to bottle and sell the spring water. A finding that the grantor had intended the privilege to be appurtenant to the land conveyed, disposed of this claim. The court said, "We think under the deed from her father . . . respondent has an easement in the spring appurtenant to the land therein conveyed enabling her to use, and to furnish to others to be used thereon, such quantity of the water of said spring as she may see fit," and it enjoined any further use.40

(2) The owner of the dominant estate cannot authorize others to use the easement for purposes unconnected with the use and enjoyment of the dominant estate.

Where a right of way for a railroad spur has been granted or reserved for the benefit of a particular piece of business property, a railroad company using the spur is limited by the appurtenant character of the easement. It may use it for the carriage of shipments connected with the business conducted on that particular property but not as a siding for the storage of freight cars,41 nor for carrying shipments to and from other business property in the neighborhood.42

The right to use a carriageway, reserved to "the owners, tenants and occupiers for the time being" of a particular tract, cannot be extended by permission of the owners to whomsoever they please. The easement thus defined is appurtenant to the land; "being so appurte-
nant, of course the privilege includes not only the right to use the road by the respective owners for the time being of the several pieces of the original tract, but also by their families, and others who, through permission of such owners, may desire to visit their homes for any lawful purpose; this marks the extent of the easement.  

When the use of a beach was reserved for the benefit of lots fronting on it, the owners of three of these lots could not extend the use of the beach to the public by building on their land a cement driveway from the highway to the beach and putting up at the entrance a sign, "Welcome, drive in."  

(3) Attempts to reserve or convey an appurtenant privilege apart from its dominant estate are ineffectual, the separation of the incidental right from the land to which it pertains being a legal impossibility. 

The Rhode Island Supreme Court in a leading case applied the principle to an easement of prospect. The owner of an extensive shore property conveyed a building site overlooking the beach. The deed contained also a grant of bathing rights and a covenant that no buildings except bathing-cars should ever be placed on that beach or on a certain knoll. The right to an unobstructed view of the beach and sea thus created could not be enforced by this grantee after he had sold the building site, although he had in terms reserved to himself his rights in the beach. These restrictions, the court said, "were manifestly intended by the parties to be restrictions in favor of the estate granted; or in other words said covenants against building created a negative easement appurtenant to the premises conveyed. . . . The easement, being appurtenant to the land, cannot exist alone. It has

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47 Bang v. Forman, 244 Mich. 571, 222 N. W. 96 (1928).

48 Jones, EASEMENTS (1898) § 28: "An appurtenant easement cannot be conveyed by the party entitled to it separate from the land to which it is appurtenant. It can be conveyed only by a conveyance of such land. It inheres in the land and cannot exist separate from it. It cannot be converted into an easement in gross." Washburn, EASEMENTS AND SERVITUDES (4th ed. 1885) 42: "Though a man may acquire an easement in gross, like a right of way over another's land, separate and distinct from the ownership of any other estate to which it is appendant, yet if his right to such way result from his ownership of a parcel of land to which it is appendant, he cannot by grant separate such easement from the principal estate to which it is appendant, so as to turn it into a way in gross, in the hands of his grantee." 3 Tiffany, REAL PROPERTY (1939) § 761, pp. 213-214: "Since an easement appurtenant is intended to be exercised only for the benefit of and in connection with the dominant tenement, it cannot be separated therefrom by its transfer to a person other than the owner of such tenement, and for the same reason an easement is not alienable, separately and apart from the land to which it is appurtenant. A separation from the dominant tenement would involve conversion of the easement into an easement in gross." See also Goddard, EASEMENTS (8th ed. 1934) 15-16, 383, 385.
no standing apart from the dominant estate to which it was attached.\textsuperscript{46}

A conveyance of land gave the right to pipe water to the land conveyed, from a spring on the grantor’s neighboring land. Thirty years later a subsequent owner, after selling off a number of lots, deeded the water privilege separately, without any of the land, to another person. This attempted transfer of the water right alone was held to be wholly ineffectual. Depletion of the spring could not be enjoined at the instance of the transferee.\textsuperscript{47}

Not infrequently it has been attempted to convey or reserve a right of way apart from the land to which it is appurtenant. Naturally the wish to secure this convenient privilege for use in connection with other premises and other business has often arisen. Such attempts are accorded no legal effect, the courts always holding that the ownership of the right of way necessarily accompanies the ownership of the land to which it originally attached and of which it is legally part.\textsuperscript{48}

(4) Such attempts to divorce an appurtenant easement from its dominant estate are not validated by the grant of an easement in the dominant estate to be used in connection with the pre-existing easement.

In several instances the owner of land with an appurtenant right of way has set apart a connecting right of way across his land and attempted to convey or reserve his old right of way along with the new one, but without conveying or reserving any other interest in his own land. The newly created easement has never been held a sufficient interest in the dominant estate to carry with it the right of way over other land. Recognizing the owner’s right to create the new right of way, recognizing also that the pre-existing easement belonged to the whole of the dominant estate and would have accompanied any portion separately conveyed, the courts at the same time have always clearly recognized and condemned the attempt to divert the appurtenant easement to new uses that are not connected with the land to which the easement pertains.\textsuperscript{49}

(5) It is not, of course, merely for the sake of symmetry in legal theory that the courts have enforced these limitations inherent in appurtenance, but because disregard of the principle would permit un-
limited encroachment on the rights that others have in the servient estate.

An easement necessarily constitutes a burden on the servient estate. User for the benefit of the dominant estate is the lawful measure and limit of that burden—in the absence of any other and stricter limitation. The needs of the dominant estate may grow with changed conditions or with its division into parcels diversely owned, and still the resulting increase in the user of certain easements (as, for instance, a right of way) can be presumed to have been within the intention of the grantor when the easement was created. Not so when the easement is used—whether by the owner or by others under his license or grant—for the benefit of other premises or for any other purpose unconnected with the needs of the dominant estate. That is an extension of the privilege beyond the terms of the grant and an invasion of the rights of the owner of the servient estate as well as the rights of other persons who have easements in it.

To sum up:

An easement appurtenant exists only for the benefit of the dominant estate, and the extent of its rightful use cannot exceed the needs of that estate.

The owner of the dominant estate cannot sever the easement from the land to which it is appurtenant—cannot sell it or reserve it apart from the land.

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50 See note 27.
51 As where two plots of ground that had been vacant except for an old house, became the site of a dye mill. National Silk Dyeing Co. v. Grobat, 117 N. J. Eq. 156, 165-166, 175 Atl. 91, 95 (1932).
What is more important, he cannot use it, or authorize others to use it, for the benefit of other property, or for merely personal profit in ways that do not benefit the land to which the easement belongs and of which it is legally part.

These rules must, on principle, apply to abutters’ easements. As essentially appurtenant rights they must needs be subject to the limitations inherent in the nature of such rights.

Illustrative applications exist in certain of the New York elevated railway cases:

Where the right to compensation for interference with the light, air and access of abutting lots had to be determined as between successive owners, the rule that such an easement can never be separately owned, apart from its dominant estate, was declared by the Court of Appeals and made part of the basis of decision.55

Proof of the amount of the damage resulting from such interference was likewise tested by the principle of appurtenance. “It is not possible to think of these rights,” said the court, “as of any value in and of themselves, separated from the adjoining land, but their value is to be measured by the injury which such taking inflicts upon the land which is left, and to which they were appurtenant.”56

**Abutter’s Easements Are Easements of Necessity**

The abutter’s easements owe their existence to the public policy that favors the improvement and development of land adjoining the public highways.

These private rights in the public thoroughfares do not depend on any express grant or covenant. They are rights that the law implies from the dedication of the public way and the proximity of the abutting land.57 “The private rights appurtenant to abutting lots arise by operation of law from contiguity, like rights for the adjacent and subjacent support of land, and their existence is presumed.”58 “These easements are created by operation of law when streets are opened.”59 Similarly it was

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said in discussing the particular right with which we are concerned:
"The right of view"—meaning visibility—"is one implied, like other
rights, from the dedication of the street to public uses."

The ground for implying these private rights in the highway is that
the beneficial use and development of the land along the highway so
completely depend upon the owner's having these rights.

We have already quoted the opinion of the New Jersey Court of
Errors and Appeals in which the abutter's easement of light and air was
characterized as "a right of necessity, without which cities could not
have been built, and without the enforcement of which they would soon
become tenantless."

The origin of abutters' easements was similarly explained in a leading
New York decision, emphasizing the various uses of real estate that
depend on the opening of streets and especially the public importance of
these uses:

"Streets, as is well understood, especially in centers of population, subserve
the interests of the state in other ways than by affording passage to the public
from one point to another. They afford opportunities for erecting wharves and
warehouses, stores and dwellings, and public buildings, by public and private
enterprise, which contribute to the convenience of the public, and enhance the
wealth and prosperity of the state. They encourage the improvement of private
property located upon the streets, and, as is well known, real property in cities
derives its chief value from such location."

Thus in their origin the abutter's easements are analogous to the way
of necessity over private land that the law implies when, as a result of
a grant or reservation without any provision for access, a parcel of land
is left "land-locked," and thus inaccessible and useless were it not for
the easement of access that the law gives. The historic basis for ways
of necessity is the same consideration of public policy that is the basis
of the abutter's easements—the interest that the community and state
have in the beneficial use and development of privately owned land.

In an early English decision on this subject, rendered in 1658, we find

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60First National Bank v. Tyson, 133 Ala. 459, 477, 32 So. 144, 150 (1902).
61Taylor, 2 Lut. 1487, 125 Eng. Rep. R. 819 (1701); Pinnington v. Galland, 9 Eng. Eq. 1, 13,
22 L. J., Exch. 348, 355 (1853); Toothe v. Bryce, 50 N. J. Eq. 589, 594 (1892); Simonton,
Ways of Necessity (1925) 25 Col. L. Rev. 571, 574.
the existence of a way of necessity put on this ground,—that "it would be not only a private inconvenience but also to the prejudice of the public weal if land were to lie fresh and unoccupied."\(^6\)

The American rule as to the extent to which ways of necessity can rightfully be used has been determined by the same consideration of public policy. Our courts have held that the way of necessity must continue to serve the needs of the land to which it is appendant even when the use of this land has been changed and the new use makes the easement more onerous to the servient estate. The reason, as stated in one case, is that the law "desires and encourages proprietors to increase the value of their land by building houses upon and cultivating it."\(^6\) As another judge put it, "The policy of the law as to easements should be one that encourages the growth and development of lands."\(^6\)

Since the abutter's easements also owe their existence to this same policy of the law, the same test is equally appropriate whenever a use that is being made of one of these easements is questioned. Its use must be rightful so long—and only so long—as it serves the intended purpose for which the privilege in the public highway was given, i.e., to further the occupation and improvement of the abutting land.

**Under These Principles, Outdoor Advertising as a Business is an Excess Use of the Easement of Visibility**

The right of visibility is then one of the rights that the law gives in order to promote the development and improvement of land bordering on public ways.

It is a right appurtenant to such land, apart from which it cannot be owned and for the benefit of which alone it can be lawfully exercised.

This means that while the abutting owner has the right to his advantage of visibility so far as it can further the beneficial use and occupation of his land, he cannot, as against the public authority owning and controlling the highway, sell or lease his right to be seen from the highway without selling or leasing the land, nor can he use, or authorize

\(^6\)Meyers v. Dunn, 49 Conn. 71, 77 (1881).
\(^6\)Erie R. R. v. S. H. Kleinman Realty Co., 92 Ohio St. 96, 99, 110 N. E. 527, 528 (1915). To the same effect, Tong v. Feldman, 152 Md. 398, 403, 136 Atl. 822, 824 (1927); Whittier v. Winkley, 62 N. H. 338 (1882); Uhl v. Ohio River Co., 47 W. Va. 59, 61, 34 S. E. 934, 935 (1899). The Corporation of London v. Riggs, L. R. 13 Ch. Div. 798, 807, 49 L. J. Ch. 297, 300 (1880), criticized in Goddard on Easements (8th ed. 1934) 380-1, is cited as contrary to the American rule. But the rule there adopted—that a way of necessity "must be limited to what is necessary at the time of the grant"—was dictated by the public interest in the particular case.
others to use, this privilege for the benefit of business conducted elsewhere.

It further means that legislation restricting roadside advertising encounters no legal right except as it affects the advertising incidents to the use and enjoyment of the land bordering the roads.

To hold otherwise would be to ignore the appurtenant character of the easement of visibility as well as the public policy in which this right has its origin. The practice of making the visibility of the land a source of profit while the land itself is left unoccupied and idle, obviously cannot be reconciled with these principles.

There still remains to be considered the support that this analysis of the billboard advertiser's rights meets in opinions and decisions dealing with various aspects of the outdoor advertising business. Although the courts have not yet used the law of easements to test the billboard advertiser's claim of right, the other points essential to our theory have already been judicially developed.

**IT HAS BEEN RECOGNIZED THAT OUTDOOR ADVERTISING IS A PRIVATE USE OF PUBLIC THOROUGHFARES**

In reasoning to the conclusion that the regulation of outdoor advertising is within the scope of the police power, Judge Trent, writing for the Philippine Supreme Court, has clearly made the point that the business of billboard advertising is essentially a use of the public highways and that so far as it uses private property it does so only for the purpose of using the highways:

"The success of billboard advertising depends not so much upon the use of private property as it does upon the use of the channels of travel used by the general public. Suppose that the owner of private property, who so vigorously objects to the restriction of this form of advertising, should require the advertiser to paste his posters upon the billboards so that they would face the interior of the property instead of the exterior. Billboard advertising would die a natural death if this were done, and its real dependency not upon the unrestricted use of private property but upon the unrestricted use of the public highways is at once apparent. Ostensibly located on private property, the real and sole value of the billboard is its proximity to the public thoroughfares. Hence, we conceive that the regulation of billboards is not so much a regulation of private property as it is a regulation of the use of the streets and other public thoroughfares."69

This observation exactly fits into our analysis of billboard advertising as an excess use of one of the easements that the abutting owner has in the highway, the right to make use of the servient estate for a particular limited purpose being the essential nature of an easement.

It is also useful to our inquiry in another way. The great stumbling block in the way of regulating outdoor advertising has been the legal

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69 Church and Tait v. Rafferty, Collector of Internal Revenue, 32 P. I. 580, 600, 609 (1915).
dogma that the police power cannot interfere with the use of private property on purely aesthetic grounds.70 That dogma was applied to the regulation of billboards on the assumption that the erection and maintenance of a billboard are as strictly a use of private property as the erection and maintenance of an office building or factory would be.71 The recognition that what is primarily and essentially involved is a private use of the public thoroughfares avoids this baffling taboo and puts the inquiry on sounder ground.

**The interference with normal highway uses, inherent in the business of billboard advertising, has been recognized**

The courts have pointed out that, because of the demand it makes on the attention of the traveling public and the extravagant display that results from its practice as a business, unrestricted outdoor advertising is bound to involve interference with the public use of the highways.

In *Fifth Avenue Coach Co. v. City of New York*, where an ordinance prohibiting the presence of advertising trucks, vans or wagons on the streets of Manhattan was sustained, such advertising was characterized as a likely cause of traffic congestion in crowded city streets, not merely because of the physical presence of the vehicles but also because the attention of the people in the street is naturally attracted by the advertisements and their progress consequently retarded:

"The extent and detail of such advertisements when left wholly within the control of those contracting therefor would make such stages, wagons or cars a parade or show for the display of advertisements which would clearly tend to produce congestion upon the streets upon which they were driven or propelled. The exaggerated and gaudy display of advertisements by the plaintiff is for the express purpose of attracting and claiming the attention of the people upon the streets through which the stages are propelled."72

In *General Outdoor Advertising Co. v. Department of Public Works*, where the Massachusetts Supreme Court sustained a thoroughgoing state system of regulation for the business of outdoor advertising, such advertising was characterized as the "forcible" intrusion of business solicitation upon the traveler and an invasion of his right to use the highways:


71This misconception is expressly stated in People v. Green, 85 App. Div. 400, 405, 83 N. Y. Supp. 460, 463 (1903): "The placing of a fence upon private property upon which is displayed an advertisement, is certainly no more subject to the police power of the State than would be the placing upon the property of a shop, house or other structure."

72Fifth Avenue Coach Co. v. City of New York, 194 N. Y. 19, 30-31, 86 N. E. 824, 827 (1909), opinion of Chase, J., quoted by the United States Supreme Court in affirming, 221 U. S. 467, 480-481 (1911).
“The object of outdoor advertising in the nature of things is to proclaim to those who travel on highways and who resort to public reservations that which is on the advertising device, and to constrain such persons to see and comprehend the advertisement. It does not appeal to the desire or consent of such persons; it is forcibly thrust upon the attention of all such persons, whether willing or averse. For such persons who strongly desire to avoid advertising intrusion, there is no escape; they cannot enjoy their natural and ordinary rights to proceed unmolested.”

In the decision of the Philippine Supreme Court from which we have already quoted, the same point is made:

“It is quite natural for people to protest against this indiscriminate and wholesale use of the landscape by advertisers and the intrusion of tradesmen upon their hours of leisure and relaxation from work. Outdoor life must lose much of its charm and pleasure if this form of advertising is permitted to continue unhampered until it converts the streets and highways into veritable canyons through which the world must travel in going to work or in search of outdoor pleasure.”

There is also the familiar proposition that advertising devices along public ways tend to distract the attention of drivers and so increase the hazards of automobile travel.

In all these instances the courts have but noted in concrete terms the objections that have always obtained to divorcing an appurtenant easement from its natural purpose and measure, i.e., the increased user of the servient estate that would naturally result if this were permitted, and the corresponding encroachment upon the rights that others have

**IT IS RECOGNIZED THAT BILLBOARDS ARE MERELY INSTRUMENTS FOR UTILIZING VISIBILITY**

In *General Outdoor Advertising Co. v. Department of Public Works*, a finding that the “only real value of a billboard lies in its proximity to the public thoroughfare within public view” was approved by Chief Justice Rugg as being matter of common knowledge.

“Suppose that the owner of private property,” said Judge Trent, writing for the Philippine Supreme Court, in a passage we have already quoted, “should require the advertiser” who leases an advertising site “to paste his posters upon the billboards so that they would face the

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*Churchill and Tait v. Rafferty, Collector of Internal Revenue, 32 P. I. 580, 609 (1915).*

*See, e.g., General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149, 180-181, 193 N. E. 799, 813-814, (1935); Perlmutter v. Greene, 259 N. Y. 327, 331, 334, 182 N. E. 5, 6, 7 (1932).*

*Howell v. King, 1 Mod. 190 (C. P. 1674) and other cases cited in notes 53 and 54.*

*General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149, 168, 193 N. E. 799, 808 (1935).*
interior of the property instead of the exterior. Billboard advertising would die a natural death if this were done.  

Condemning a billboard that had been erected in a New York street outside of the building line, Judge Seabury observed that it "served no other purpose than that of a surface upon which advertisements are displayed."

Since this is their sole function billboards are sure to be as insubstantial and as nearly two-dimensional as the law will allow. It is this characteristic flimsiness that has necessitated their structural regulation in the interest of public safety.

**IT IS RECOGNIZED THAT A "LEASE" OF A BILLBOARD SITE DOES NOT CREATE A LEASE-HOLD**

Such instruments regularly provide that the "lessee" shall have the exclusive right to use the land for advertising and to erect and maintain billboards on it, together with the right to go on the land for these purposes. Instruments of this sort have been repeatedly construed as not giving the right of possession which is the essential feature of a lease and therefore as not creating the relation of landlord and tenant.

The "lessee's" interest under such an agreement has been defined as

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80It is matter of common knowledge that billboards are usually, if not invariably, cheap and flimsy affairs, constructed of wood, and erected on vacant lots of land along or near to the streets, in order to catch the eye of the passers-by. Such structures, if of sufficient height, may be very readily blown over by wind, or shaken down by an earthquake, and in such event (depending upon their height and proximity to the public thoroughfare) may very easily cause injury to persons standing or passing thereon." In re Wilshire, 103 Fed. 620, 623 (C. C. S. D. Cal. 1900). "They are in the very nature of things temporary structures, generally consisting of one frail narrow line of boards nailed to upright posts set in the ground and cheaply constructed. . . . Most of them are so constructed that their bodies or wings are wide spread like the sails of a great vessel and they gather the winds, and if not properly and securely constructed they will more than likely be blown down when the first high wind strikes them, and inflict injury upon those who are upon the streets." St. Louis Gunning Co. v. St. Louis, 235 Mo. 99, 174-175, 137 S. W. 929, 952 (1911).
merely a license,\textsuperscript{62} or at most an easement,\textsuperscript{63}—if the latter, then an easement in gross, for the privilege is obviously a personal one, there being no dominant estate "to which the easement might attach."\textsuperscript{84}

Thus the courts recognize (1) that such "leases" give the advertising company no interest in the land except the right to erect and maintain advertising structures, and (2) that this right is given as a personal privilege—to be exercised for personal profit and without the limitations to which appurtenant privileges are subject. And they hold these features of the transaction to be determining when the relation between the abutting owner and the advertising company and their respective rights are in question.

It is the features thus recognized that must determine also our question,—whether, as against the State and its governmental units, the advertising company can acquire any legal right to have its billboards seen from the highway.

As soon as that question is raised in connection with such a "lease" it will immediately be seen that the essential thing the advertising company gets and pays for is the permission of the abutting owner to exploit the visibility of his land. Whatever privileges in the abutting land the "lease" expressly gives are only the necessary means to that exploitation, and not in themselves the gist of the transaction. For without the right to attract the eyes of the traveling public, a right to erect and maintain billboards and a right of access for that purpose could have no possible value.\textsuperscript{85}

It is then clear, in the light of the above mentioned rulings, that the transaction must be judged either as an attempt to sell or lease the abutter's easement apart from any proprietary interest in his land or as an attempt to license the advertising company to use that appurtenant privilege as a purely personal right,\textsuperscript{86} and that in either view it must be

\begin{itemize}
  \item Wilson v. Tavener, L. R. 1 Ch. 578, 70 L. J. Ch. 263 [1901]; The Queen v. St. Pancras Assessment Committee, 2 Q. B. D., 581, 590, 46 L. J. M. C. 243, 251 (1877), Lush, J. \textit{See also} Gaertner v. Donnelly, 296 Mass. 260, 5 N. E. (2d) 419 (1936); Walton Harvey, Ltd. v. Walker & Homfrays, Ltd., [1931] L. R. 1 Ch. 274, 277, 280; 100 L. J. Ch. 93, 103, Lord Hanworth, M. R.
  \item See Judge Trent's observation in Churchill and Tait v. Rafferty, Collector, quoted \textit{supra} page 742.
  \item For their own profit wherever they see fit," Judge Pound put it, in stating the extent to which the outdoor advertising business claims the privilege of visibility. Perlmutter v. Greene, 259 N. Y. 327, 332, 182 N. E. 5, 7 (1932).
\end{itemize}
held ineffectual as against the owner of the servient estate, the public authority owning and controlling the highway.

It has been judicially declared that public highways are not created for the outdoor advertising business

In the Massachusetts decision we have several times mentioned and quoted, Chief Justice Rugg queried the "constitutional right" to exploit the visibility of land along highways and parkways, which the advertising companies were claiming:

"The constitutional right asserted by the plaintiffs is in the main to conduct their business of outdoor advertising as they have been accustomed without interference by the enforcement of rules and regulations adopted by the defendants. It is of primary importance to ascertain the nature of that asserted right. That business had peculiar features. It is one that depends entirely for its success upon the occupation of places along the sides of highways and near parks and similar public places. The rules, regulations and statutes are not applicable to signs or advertising devices indicating solely the person occupying, the business transacted on, or the sale or letting of the premises. They relate alone to advertising carried on as a business. . . . The object of outdoor advertising in the nature of things is to proclaim to those who travel on highways and those who resort to public reservations that which is on the advertising device, and to constrain such persons to see and comprehend the advertisement. . . . In this respect the plaintiffs are not asserting a natural right . . .; they are seizing for private benefit an opportunity created for a quite different purpose by the expenditure of public money in the construction of public ways and the acquisition and improvement of public parks and reservations. The right asserted is not to own and use land or property, to live, to work, or to trade. While it may comprehend some of these essential liberties, its main feature is the super-added claim to use private land as a vantage ground from which to obtrude upon all the public travelling upon highways, whether indifferent, reluctant, hostile or interested, an unescapable propaganda concerning private business with the ultimate design of promoting patronage of those advertising. Without this super-added claim, the other rights would have no utility in this connection."\textsuperscript{87}

It will be seen that even without invoking the principles which govern easement rights Chief Justice Rugg reached the conclusion (inevitable when these principles are applied) that roadside advertising cannot be a matter of right when the visibility of the land is used as a source of profit for an advertising company.\textsuperscript{88}

Compare the question Judge Pound found it unnecessary to answer in \textit{Perlmutter v. Greene}, but so framed as to indicate the difficulty of agreeing with the plaintiffs' claim to an easement in the street—


\textsuperscript{88}Since Judge Rugg thought the Massachusetts regulations were within the police power, he sustained them on that ground (289 Mass. at 180, 184-188, 207-211; 193 N. E. at 813, 815-817, 825-828) and had no need to rely on the alternative ground of validity briefly suggested in the passage of his opinion quoted.
"whether the highway, created by public money, is controlled in part by those who desire to thrust upon the notice of the public the ostentatious display of private advertising from the adjoining premises for their own profit wherever they see fit."289

EFFECT OF THE PROPOSED TEST ON THE PROBLEM OF REGULATION

Along these lines the foundation has been fully laid for testing the outdoor advertiser’s right by the first principles of the law of easements.

These principles, as we have shown, would confirm the right to exhibit signs or displays that call attention to some use of the premises where they appear. For such signs and displays involve only a legitimate exercise of the easement of visibility, consistent with the appurtenant character of the right and with the public policy that is its source. The regulation of such advertising would still have to depend upon the overriding prerogative of the police power.90

All other roadside advertising would, under these principles, have to be classed as an excess use of the privilege, permitted only by indulgence. The regulation or even prohibition of such excess use would interfere with no right; it would merely limit or withdraw a favor,91 and would consequently involve no constitutional question, since constitutional guaranties cannot protect non-existent rights.92 Here we would have a theoretical basis for billboard regulation that would not depend upon police power prerogatives and would not be hampered by the precedents which still hamper that power in this field.

Legislators, both state and local, have recognized a distinction between the business of outdoor advertising and the advertising incident to some use of the premises where it appears, and have constantly shown a tendency to restrict the former more stringently than the latter. Statutes and ordinance regulating outdoor advertising devices often provide that some or all of their requirements shall not apply to sale or rent signs, or shall not apply to signs advertising a trade or business conducted on the premises.93

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95CAL. BUS. & PROFESSIONS CODE (1941) § 5229; COLO. STAT. ANN. (Michie, Supp. 1937) c. 48, § 403; CONN. GEN. STAT. (Supp. 1935) § 92c; DEL. LAWS (1939) c. 182, § 8; FLA. GEN. LAWS (1941) c. 20446, § 14; MAINE PUB. LAWS (1935) c. 163, § 2 (amended PUB. LAWS 1937, c. 179, § 1); MD. CODE PUB. GEN. LAWS (Flack, 1939) art. 56, § 336; MASS.
But when such regulations have come before the courts this distinc-
tion has been given little or no weight, and the question of their consti-
tutionality has been treated as simply a question of how far and on
what grounds the police power can interfere with property rights—with
varying results.94

That does not mean, however, that the rules logically applicable to
easements of visibility, and the principles of necessity and appurtenance
from which they derive, cannot be invoked with confidence for the pur-
pose of testing the legal rights of billboard advertisers.

For one thing, the limits of outdoor advertising rights have apparently
never been argued to the courts, and consequently have not been decided,
in the light of these principles. The business of billboard advertising has
still to be judicially analyzed as an exercise of the easement of visibility,
under the governmental challenge that it exceeds the lawful privilege and
imposes an illegitimate burden on the public thoroughfares.

For another thing, the rapid growth of billboard displays and the
resulting detriment to the public in its use of the highways have been
judicially described96 and the need of more regulatory power has been
expressed.96 The law of easements provides the criterion by which these
practical objections become legal objections.

Further, all that has been decided concerning the right to be seen
from the highway is entirely in line with these principles. As we have
seen, this right has been enforced only in connection with business con-

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95 See also the dissenting opinion of Finch, J., in Matter of Mid-State Advertising Corp. v. Bond, 274 N. Y. 82, 8 N. E. (2d) 286 (1937). For a list of non-judicial protests, see Mee, Municipal Regulation of Outdoor Advertising (1939) 4 John Marshall L. Q. 348, n. 73.

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ducted on the premises and never as a merely personal right.\textsuperscript{97}

Last but not least, it would be difficult to find any theoretical basis on which the question, if squarely presented could be otherwise determined.

\textsuperscript{97}Supra, pages 726-729.
"THE INEVITABLE OBLIGATION OF OUR TIME"

CHARLES FAHY*

WHEN the Journal was founded in 1912 I was a student at the Law School and was honored to become a member of its staff in its earliest years. The moving spirit of the enterprise, as I recall, was Eugene Quay, a scholarly and idealistic student. Without his devotion the infant Journal would not so quickly have gained recognition and growth. My contributions to the Journal were extremely meager, and indeed in the years that have intervened I have never again felt quite able to meet the standards of a law journal article. It remains one of my unfulfilled ambitions to take the time and the care necessary to do this, and to leave the product reposing within the pages of a Journal for all the future to read and appraise. It should, I think, always remain for everyone a very serious and difficult undertaking to do a law journal article. These articles serve not only as educational sources to fellow students but as real means of self-education of the writer. They are also capable of being of great value to the practicing bar, to teachers and to jurists and through these various means to play a part in the development of the law. Editors or contributors to law journals, for these reasons, should approach this branch of legal writing with a high sense of responsibility and scholarship — to give to those who read and study the benefit of a treasure, as it were, that the writer has mined by hard, thoughtful labor.

It was only a few years after the Journal’s first issue that the world began to be engulfed in a war. Many young lawyers of that day laid aside their professions, and students left the classroom for the fields and the waters and the air of battle. Today again young men are laying down their law books, some of them forever, and the schools will not see so many of them for a while. The law student and the lawyer is quick to appreciate the necessity for this because he has had unique opportunity to know that the attack upon us is one upon ordered liberty under law. The enemy seeks the substitution of force, behind which lurks a desire to destroy the right of peoples to live in peace, to work out the solution of their relations to each other and to God in freedom as we have established it for ourselves. Under an enlightened leadership, with unity of purpose and with determination, with invincible energy and unconquer-

*This address was delivered by the Honorable Charles Fahy, Esq. ’14, Solicitor General of the United States, at the Thirtieth Annual Banquet of the Georgetown Law Journal on the evening of April twenty-first, nineteen forty-two. It seemed to the Editors so brilliant and so ennobling it deserved more permanence than the evanescent word.
able courage we, with our allies, must dedicate ourselves to the overthrow of this threat of darkness that would impose itself upon us. The price paid in the past for ordered liberty under law that has come down to us must be paid again that such a society may continue now and be handed on to the future. This is the inevitable obligation of our time.
ADMINISTRATIVE LAW

BOARD OF TAX APPEALS RETAINS JURISDICTION DESPITE LAPSE OF ADMINISTRATIVE PERIOD OF LIMITATION

ON APRIL 1, 1937, Denholm and McKay Co., a Massachusetts corporation, received a tax deficiency letter from the Commissioner of Internal Revenue covering the fiscal year ending January 31, 1935. The Corporation filed a petition with the United States Board of Tax Appeals, according to authorized procedure,\(^1\) for a redetermination of the deficiency. The Board conducted a hearing on that issue and held that the Corporation was not deficient in its 1935 tax return but, on the contrary, was entitled to a substantial refund. Accordingly, on July 24, 1939 the Board entered an order allowing this refund in favor of the Corporation for the sum of $821.37.

On September 8, 1939, forty-six days after the above order had been entered, the Commissioner of Internal Revenue filed a motion with the Board to reconsider the Corporation's tax liability. This action was taken in attempted compliance with Rule 19,\(^2\) promulgated by the Board itself, which allows thirty days in which to make such a motion. The Board did not act on this motion until the following April 4, which was five and one-half months after the date fixed by statute when the Board's decision was to become final for all purposes.\(^3\) On that date it vacated its former decision, and in a proceeding in which the Corporation was given no opportunity to participate, the Commissioner's belated motion to reconsider was allowed.

Upon learning that the Board was about to issue an order reversing its final decision and disallowing the refund, the Corporation petitioned the District Court to issue a writ of prohibition to prevent the Board from

\(^1\)Int. Rev. Code § 272 (a) (1940).

\(^2\)Rule 19, Rules of Practice before the United States Board of Tax Appeals, provides:

"Motions for rehearing, reconsideration, further hearing, and the like, to be considered timely, shall be made within 30 days after promulgation or entry of the report."

"Motions to vacate, correct, or revise a decision of the Board, to be considered timely, shall be made within 30 days after entry of the decision."

\(^3\)The Board of Tax Appeals' procedure allows the parties litigant thirty days in which to make a motion back to the Board to vacate its decision, or ninety days in which to appeal to the Circuit Court of Appeals or the Court of Appeals for the District of Columbia. If, after ninety days, no appeal has been taken, the decision of the Board then becomes final. Section 1142 of the Internal Revenue Code (1940) provides:

"The decision of the Board rendered after February 26, 1926 . . may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in Section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered."
taking this action. The District Court decided to disallow the writ, and the Court of Appeals for the District of Columbia sustained this decision.4

The Court of Appeals reasoned that the Board of Tax Appeals probably retained sufficient jurisdiction to enter its judgment of April 4, 1939, but that even if it did not, the writ of prohibition was not the proper remedy in the circumstances. The court said:

"In seeking a writ of prohibition the lack of authority of the body against which the writ is to be directed must be clearly shown. It is highly doubtful that upon the instant complaint we could so conclude.

"Our holding . . . is based upon a more vital proposition. . . . Now when there are regularized forms of appeal most questions, usually including those of jurisdiction, are passed upon in the first instance by the administrative tribunal and judicial review comes in orderly fashion upon a complete record."5

In such language the court lightly passes over two problems. The issues in this case involve nothing less than the question whether a governmental board which has been unsuccessful in the trial court, can, by clever judicial manoeuvring, shift the burden and cost of an appeal from its own shoulders to those of the victorious litigant.

Two questions stand out clearly: did the Board lose jurisdiction to enter the decree of April 4; and if so, is the writ of prohibition the appropriate remedy?

The fact that there must be a determinable date at which time decisions of the Board become final has been made clear both by congressional enactment and by judicial decree. This principle is too firmly rooted in fairness and common sense to be overruled for unsubstantial reasons.

In the case of J. S. Rippel Company,6 the Board of Tax Appeals held:

"It is well settled that the Board is a tribunal of limited authority and jurisdiction, and where the statute provides that our decisions shall, under certain circumstances, become final, we have no power to reopen and change them when such finality has taken place."7

The Supreme Court of the United States has emphatically declared: "By § 1005 the decision of the Board is to become final in respect to all the numerous instances which in the course of the review may naturally end further litigation. . . . The complete purpose of Congress to provide a final adjudication in such proceedings, binding on all parties, is manifest. . . ."8

4United States ex rel. Denholm and McKay Company v. United States Board of Tax Appeals, 125 Fed. (2d) 557 (1942).
5Id. at 558.
7See, St. Petersburg Land & Loan Co. v. Commissioner of Internal Revenue, 26 B. T. A. 530 (1932); Sweet v. Commissioner of Internal Revenue, 120 F. (2d) 77 (C. C. A. 1st, 1941).
8Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U. S. 716, 726, 727 (1929).
In view of the above authorities, there is but one line of reasoning that could possibly lead to the conclusion that the Board's decision had not become final eight and one-half months after its rendering, and that is that the motion to vacate, made on September 8, 1939, tolled the statutory three-month period. In support of this argument, the case of Helvering v. Continental Oil Company might be cited.\(^6\) In that case the court decided that the filing by the Board of a motion to vacate would toll the statute for as long as 14 months. The argument of the court was that the very statute which created the Board\(^10\) provided that its proceedings should be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board might prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. Therefore, since the matter of appeal was properly included within the meaning of the words "practice and procedure", the Board was authorized to do as other judicial bodies would have done under like conditions, \textit{i.e.}, let the motion to reconsider suspend the running of the statute.\(^11\)

Assuming this to be the reasoning followed by the court, there are still two objections to its application to the present case. First of all, in order for the motion for a rehearing to become effective to toll the statute, it is necessary that it be made within the prescribed time-limit. The Board itself, in this case, prescribed a thirty day limit in which the motion was to be made. This motion was made fifteen days after the limit had expired. To say that this motion was validly made is to say that the Board may impose a limitation on the right to move to reconsider which will be binding on the taxpayer, but binding on the Commissioner only as long as he deems it expedient to be bound.

In the case of \textit{Foster v. Commissioner of Internal Revenue}, the court said, after reviewing a set of facts essentially similar:

"The motion was filed on February 11, 1939. Rule 19 of the Rules of Practice of the Board of Tax Appeals provides, in part, as follows: 'Motions to vacate, correct, or revise a decision of the Board, to be considered timely, shall be made within thirty days after entry of the decision.'

"The motion therefore was not timely under the Board's rules."\(^12\)

There is yet another objection. This doctrine flies in the face of a


\(^{10}\) Section 900 (h), 907, Act 1924, Section 1000, Act 1926, as amended by Section 601, Revenue Act of 1928.

\(^{12}\) The court quoted from Old Colony Trust Co. v. Commissioner of Internal Revenue, supra, note 8.

\(^{13}\) 112 Fed. (2d) 109, 114 (C. C. A. 1st, 1940).
congressional policy which is a salutary one. That policy is that litigation must come to an end. The victorious party is entitled to know, within a reasonable time, whether he is to be dragged into an appellate court. If the court holds, as here, that the three-month limit can be tolled by the mere filing of a motion, which can be filed in every case as a matter of course, then it is saying that the Board has the power to hold the case open for a year, or five years, or indefinitely, by merely refusing to act on the motion. This would obviously work an intolerable hardship on the victorious party. Surely if this doctrine is to be allowed, some reasonable limits should be placed on it. Perhaps by applying a statutory analogy, which the courts are doing with increasing frequency, the three month statutory limitation might properly be held to begin to run from the time when the motion was filed. This alternative would, on the one hand, observe the administrative rules of procedure, and, on the other hand, would not be doing violence to statutory fiat.

If the Board did lose jurisdiction, there yet remains the question whether a writ of prohibition lies. The court’s position evidently was that the appellant should have taken his appeal from the order of April 4, instead of seeking a writ of prohibition. In that regard, the court said:

"The writ of prohibition is a special form of relief. The common nomenclature is that it is one of the extraordinary writs. It is easy to feel an aura about the meaning of extraordinary that results in there being no extraordinary situations. Nonetheless, as a special form of relief the discretion of the issuing court will prevent the writ’s use when there is another adequate remedy. Adequate has a more flexible meaning than extraordinary. Sometimes all forms of judicial relief seem inadequate. Sometimes if there is any possible relief, it is considered adequate."

The court observed further that the use of this writ to supervise or review the actions of “quasi-judicial” bodies had its origin and main application in the days of the “stone age of administrative law.”

This decision is undoubtedly in line with the modern trend to limit the use of these extraordinary remedies especially in administrative law fields. Formerly it was not so. At one time the Supreme Court would have held, if jurisdiction had been lost, the writ could have issued as a matter of

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30There is a line of federal and state cases, of which United States v. Hutcheson, 312 U. S. 219 (1941) is one of the most forceful, holding that when Congress lays down a statutory policy in one field, that policy may be applied by the courts to closely analogous situations wherein statutory enactment is silent. But see Note (1942) 30 Georgetown Law Journal 776.

right; and if jurisdiction had not been lost, the writ might issue as a matter of judicial discretion. In *Ex Parte Oklahoma* the court said:

"Prohibition is an extraordinary writ which will issue against a court which is acting clearly without any jurisdiction whatever, and where there is no other remedy; but where there is another legal remedy, by appeal or otherwise, or where the question of jurisdiction is doubtful or depends on matters outside the record, the granting or refusal of the writ is discretionary."

It is greatly to be regretted that the use of the writ of prohibition is becoming obsolete. It could still serve a useful purpose. In the present case we have a corporation that was forced into an expensive litigation because of an admitted error of calculation of the Commissioner of Internal Revenue. After going through the legal processes, the corporation emerged victorious. Three months after the statutory period had elapsed during which an appeal could have been taken, counsel for the corporation had every right to be confident that the litigation was at an end. Now, under the decision of this case, the Board of Tax Appeals, on behalf of the Commissioner of Internal Revenue, who lost in the trial, can suddenly reopen the case and decide it adversely to the corporation without even giving it a hearing. Moreover the corporation, who has now forgotten all about the case, is forced to prosecute an appeal on pain of being taxed illegally. *Thus he who was victorious is now forced to assume the initiative and the offensive in an appeal, and is forced to assume the burden of reproving what was already proved at the trial.*

Thus administrative absolutism moves forward apace.

DAVID S. KING

RES JUDICATA AND THE RIGHT OF AN ADMINISTRATIVE AGENCY TO REVERSE ITS PRIOR RULING

THE rationale of a recent decision of the Supreme Court of Utah invites review of the concept of *res judicata* as applied in the administrative field. A previous order of the Utah Public Service Commission had denied to a trucking company a certificate of public convenience and necessity to operate as common carrier. The court held this did not preclude the Commission from subsequently issuing a new order granting the certificate even in the absence of changed conditions since the earlier hearing. Protesting railroads had contended that in the absence of evidence of changed conditions since the hearing and denial of the trucking company's former application, that determination should be *res...*

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1220 U. S. 191 (1911); see, *In re Alix*, 166 U. S. 136 (1897).

1Mulcahy v. Public Service Commission, 117 P. (2d) 298 (Utah 1941).
judicata of the issue involved. Asserting that the doctrine of res judicata applies only to judicial decisions and not to legislative, executive or ministerial determinations, the court reasoned that the nature, purpose, and legal effect of the decision constitute the test for deciding whether the determination is judicial. A determination partakes of the judicial when it performs a judicial function: "to define the legal rights and obligations conferred or imposed by law upon the community to the individual, the individual to the community, or one individual to another individual; and to apply the remedy when one such party has infringed the right of, or failed in his or its obligation to the other." The judicial function is further described by the Court: "It comes into operation only on request of the community or of an individual, when such party thinks another has interfered with his rights, or failed in obligations to him. The judicial function only plays a role when there is an apparent controversy over the extent or infringement of legal rights, and appeal to the judiciary is made by one party to define and fix the legal rights of the parties with respect to the matter in controversy." If decisions which are an exercise of the judicial function thus described are considered res judicata of the issues raised in the controversy, the question in the instant case, Mulcahy v. Public Service Commission, was whether a denial of a certificate of public convenience and necessity is a settlement of such a legal controversy, as to bring the judicial doctrine of res judicata into play. It was concluded that the Commission had not exercised a judicial function in issuing its order, since the application and the opposition thereto were "addressed to the discretion of the Commission for its determination of matters pertaining primarily to the needs and conveniences of the public, and not to rights theretofore vested in, or obligations theretofore assumed or imposed upon either of the parties before the court." Mr. Justice Wolfe concurred in the proposition that the Commission was not exercising a judicial function, but quoting from his dissent in Rowell v. State Board of Agriculture, issued a warning against labelling the functions of administrative agencies as executive, legislative, or judicial, since the very raison d'etre of the administrative process is "the very necessity of departing from the rigidity of separation of powers into these three categories."

The doctrine of res judicata as discussed in the Mulcahy and numerous other decisions is an uncomfortable visitor from the law courts attempting

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2Mulcahy v. Public Service Commission, 117 P. (2d) 298, 302 (Utah 1941).
3Ibid.
4Ibid. at 304.
598 Utah 353, 369, 99 P. (2d) 1, 8 (1940).
to adapt itself to the ways of administrative procedure. Based on the sound public policy that there be an end to litigation, the doctrine is so firmly established in our jurisprudence as to require no explanation nor justification at this time. The Mulcahy opinion refers to res judicata as "plain and intelligible," and so it is as developed and applied in "plain" judicial actions, but as imported from the law courts into administrative proceedings it has been subjected to such inconsistent interpretations that we may well pause to consider to what extent, if any, the doctrine should be applied to the authority of administrative agencies to modify their prior rulings.

Considering the nature, history, and development of administrative procedure, it might appear elementary and therefore beyond the need for demonstration that legislative intent expressed in a statute delegating authority to an administrative agency should govern the right of the agency to rehear and redetermine prior decisions; yet even on this point there have been cases to the contrary. An administrative body can act only within the limits of its delegated authority or else its acts are arbitrary and in violation of due process; yet it must be enabled to act to the full extent of its constitutionally delegated authority if the administrative process, concededly necessary in modern society, is to have any meaning. Thus, if the legislature has given it delegable authority, including the procedural device of rehearing, it should follow that the rehearing constitutes no lack of procedural due process. A legislature which is empowered to change the time-worn procedure of the law courts certainly can set the procedure of an agency which is its creature, and it is not for the courts to emasculate, much less ignore this procedure.

In the absence of express legislative intent regarding the right of an administrative body to rehear once it has made a determination, the right is less obvious. Taking their cue from the familiar principle which they had so often applied in the courts to preclude adversary litigants from twice trying the same cause of action, judges therefore analogized that an officer's authority is exhausted by its initial exercise; the administrative officer like the private litigant could have but "one bite at the apple". Thus res judicata became a familiar term in decisions in the field of administrative law as in other legal fields. Conceding that the doctrine of res judicata is a salutary one which should not be cast aside merely because it might tend to frustrate free administrative action and, further, that the situations in which the doctrine has been applied point

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13 See dissent in Austin Co. v. Commissioner of Internal Revenue, 35 F. (2d) 910, 913 (C. C. A. 6th, 1929).
to the need for some similar principle in administrative law, it seems nonetheless unfortunate that the doctrine was carried over bodily and apparently with no attempt to square it with the purposes of administrative action. Whereas other familiar legal principles have been held inapplicable to administrative procedure or applicable only in a modified form, res judicata appears to have entered the administrative field involuntarily against modification. Rules of evidence take on a new complexion when an administrative proceeding is in progress, but res judicata knows no such change, though oddly enough the courts that rely on the doctrine do not seem to remember the companion rule that a court retains continuing jurisdiction over a case during the term of the court.\textsuperscript{12}

The felt need for some doctrine resembling res judicata appears to have led some to sanction the complete importation of the rule into administrative procedure;\textsuperscript{13} others, sensing that it has not always proved so satisfactory in its new as in its old environment, would seem to advocate throwing it completely into the discard.\textsuperscript{14} Still others have examined the reported cases in which the courts have rejected or accepted the doctrine and have made attempts to rationalize the conflicting decisions and to formulate rules for the use of the doctrine in administrative procedure.

One widely used criterion for the applicability of the rule looks to the function that the administrative body was performing at the time of the original determination. If the agency was acting in a quasi-legislative or in a quasi-executive capacity the doctrine is said not to apply, but if a quasi-judicial function was being performed the rule is otherwise.\textsuperscript{15} The failure of this touchstone of applicability results from the fact that an administrative body by its very nature is likely to perform all, or one, or any combination of the three functions of government. The difficulty of separating these functions was recognized by the Special Committee on Administrative Law of the American Bar Association:

"It is not always possible, of course, to classify a particular function as quasi-legislative or as quasi-judicial, for the two shade into each other in cases such as railroad rate orders of the Interstate Commerce Commission. Similarly, it is not always possible to classify a function as quasi-judicial or executive."\textsuperscript{16}

\textsuperscript{32}Kalinick v. Collins Co., 116 Conn. 1, 163 Atl. 460 (1932).
\textsuperscript{33}Happy Coal Co. v. Hartburger, 251 Ky. 779, 65 S. W. (2d) 977 (1933); State \textit{ex rel.} Schuster Realty Co. v. Lyons, 184 Wis. 175, 197 N. W. 585 (1924); Hayden v. R. Wallace & Sons Mfg. Co., 100 Conn. 180, 123 Atl. 9 (1923).
\textsuperscript{34}Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134 (1940); Fair v. Hartford Rubber Works, 95 Conn. 350, 111 Atl. 193 (1920).
\textsuperscript{35}Lilienthal v. Wyandotte, 286 Mich. 604, 282 N. W. 837 (1938); Shugg v. Anaconda Copper Mining Co., 100 Mont. 159, 46 P. (2d) 435 (1935).
\textsuperscript{36}Report of the Special Committee on Administrative Law, (1933) 58 Reports of American Bar Association 407, 411.
To make this shadowy distinction the basis for defining the powers of tribunals which

"owe their existence . . . to the generally recognized need for expert tribunals engaged in exercising continuing supervision over a given subject-matter"17 is to make a half-hearted attempt to fill that need.

Another proposed method for measuring the authority of an administrative body to modify its orders is to look to the nature of the agency seeking the authority. By this method some administrative agencies would have the right at all times, others would never have the right.18 This seems to be a completely irrelevant criterion, since it is more logical to determine the rights of an individual on the basis of the facts of a case rather than on the fortuitious circumstance that his rights are being determined by a particular type of tribunal.

It is submitted that a solution to this vexing problem might be to eliminate from the field of administrative law the concept of res judicata as known to the common law and to substitute therefor the simple query whether an administrative body has the power to rehear and redetermine a case involving substantially the same set of facts on which a prior ruling was based. When the problem is thus restated, we may argue that in the absence of statutory prohibition an administrative tribunal should have discretion to decide whether a case, once determined, should be reopened. This would seem to be more in keeping with the purposes for which administrative tribunals were created, for we must assume that administrative bodies, being specialists in their respective fields, are in a better position than courts of law to determine the necessity for a rehearing in any particular case and whether the rehearing and modification of an order are in the best interests of the public. There is relatively little danger that abuse of discretion by the agencies would result in deprivation of rights. The courts would be on the alert to guarantee due process in the event that the administrative action was arbitrary, unfair, beyond statutory power, when there was fraud in the proceedings, or when the necessity for the rehearing could not in reason be supported by the record. It would seem proper, therefore, and more consistent with the purposes of administrative procedure to rely on lack of due process rather than on res judicata to deprive an administrative body of the right to modify its ruling in a particular case.

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17Id. at 411.
THE United States House of Representatives performs its duties in accordance with

"perhaps the most finely adjusted, scientifically balanced, and highly technical rules of any parliamentary body in the world. Under them a majority may work its will at all times in the face of the most determined and vigorous opposition of a minority."1

In any article touching on the functions of the legislative branch of our government, one must distinguish at the outset between the "majority party" and a "majority of the members." "Majority party" refers to members of the political party that dominates the membership and, through its majority, is able to elect the Speaker, direct the policy to be pursued and control the committees by translating its majority in the House itself into a proportionate majority in the House Committees.2 A "majority of the membership," of course, refers to a majority of the members of the body, without regard to party affiliation. In the ordinary course,3 legislation, from proposal to enactment, is designed to meet the Administration's policies through action by the majority party.4 To this party belongs the responsibility for affirmative action, together with the natural concomitants—credit or blame for the success or failure of its policies.

Referring to the committee system President Wilson said

"I know not how better to describe our form of government in a single phrase than by calling it a government by the Chairmen of the Standing Committees of Congress."5

Through the committee system, a smaller and more workable group may carefully study and consider proposed legislation. The controls exercised by the majority party over the committees are both numerous and effective. For example, if the Administration is opposed to a proposal, reference to a committee ordinarily spells its doom, either by outright

2In the present (77th) Congress, there are 47 standing committees and 6 special committees of the House of Representatives.
4"Legislators conceive few of the great mass of statutes enacted every year. This is particularly true of Congressmen, because for the most part they have passed the inventing stage . . . . Probably more than half the business, measured by importance, comes directly or indirectly from the Departments of Bureaus of the Government." So says Robert Luce, former Representative from Massachusetts in his notable book. Luce, Congress (1926) 3.
5Woodrow Wilson, Congressional Government (1885) 102.
defeat or by refusal of the committee to act.\textsuperscript{6} Occasionally, however, the sentiment of a committee to which proposed legislation would normally be referred is known to the Speaker to be contrary to the Administration's wishes. In such circumstances, the Speaker may, by using a minor part or a secondary purpose of the bill as a basis of reference, assign it to a committee known to be in agreement with the wishes of the Administration.\textsuperscript{7} His reference of public bills is final, subject only to recall by a majority vote of the House with instructions for reassignment to another committee.\textsuperscript{8}

When the unusual happens, and a bill, opposed by the majority party, is favorably reported by a committee, it is placed on either the Union\textsuperscript{9} or House Calendar,\textsuperscript{10} where it may still be blocked effectively. It is extremely unlikely that a favorably reported bill, when contrary to the Administration's wishes, will ever be considered by the House on its merits by merely waiting its turn on the calendar. Any bill on either the House or Union Calendar may at the request of a member be placed on the Consent Calendar,\textsuperscript{11} but, the objection of three members is sufficient to deny its consideration under the Consent Rule. It naturally follows that a measure without Administration support has no chance of passage whatever under this rule.

From a practical standpoint, there remains but one means of bringing a controversial bill up for consideration. That means is by way of a favorable rule from the Rules Committee.\textsuperscript{12} This committee is dominated

\begin{itemize}
  \item \textsuperscript{6}In the 76th Congress, Jan. 3, 1939 to Jan. 2, 1941, 11,358 bills and joint resolutions were introduced in the House, 3,113 were reported by committees, and 1,403 were passed by the House. Of those passed, 1,005 became public laws, and 657 became private laws; 78 were vetoed, and 22 were pocket vetoed. \textit{Calendars of the United States House of Representatives and History of Legislation}, (Final Ed., 76th Cong., 1941) 338.
  \item \textsuperscript{7}"Tradition and unwritten law require that the Speaker apply the Rules of the House consistently, yet in the twilight zone, a large area exists where he may exercise great discrimination and where he has many opportunities to apply the rules to his party's advantage."
  Riddick, \textit{Congressional Procedure} (1941) 50.
  \item \textsuperscript{8}\textit{House Rules and Manual}, 77th Cong. (1941) Rule XI.
  \item \textsuperscript{9}Rules, \textit{supra}, note 8, Clause 1, Rule XIII: "First. A calendar of the Committee of the Whole House on the state of the Union, to which shall be referred bills raising revenue, general appropriation bills and bills of a public character directly or indirectly appropriating money or property."
  \item \textsuperscript{10}Rules, \textit{supra}, note 8, Clause 1, Rule XIII: "Second. A House Calendar, to which shall be referred all bills of a public character not raising revenue nor directly or indirectly appropriating money or property."
  \item \textsuperscript{11}Rules, \textit{supra}, note 8, Clause 1, Rule XIII: "Third. After a bill has been favorably reported and shall be upon either the House or Union Calendar any Member may file with the Clerk a notice that he desires such a bill placed upon a special calendar to be known as the 'Consent Calendar'."
  \item \textsuperscript{12}All proposed action touching the rules, joint rules, and order of business are referred to the Committee on Rules. Without the sanction of the Rules Committee special considera-
by senior members of the majority party, and may, as it sees fit, submit to the House membership special rules. These must be adopted by a majority of the House. This grants a right-of-way on the floor of the House for consideration of particular legislation. However, the powers of the Rules Committee are broad, and it may refuse to grant a special rule, or it might grant a rule of such a prejudicial nature as to make the passage of the bill virtually impossible.

When the majority of the members have the same attitude toward proposed legislation as the Administration, the control which the party has over the disposition of a bill is democratic enough. If, however, the majority party could, by exercise of these controls, legislate, in spite of the dissent of its own members and the members of the minority party, a majority of the body would be impotent when its wishes differed from those of the controlling party, and the bulk of the nation would lack representation. Failure of the legislative process to reflect changing opinions of the members would be contrary to the American concept of representative government. Largely to protect the rights of the minority, a neat balance has been worked out through parliamentary procedure and rules, enabling the Administration to keep an effective control over legislation as long as it retains a majority of the members, while, at the same time, not denying the minority the right to be heard, and, if possible, to bring its strength to a majority. In this manner, we are able to maintain a government, neither radical nor conservative, but one which, through compromise, moves steadily forward. 14

A determined minority may at times, under the rules, as clarified by a sort of stare decisis, unique in the body, force consideration of legislation on the floor, in spite of the Administration’s plans. A recent example involved the question of limitations on the profits of those manufacturers of war equipment to be paid from funds appropriated by the

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Sixth Supplemental Appropriation Bill.\textsuperscript{16} This bill was sponsored by the Administration to provide funds for implementing the war effort. It contained no provision limiting profits. The need for the enactment of legislation limiting profits on war contracts was generally recognized.\textsuperscript{17} Committees of the House already had the entire subject of excess profits and profit limitations under consideration, but had made no recommendations. Passage of the Appropriation Bill was a foregone conclusion.\textsuperscript{18} Seizing upon the opportunity to attach such a measure to the "coat-tails" of a bill regarded as vital by the Administration, thereby forcing its consideration by the Congress and its ultimate approval by the President,\textsuperscript{19} a minority member offered two amendments.\textsuperscript{20} The first was ruled out on a point of order as seeking to "Legislate" in an "appropriation" bill, in violation of the House Rules.\textsuperscript{21} No point of order was raised against the second amendment, evidently because it was not regarded as legislation, but, rather, as a limitation on the use of the funds, a type of amendment permitted by the rules.

The Administration-sponsored, Appropriation Bill, including the profit limitation, passed the House and went to the Senate. The Senate could choose between accepting the House bill \textit{in toto}, striking out the amendment, or rejecting the amendment and substituting its own proposal. The first course was unacceptable to the Administration group in the Senate. The second seemed injudicious in an election, since it would be interpreted as indicating Senate objection to a limitation on war profits. Thus the Senate took the only alternative, and, after holding committee

\textsuperscript{17}See Cong. Rec., April 7, 1942, at 3479 \textit{et seq.}
\textsuperscript{18}A general appropriation bill has priority in the order of business before the House of Representatives. Eleven standing committees have such priority and have leave to report at any time on matters specified under House Rule XI, Paragraph 45.
\textsuperscript{19}Article I, § 7 of the U. S. Constitution, which places the veto power in the President, does not expressly deny him the right to veto separable items of Acts of Congress. "It is with respect to the power to veto items in appropriation bills that the veto system as it exists in the majority of the states is in marked contrast with that of the Federal Government. In the Federal Government no such power is conferred upon the President. WILLOUGHBY, PRINCIPLES OF LEGISLATIVE ORGANIZATION AND ADMINISTRATION (1934), 77-87. See also Cong. Rec., April 21, 1942, at 3784, Statement by Senator Vanderberg on item veto. Mr. Vanderberg points out the fact that 39 states now have provisions for item veto, and gives citation to the various State constitutions on the subject.
\textsuperscript{20}Cong. Rec., March 28, 1942, at 3230, 3231.
\textsuperscript{21}House Rule XXI § 2 seeks to prevent delay of appropriation bills because of contentions over proposed "riders." However, amendments limiting or "retrenching" are in order, "In construing a proposed limitation, if the Chair finds the purpose to be legislative, in that the intent is to restrict executive discretion to a degree that may be fairly termed a change in policy rather than a matter of administrative detail, he should sustain the point of order." Remarks of Chairman Luce, Jan. 8, 1925, Cong. Rec., 68th Cong., 2d Sess. at 1497.
hearing, scuttled the House amendment and wrote into the bill a modified form of profit limitation with a clause providing for the re-negotiation of contracts, where necessary to curtail excess profits. Subsequently, the Senate and House versions were referred to a Conference Committee, to compose the differences, from which it emerged substantially as finally enacted.

The balance inherent in the system appears when the party in power loses its majority on a particular issue. An example resulted from the pressure for legislation curtailing the rights of labor. Here, over the objection of the Administration, and in spite of the desire of those majority members favoring such legislation to avoid a record vote, a shrewd use of the rules of the Senate resulted in assurances that such a bill would be given consideration by the Senate. It is in such cases that the skilled parliamentarian resorts to the outer fringe of the rules to save his principle, his party or his face.

WOODROW S. WILSON
R. M. SIMPSON


23 The conferees are appointed in the House by the Speaker and in the Senate by the President of the Senate and are generally the ranking members of the committees originally reporting the bill. They must confine themselves to the differences committed to them. The power of the conference committee is augmented by the fact that the "report which they bring in will not be adopted piecemeal by either House, but that it must be accepted or rejected as a whole and cannot be amended. This gives them great power, especially if their report is brought in late in the session when there is no time to examine it carefully to find whether or not the conferees have altered any legislation agreed upon by both houses or have included anything outside the differences committed to them." McCowan, The Congressional Conference Committee (1927) 15. In this manner, the Conference Committee is able to revamp the bill, making it conform to a large degree with the original wishes of the Administration.
NOTES

PARTIES SUBJECT TO NONRESIDENT MOTORIST STATUTES

THE American's propensity for travel has led to an ever-increasing flood of motorists across the country. State boundaries, viewed nonchalantly, are virtually swept aside by the onrush of this flood. And as with every flood, there has been the consequent injury and destruction and society has been forced to readjust itself. Indeed the flood of automobiles across the country leaving in its wake injured citizens created a perplexing problem, arising from the lack of personal jurisdiction over nonresident motorists involved in collisions within a given state. The Supreme Court has stated, "The authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established."

Jurisdiction has always been regarded as based on physical power. Because of the restrictive principle of jurisdiction, frequently, the local citizen was compelled to travel to a distant forum for the litigation growing out of collisions with nonresident motorists. To ameliorate this hardship, statutes providing for substituted service of process were enacted in nearly all the states. These statutes usually make the mere operation of a motor vehicle on the highways by a nonresident the equivalent of a formal appointment of a public officer as agent for receiving service of process. Early in their development the statutes were tested to determine their constitutionality. The Massachusetts statute was upheld by the Supreme court in the notable case of Hess v. Pawloski. The proper constitutional basis of these statutes seems to be that they are a rightful exercise of the states' police power. The agency fiction is the particular

\[1\] Pennoyer v. Neff, 95 U. S. 714, 720 (1877).
\[2\] McDonald v. Mabee, 243 U. S. 90 (1917); Michigan Trust Co. v. Ferry, 228 U. S. 346 (1912).
\[3\] A typical statute is that of New York. VEHICLE AND TRAFFIC LAW § 52: "The operation by a nonresident of a motor vehicle... on a public highway in this state, or the operation... of a motor vehicle... owned by such nonresident if so operated with his consent, express or implied, shall be deemed equivalent to an appointment by such nonresident of the secretary of state to be his true and lawful attorney upon whom may be served the summons in any action against him, growing out of any accident or collision...." See Note (1935) 20 IOWA L. REV. 654 for a collection of these statutes and an account of their development.
\[4\] 274 U. S. 352 (1927).
\[5\] Id. at 356, Justice Butler stated: "Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and nonresidents alike, who use its highways." For an excellent discussion of the constitutional basis of these statutes, see Culp,
THE JUDICIARY LOOKS AT THE STATUTES

It is not difficult to contemplate the mental gyrations of the courts when first they examined these statutes. Obviously, some maxims of statutory construction had to be applied, and furthermore there were very definite notions of social policy sought to be effectuated by the statutes. But most lawyers are disposed to look upon the familiar rules of construction with a knowing eye. Their usual inquiry is, "What is the underlying public policy which the court seeks to foster by adhering to this or that rule of construction?" An examination of the cases reveals that in interpreting these statutes the courts have vacillated between notions of social policy and a familiar maxim of construction with greater deference to the latter. The notions of social policy are unmistakable—the purpose and policy of these statutes is to furnish an effective civil remedy against nonresidents comparable to that against residents of the state, to encourage greater care in the operation of motor vehicles by nonresidents. And not without technical justification, the maxim of construction employed by the courts is that these statutes are in derogation of the common law and therefore must be strictly construed, and cannot be extended by implication to include persons not clearly within their terms. The present inquiry is, in view of the foregoing considerations which have guided the courts, what persons come under the statutes as parties, and in this respect, how are the statutes deficient?


"The courts are reluctant to regard the agency as a fiction. Nonetheless, when one considers that an essential characteristic of agency is control by the principal, he must conclude that the agency contract is merely a convenient fiction. To torture the word "agency" here contributes only to confusion, as it does in the field of domestic relations where used to explain the husband's liability for necessities bought by his wife.

There is valid service "if the statutory provisions in themselves indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice." Wuchter v. Pizzuti, 276 U. S. 13, 24 (1928). In McDonald v. Mabee, 243 U. S. 90, 92 (1917) cited supra note 2, the court stated: "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."

"See note 5, supra.


Statutes in derogation of the common law are not to be so strictly construed as to defeat the obvious intent of the legislature, Johnson v. Southern Pacific Co., 196 U. S. 1 (1913). This leading case seems to have been ignored by some courts as they jumped on the strict construction bandwagon. See cases cited note 14, infra.
Who Are Nonresidents?

The word "nonresident" has not escaped attack. However, the courts called upon to construe this word reached the proper result, namely, that, in the absence of an express provision including persons who were residents at the time of the collision and have subsequently removed, the operation of the statute is confined to persons who are nonresidents at the time of the collision. In Ohio, New York, Montana, Massachusetts and Pennsylvania, express provisions in the statutes indicate that actual nonresidence at the time of the suit regardless of residence at the time of the collision is the test for the operation of the statutes. This is a preferable form of statute.

PRINCIPALS AND AGENTS

Bowing obeisance to strict construction, the courts seized upon the word "operation" and interpreted it to mean only the physical act of working the mechanism of the automobile. As a necessary consequence, service was held not valid against one not personally operating his automobile. To restrict the statutes in this manner would frustrate their very purpose and policy. Consequently, the legislatures, aware of the restrictive effect of the courts' interpretation, amended the statutes to attribute to the principal the agent's actual manipulation of the automobile. At the present time nearly all the states' statutes provide expressly for service on the nonresident principals of nonresident agents who are operating their principals' automobiles. Only in the isolated

Wood v. White, 68 App. D. C. 341, 97 F. (2d) 646 (1938), cert. denied 304 U. S. 578 (1938) (statute held not to apply to one who was a resident of the District of Columbia at the time of the collision, and who became a nonresident prior to the time an action was instituted); Suit v. Shailer, 18 F. Supp. 568 (D. C. Md. 1937); Northwestern Mortgage Co. v. Noel Const. Co., 300 N. W. 28 (North Dakota, 1941) (nonresident was treated by this court as synonymous with non-domiciliary).


See note 16, infra.

Day v. Bush, 18 La. App. 682, 139 So. 42 (1932); Brown v. Cleveland Tractor Co., 265 Mich. 473, 251 N. W. 557 (1933); O'Tier v. Sell, 232 N. Y. 400, 169 N. E. 624 (1930) cited supra note 9. These cases were decided under the statutes prior to their being amended. See the amended statutes note 16, infra.

See cases cited supra note 14.

Mich. Comp. Laws (Mason, Supp. 1935) § 4790 as amended by Mich. Acts 1935, No. 110: "... the operation by a nonresident ..., or the operation on a public highway of this state of a motor vehicle owned by a nonresident if so operated with his consent, express or implied ..."; Vehicle and Traffic Law § 52 as amended by N. Y. L. 1930, c. 57: "The operation by a nonresident ..., or the operation ... of a motor vehicle owned by a nonresident if so operated with his consent, express or implied ..."; La. Gen. Stat. (Dart, 1939) § 5296: "... the operation by a nonresident or his authorized employee. ..."

See Note (1935) 20 Iowa L. Rev. 654 (collection of 33 statutes); Bigham v. Foor, 201
instance was this result achieved without the benefit of legislative action.\textsuperscript{18}
This line of cases serves best to illustrate the effect of the courts’ adherence to strict construction.

With some deference to strict construction and with a sound notion of social policy, the courts have refused to permit service on the nonresident principal of a resident agent driving his own automobile.\textsuperscript{19} Possibly the basic reason why the courts refuse service under these circumstances was best stated by the New York court in \textit{Wallace v. Smith}:\textsuperscript{20}

"The law permitting service by the means suggested may be necessary in certain cases and may bring about a very just result. If it is to be extended so that it cover a case of this character, it may be subject to great abuse. A person or corporation which is neither the owner nor the operator of a car may be called to some distant state to defend a personal injury action on the allegation that a person operating a car in that state was doing so as the agent of the person or corporation sought to be made defendant. The statute was never intended for such a purpose. To permit such a practice would result in very great injustice."

Such a clear and unhesitating statement of social policy as the reason for a decision is seldom found in the cases decided under these statutes. On the other hand, it might be argued that the courts in refusing to permit the principal to be served on this basis are making an elusive and difficult distinction between a matter of jurisdiction and one of defense. It would seem that the distinction can not be made until the facts are determined; and as a practical matter, a decision then on either ground would effect the same result. It must be remembered that jurisdiction in these cases is not dependent upon liability.\textsuperscript{21}

\textbf{Who May Be Plaintiff?}

It would seem there might be some question whether a nonresident...
might sue under the statute. Social policy has influenced the courts in interpreting the statutes as extending their convenient redress to nonresidents. Certainly in most cases the better place for suit is where the accident occurred, where the evidence is available. In permitting nonresidents to sue under these statutes the courts have stated that the public interest purpose of the statutes, i.e., protection of person and property, is equally applicable to nonresidents.

INFANTS

The validity of service on infants is particularly interesting because of the agency fiction in these statutes. It would seem that if the agency contract fiction were closely adhered to, service on a minor would be invalid since it is based on an agency created by an implied agreement which an infant may repudiate at his election. But, once again, guided by the obvious purpose of the statute, the New York court upheld service on a minor in Gesell v. Wells. As the court stated:

"... It is an exercise of the police power of the state, reasonably calculated to promote care and accountability on the part of all who use its highways for the operation of dangerous machines such as are motor vehicles. Surely they are not less dangerous in the hands of minors. It is inconceivable that there should have been any legislative intent to exclude minors. But it is urged that the statute in question is based upon an implied agreement which, in the case of an infant, may be repudiated at his election. It would be strange if a police regulation could be thus avoided."

It is evident from the disposition of this case that the court felt the substantial basis for sustaining service was not close compliance with the agency contract fiction but rather the effectuating of the police power purpose. The court viewed the agency fiction as not contractual in the strict sense but as an obligation imposed by the sovereign power of the state upon the act of coming into the state and using the state's highways. It would seem that the obligation imposed by the statute could not be evaded, disaffirmed, or repudiated because of an agency principle.


23Ibid.


25Ibid.
Notes

Personal Representatives

Possibly the worst deficiency of the statutes is that they fail to provide for substituted service on the personal representative of a deceased non-resident motorist.\(^{26}\) Certainly many collisions result in the death of some of the parties involved. An illustrative case is *Donnelly v. Carpenter*.\(^{27}\) Substituted service on the personal representative of the deceased non-resident motorist, attempted under the Ohio statute, was not allowed. The court based its decision on a fundamental principle of agency, namely, that the death of the principal revokes the authority of the agent unless the power be coupled with an interest.\(^{28}\) This result makes it clear that the Ohio court thought the substantial basis of sustaining substituted service was the agency contract fiction.

To refuse service on personal representatives does not effect the purpose of the statutes. Should justice to the plaintiff be made to depend upon whether the alleged tortfeasor died as a result of the collision? Since it was the purpose of the statutes to subject a nonresident to the jurisdiction of the courts of a state, in the same measure as a resident, should not the statute be held to have application also to the personal representative of a deceased nonresident motorist in view of the fact that the personal representative of a resident is subject to suit and process for the torts of his decedent?\(^{29}\) However, guided by the maxim of strict construction and using the rule of the *Donnelly case*, the courts felt it necessary to refuse substituted service on personal representatives although most of the courts suggested that personal representatives be expressly included in the statutes.\(^{30}\) One court even suggested express terms for the amendment.\(^{31}\) In view of the desirability of expressly including personal representatives from a standpoint of social policy,


\(^{28}\)Hunt v. Rousmanier's Adm'r's, 21 U. S. 174 (1823).

\(^{29}\)"By statute, most states have abrogated the common law and have permitted suits by or against the representatives of the dead claimant or wrongdoer." Goodrich, *Conflict of Laws* (2d ed. 1938) § 98. Whether there is survival depends upon the law of the place of the wrong. Goodrich, *Law Governing Claims Against Deceased Tortfeasor* (1934) 19 Pa. Bar Ass'n Q. 220. If tort actions do not survive in the personal representative's state, relief must be denied. Herzog v. Stern, 264 N. Y. 379, 191 N. E. 23 (1934) *but see* the vigorous dissenting opinion of Judge Hubbs. Also cf. (1934) 44 Yale L. J. 158, 160.

\(^{30}\)See note 26, *supra*.

it is perhaps worthy of inquiry just how the amendment would survive attack.

How would the statute survive an attack based on jurisdictional principles? Undoubtedly it would be assailed as a provision for substituted service on an individual who never entered the state. In the light of precedent, the statute would be particularly vulnerable. But as one writer has stated: 32

"The trend of recent decisions seems to be away from the traditional concept of jurisdiction as based upon 'physical power' and toward the adoption of functional approach to the problem: if the exercise of judicial authority over nonresidents is factually reasonable, there is an increasing likelihood that a statute permitting such action will be upheld."

Moreover, since the courts have permitted substituted service on the absent principal of an agent personally operating the principal's automobile, 33 it is difficult to see why the same courts would not permit service on the personal representative of the deceased non-resident motorist. In neither case has the person to be subjected to service entered the state. The nonresident motorist statutes as they exist today represent a very definite extension of the Pennoyer case, and to approve the suggested amendment would represent only a slight extension. Such an enlargement is desirable when the social considerations are measured. 34

Another vulnerable spot of the suggested statute is the doubtful constitutionality of a provision for suit against officers appointed by the courts of another state. 35 The basis of the cases holding similar statutes unconstitutional is that a foreign judgment against a personal representative is not provable in the state which appointed him 36 because it is regarded an assumption of jurisdiction which conflicts with the exclusive authority of another state over a matter within its jurisdiction, and therefore


33See note 17, supra.

34Of course this would necessarily require ignoring the incident of agency that death of the principal revokes the authority of the agent. However, jurisdiction here depends upon the state's power to regulate dangerous instrumentalities and not upon the agency contract fiction. Scott, Jurisdiction Over Nonresident Motorists (1926) 39 Harv. L. Rev. 563. The approach of the New York court in Gesell v. Wells, cited supra note 24 would seem to be the proper one, i.e., ignoring the incident of the agency contract fiction to give effect to the purpose of the statute.


36BEALE, loc. cit. supra note 35.
violates the due process clause of the Fourteenth Amendment.\textsuperscript{37} Still this difficulty does not appear insuperable. It has been suggested in the cases\textsuperscript{38} and by a leading author\textsuperscript{39} that if the state which appoints the personal representative has indicated it will enforce a foreign judgment entered against its personal representatives, or allows foreign personal representatives to be sued, then another state may validly take jurisdiction of the representatives of the former. But applying this to the suggested amendment, it is readily seen, therefore, that to come within the proposed theory, and to be of any practical value, it would be necessary that the amendment be universally adopted, and that courts enforce foreign judgments entered against their officers as a matter of comity.

In view of the doubtful validity of the proposed amendment, a solution for a limited number of cases is indicated by the Supreme Court of Illinois. \textit{Furst v. Brady}\textsuperscript{40} presented a typical factual situation. There was, however, the added element that the nonresident decedent carried automobile liability insurance with a Missouri corporation licensed to do business in Illinois and amenable to process there. The Illinois court appointed an ancillary administrator on the ground that the insurance policy was an asset within the state.\textsuperscript{41} The court's legitimate purpose evidently was to provide an administrator within the state against whom claims might be asserted. Thus, a resident is enabled to present his claim in the manner sought by the nonresident motorist statutes against an ancillary administrator who must defend the suit.

\textbf{What Lies Ahead?}

From the brief survey of the statutes and cases, it is seen that the courts have been guided chiefly by the consideration that the statutes are in derogation of the common law and therefore must be strictly construed. The action of the legislatures in amending the statutes to attri-

\textsuperscript{37}Thorburn v. Gates, 225 Fed. 613 (S. D. N. Y. 1915); Helme v. Buckelew, 229 N. Y. 363, 128 N. E. 216, 217; see cases cited note 35 \textit{supra}.


\textsuperscript{39}Beale, \textit{op. cit. \textit{supra} note 35, § 514.1.}

\textsuperscript{40}375 Ill. 425, 31 N. E. (2d) 606 (1940), (1941) 27 VA. L. REV. 953, (1941) 54 HARV. L. REV. 1401. \textit{Accord:} Gordon v. Shea, 300 Mass. 95, 14 N. E. (2d) 105 (1938); \textit{In re Vilas,} 166 Or. 115, 110 P. (2d) 940 (1941); Robinson v. Carroll, 87 N. H. 114, 174 Atl. 772 (1934).

\textsuperscript{41}It is established that an ancillary administrator may be appointed in the state of the situs of the decedent's property. Vincent v. Sargent, 195 Mass. 133, 80 N. E. 826 (1907); Cooper v. Beers, 143 Ill. 25, 33 N. E. 61 (1892); Barrett v. Barrett's Adm'r, 170 Ky. 91, 185 S. W. 499 (1916); Spencer v. Wolf, 49 Neb. 8, 67 N. W. 858 (1896); \textit{RESTATEMENT, CONFLICT OF LAWS} (1934) § 467. If a claim against the insurer is considered a simple chose in action, it is an asset of the decedent at the residence of the debtor.
bute to the principal the agent’s actual manipulation of the automobile indicates that they are cognizant of the social policy sought to be effected by the statutes. Whether the legislatures will amend the statutes to include personal representatives seems doubtful in view of the difficulties to be encountered in upholding the constitutionality of the statutes. The suggested theory would necessitate action by all the legislatures. That this can be accomplished is at most very doubtful. The approach suggested, by *Furst v. Brady* can provide some relief but this is necessarily limited to cases where the nonresident decedent carries insurance with a company licensed to do business and amenable to service in the state of the collision. To afford complete relief, the amendment suggested above is necessary.

PAUL R. DEAN

**REPEAL BY IMPLICATION: RECENT INCONSISTENCIES OF THE SUPREME COURT**

COURTS are frequently presented with the problem of orienting the conflicting penumbras of two statutory schemes. The problem is most clearly presented when a certain standard of conduct is prohibited by the policy of one congressional objective and allowed by the policy of another. There are two solutions. The court, through a reading of the whole statutory history of both, can read into the latter statute a repeal by implication of the earlier so far as the repugnancy exists. Or it can consider both congressional objectives on a parity and turn the problem of orientation over to the Congress. In situations where the history of the later statute fails to disclose any reference to the other congressional objective, it is safe to say the courts will return the problem to the Congress. And in cases where some reference is made but the intention to repeal is ambiguous, the prevailing judicial attitude is the same. Yet, the matter of reading repeal, despite ambiguous statements in the statutory history is at times not beyond the judicial conscience. To ascertain the criteria upon which the courts will read out a repeal would carry the legal mind beyond the realm of the legal syllogism and into the domain of speculative metaphysics.

The judicial approach to the problem of blending two statutory schemes is illustrated by a comparison of *United States v. Hutcheson*¹ and *Southern Steamship Co. v. National Labor Relations Board.*²

The method of statutory orientation used in the *Hutcheson case* which

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read precedence into the standard of conduct prescribed by the Norris-LaGuardia Act\(^3\) and forced the Sherman Antitrust Act\(^4\) to give ground would, if used in the *Southern Steamship case*, have read precedence into the National Labor Relations Act\(^5\) and forced the Mutiny Statutes\(^6\) to accede in the extent of their repugnancy. This would not have defeated the fundamental objectives of the Mutiny Statutes as disclosed by an over-all reading of their history.\(^7\)

The parallel between the two cases is remarkable in its similarity of statutory schemes. In the *Hutcheson case* the standard of conduct pertained to non-violent striking activity. The policy of the Norris-LaGuardia Act protected such activity, yet that same standard of conduct was attacked under the Sherman Antitrust Act as being concerted action in restraint of trade. The court by a historical reading of both

7Rev. Stat. §§ 5359, 5360 (1878), 18 U. S. C. §§ 483, 484 (1940); 4 Stat. 775-776 (1835), 18 U. S. C. §§ 483, 484 (1940). In opposition to a proposed amendment to the Act of 1835 Senator Clayton said the Act was to apply only "to conspiracies by the crew to neglect their duties so as to endanger the safety of the ship and crew." 2 Cong. Globe 265 (1835).
17 Stat. 262, 273 (1872), 46 U. S. C. § 541 (1940). This act made liable to punishment seamen who engaged in a combination "with any other or others of the crew to disobey lawful commands or to neglect duty." This clause was probably applicable to strikers.
30 Stat. 755, 760-761 (1898), 46 U. S. C. § 569 (1940). This act repealed the section of the Act of June 7, 1872, which might have been applicable to strikers.

The purpose of the 1898 Act as disclosed by Rep. McGuire, who had introduced the original bill, was to accord sailors "rights that are common to American citizens in all other trades, callings and occupations under the American flag ... [i]t proceeds upon the principle that the sailors in our merchant marine service should, in their personal rights, be placed upon equality with American citizens engaged in other industrial disputes." 28 Cong. Rec. 6288 (1896).

A portion of the Committee report reads: "your committee ... are not unmindful of the inconvenience and loss that may occur to the vessel by reason of the seaman's disdain of his obligations of his agreement. In the case of employees on railroads great inconvenience and loss often follow a strike, but no one proposes imprisonment as a remedy." H. R. Rep. No. 1657, 55th Cong., 2d Sess. (1898).

38 Stat. 1164 (1915), 46 U. S. C. § 569 (1940). This act refers to what Congress thought to be the rights of seamen in port. The House report stated "By relieving seamen from any criminal proceeding for violating a contract to labor ... you place him exactly in the same position as other workmen." "... It is not proposed to prevent vessels from employing seamen in ports where they can secure them cheapest, but it is proposed by this bill to give seamen the right to leave the ship when in a safe harbor." An amendment read as follows "Section 6 amends the existing law so as to give the seaman the same freedom as landsmen when his vessel is in a safe harbor and to enforce proper discipline while at sea." The Clayton Act referred to in the *Hutcheson case* was passed at this same session of Congress.
statutory schemes and by a strained interpretation of the Clayton Act, found in the scheme of the Norris-LaGuardia Act an implied repeal of the Sherman Antitrust Act with respect to labor activity. In the Southern Steamship case the statutory problem was substantially the same. The policy of the National Labor Relations Act protected employees in their right to strike for a lawful objective. That same standard of conduct was attacked as being in violation of the Mutiny Statutes which forbade seamen to disobey the lawful commands of their superior officers. By a reading of the over-all statutory schemes the Court refused to sanction the strike, saying:

"It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."9

The action of the Board is always accomplished subject to judicial review, and had the Court itself chosen to ignore the equally important congressional objectives via the Hutcheson case, it would have been entirely proper. The fact remains, however, that the Court refused to sanction the strike, notwithstanding that an over-all reading of the Mutiny Statutes disclosed that "sailors in [the] merchant marine services should, in their personal rights, be placed upon equality with American citizens engaged in other industrial disputes"10 and that Congress had attempted "to give the seaman the same freedom as landsmen when his vessel is in a safe harbor . . ."11

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938 Stat. 730, 738 (1914), 29 U. S. C. § 52 (1940). Section 20 provided as follows:

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert from ceasing to perform any work or labor or from recommending, advising, or persuading others by peaceful means so to do . . . nor shall any of the acts specified in this paragraph be considered or held to be in violation of any law of the United States."

Mr. Justice Frankfurter held that the Norris-LaGuardia Act must be read in the light of the whole labor policy. In that respect § 20 of the Clayton Act made strikers immune from suit under the Sherman Act. This theory was adhered to in spite of the interpretation given § 20 of the Clayton Act by the Court in Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921) and Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n., 274 U. S. 37 (1927). These cases had considered § 20 to be inapplicable to substantive rights.

The basis of Mr. Frankfurter's theory rested on a sound basis, however. Statements made in the House Judiciary Committee, while considering the Norris-LaGuardia Act were as follows:

"The purpose of the Bill is to protect the rights of labor in the same manner as Congress intended when it enacted the Clayton Act, which Act, by reason of its construction and application by the Federal Courts, is ineffectual to accomplish the Congressional intent." H. R. Rep. No. 669, 72d Cong., 1st Sess. (1931) 3.


10See note 7, supra.

11Ibid.
The usual situation in which the problem of an implied repeal is raised involves two statutes of the same statutory scheme enacted pursuant to a similar congressional objective. The principle stated broadly is "that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law that all acts in pari materia are to be taken together as if they were one law . . . and if it can be gathered from a subsequent statute in pari materia, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meanings, and will govern the construction of the first statute."12

All situations do not and cannot occur to the legislative mind in the consideration of policy legislation; neither should the court expect to find all situations covered.

"A statute may indicate or require as its justification a change in the policy of the law, although it express that change only in specific cases most likely to occur in the mind. * * * If it has intimated its will, however indirectly,13 that will should be recognized and obeyed. (Italics supplied). * * * We have had occasion to point out the importance of giving "hospitable scope" to Congressional purpose even when meticulous words are lacking."14

It is upon these bases that the courts may assume to aid the legislature in the conflicting penumbras of two statutory schemes.

The extent to which the courts will go in finding an implied repeal is considerably narrowed when the principles are viewed in the light of the self-imposed limitations of the court. The limiting principles stated by Mr. Justice Hughes in United States v. Borden15 were: first, that repeals by implication are not favored;16 second, when there are two acts upon the same subject, the rule is to give effect to both if possible;17 third, the intention of the legislature to repeal must be clear and manifest;18 and fourth, there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old

12United States v. Stewart, 311 U. S. 60, 64 (1940); Tiger v. Western Investment Co., 221 U. S. 286, 309 (1911); Cope v. Cope, 137 U. S. 682, 688 (1891); United States v. Freeman, 3 How. 556, 564 (U. S. 1845).
15308 U. S. 188 (1939).
16General Motors Acceptance Corp. v. United States, 286 U. S. 49, 61, 62 (1932); Henderson's Tobacco, 11 Wall. 652, 657 (U. S. 1870); United States v. Tynen, 11 Wall. 88, 92 (U. S. 1870).
law is repealed by implication only to the extent of the repugnancy.\(^19\)

Probably there is an overindulgence of judicial imagination when the Court gathers indiscriminately from all sources of statutory debris to find the mind of Congress. In view of the limitations in statutory construction, the Court went far beyond the traditional limits in the *Hutcheson case*, where the evidence of congressional intent was meager and the repeal, which was implied, pertaining to an entirely different congressional objective. Notwithstanding the breach of tradition, it is a precedent for a judicial selection of one statutory scheme over another, especially so far as the *minutiae* of border-line cases are concerned and the fundamental objectives of Congress are not impaired.\(^20\)

In the *Southern Steamship case*, the Labor Board did not offer the National Labor Relations Act as a *causa debendi* for the Court’s finding a justification for the strike. The Board proceeded on two theories: first, that the history of the Mutiny Statutes themselves disclosed an intent on the part of Congress to withhold application of the statute in situations where it was consistent with the safety of the ship; second, even if the statutes were applicable, a strike which did not endanger the ship was a mere technical violation and as such could not prejudice the Board’s right to order reinstatement.\(^21\)

In the face of the Board’s position, the possible basis for an implied repeal in the Mutiny Statutes, the theory of statutory construction in the *Hutcheson case*, the repugnancy of the Mutiny Statutes to the congressional labor policy, the Court in the *Southern Steamship case* chose to leave a solution of the problem to Congress. This was a reversion to tradition and *a fortiori* a repudiation of the judicial method of statutory “construction” employed in the *Hutcheson case*.

MILTON A. NIXON

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\(^19\) *Id.* at 363; See also, Pasados v. National City Bank, 296 U. S. 497 (1936).

\(^20\) The Court in the *Southern Steamship case* felt that an implied repeal of the Mutiny Statutes would impair the fundamental objectives of Congress.

RECENT DECISIONS

ADMINISTRATIVE LAW—The “Constitutional Jurisdictional Fact” Theory—Inapplicable Where United States Court Sits As State Court

The much-disputed doctrine of “constitutional jurisdictional fact” was recently relied upon by the appellant in a District of Columbia compensation case. The Workmen’s Compensation Act of the District of Columbia is merely an extension of the provisions of the Longshoremen’s and Harbor Workers’ Compensation Act, 44 STAT. 1424 (1927), 33 U. S. C. § 901 et seq. (1940), which is made applicable to the “injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term ‘employer’ shall be held to mean every person carrying on any employment in the District of Columbia, and the term ‘employee’ shall be held to mean every employee of any such person.” D. C. Code (1941) tit. 36, § 801. Appellant, a resident of the District of Columbia, was injured in Maryland while in the employ of a construction company. He claimed and was awarded compensation under the Maryland law. He then filed a claim under the more liberal provisions of the District of Columbia Act. The deputy commissioner rejected his claim, chiefly on the ground that no employment existed in the District of Columbia, as required by the Act, and thus the deputy held he was without jurisdiction to make the award. Appellant sought a mandatory injunction in the District Court, alleging that the deputy’s order was not in accordance with law and was not supported by the evidence, and later, by amended complaint, also asked that the evidence be reweighed by the District Court in a trial de novo. The District Court held that appellant was not entitled to an independent judicial review of the evidence, and upon consideration of the record held that there was substantial evidence to support the findings and order, and dismissed the complaint. Appellant appealed from the District Court’s refusal to reweigh the evidence and determine for itself the facts. His principal contention was that under the doctrine of Crowell v. Benson, 285 U. S. 22 (1932), the question of whether the employer-employee relation existed was one of “constitutional jurisdictional fact” and thus one as to which the deputy could not make conclusive findings, and the District Court must make an independent inquiry itself of the question. Held, the decision in Crowell v. Benson, supra, was reached chiefly on the theory that a decision to the contrary (i.e., that in cases where there was present a constitutional limitation the administrative board’s decision might be final) would unconstitutionally restrict the judicial power granted by Art. III of the Constitution to the Federal courts, by requiring them to reach a conclusion on a record made before another body. Thus, the doctrine has no application as to the power, either in the Federal Government or a State, to make an administrative decision final where a constitutional limitation is lacking. As Congress was exercising the powers of a state, as it may do under Sec. 8 of Art. I, Keller v. Potomac Electric Power Co., 261 U. S. 428, 482 (1923), when it made applicable the federal compensation act to the District of Columbia, the same considerations that govern the state’s delegation to an administrative body of the power to make final decision on all fact questions govern this case. Numerous decisions have held that a state may validly so delegate its power. Helfrick v. Dahlstrom Metallic Door Co., 256 N. Y. 199 (1931), aff’d, 284 U. S. 594 (1932). The doctrine of constitutional jurisdictional fact was held to have no application, then, and the deputy’s findings were final if supported by substantial evidence. As there was evidence on both sides as to the existence of the employer-employee relation, the deputy’s findings and the District Court’s refusal to reweigh the evidence de novo were affirmed. Gudmundson v. Cardillo, Deputy Commissioner, 126 F. (2d) 521 (App. D. C. 1942).
The development of the modern "jurisdictional fact" theory, brought about primarily by the decision of the Supreme Court in Crowell v. Benson, evoked much discussion and some apprehension as to its effects on administrative procedure in general. Briefly, the theory, in its application to administrative law, is that where a legislative enactment is interpreted as purporting to confer on an administrative body the authority to act only with regard to a certain definite and particular class of cases, and no others, then the question whether or not a particular situation was in fact of the type specified by the statute (upon the decision of which question the presence or absence of power or jurisdiction in the administrative agency to act depends) must be decided de novo by a court. If the restriction or limitation of the statute's application to certain specified cases or situations springs from an interpretation of the statute itself, the case is one for the application of the doctrine of "jurisdictional fact"; if the limitation springs from the Constitution, the "constitutional fact" theory, as it is sometimes called, may be invoked. The principal difference, then, in the two theories is the source of the limitation.

Crowell v. Benson is the leading case on the "constitutional fact" theory. In that case it was held, in a suit to recover compensation under the federal Longshoremen's and Harbor Workers' Act, 44 Stat. 1424 (1927), 33 U. S. C. § 901 et seq. (1940), that the existence of two conditions precedent to the applicability of the federal enactment must be found by a court to exist before a case could be brought under the Act. These two conditions precedent to the statute attaching to a particular case are the establishment of the fact that an employer-employee relation existed, and that the injury for which claim was filed occurred on navigable waters of the United States. The existence of these fact-questions, it was held, must be decided independently by a court, and not merely examined to see whether there was substantial evidence to support the findings. An administrative decision thereon could not be final.

Mr. Justice Brandeis, in the dissenting opinion, argued that if the fact of the employment were so fundamental as to require a court review de novo, then so should be the fact of the existence of the injury, or its occurrence during the course of employment, or the fact that it was not intentionally self-inflicted, inasmuch as all were elements which were required to be proved under the Act in order to impose liability without fault. Although under the Act proof of the existence of the employer-employee relation was one essential to compensation, argued the minority, that fact was not jurisdictional, but rather was a question going to the applicability of the substantive law and not to the administrative agency's jurisdiction to hear the case. Crowell v. Benson, supra, at 85.

The decision of the Court of Appeals in the principal case is typical of the judicial trend followed since the evolution of the constitutional jurisdictional fact theory. As previously stated, the theory incurred much discussion and little criticism. In its final analysis the majority decision in Crowell v. Benson was strongly indicative of the unwillingness of the courts to give to an administrative agency the power to adjudicate finally, while the minority was in substance propounding the views of the advocates of the administrative system. Landis, The Administrative Process (1938) 123 et seq. It was feared that the doctrine's admittedly strong syllogistic reasoning, if carried to its logical conclusions, would require a judicial review de novo of the administrative board's decisions in all cases involving a jurisdictional fact. Dickinson v. Benson, Judicial Review of Administrative Determination of Questions of "Constitutional Fact" (1932) 80 U. of Pa. L. Rev. 1055. This would have in turn necessitated to a great degree judicial review of such decisions of administrative boards, thus thwarting one of the chief purposes of the administrative system, i.e., prompt and final decisions.

However, the apprehensions of those advocates of the administrative system who
feared a liberal application of the doctrine of *Crowell v. Benson* have not, for the most part, materialized. In the federal courts the "constitutional jurisdictional fact" theory has been narrowly construed, as in *South Chicago Coal and Dock Co. v. Bassett*, 104 F. (2d) 522 (C. C. A. 7th, 1939), and in some situations in which it would seem that the doctrine would have been directly in point, the failure to either apply it or cite *Crowell v. Benson* is indicative of the favor with which the minority opinion in that case is being viewed. See, Note (1940) 25 CORN. L. Q. 274 for a discussion of these cases.

As the decision in the *Gudmundson case* indicates, it has been generally held that there is no constitutional limitation involved in a state delegation of power to an administrative body to make its findings final as to all questions of fact, *Helfrick v. Dahlstrom Metallic Door Co.*, *supra*, and the rule applicable to such state delegation governs the extension of a federal compensation act to the District of Columbia, which for such purposes is regarded as a state. The doctrine of constitutional fact accordingly does not apply, the decision re-emphasizing again the narrowness with which the doctrine is being construed.

GEORGE J. KILROY

**ADMINISTRATIVE LAW—Wage-Hour Administrator Held Not Empowered to Delegate Subpoena Power**

Section 4 (c) of the Fair Labor Standards Act, 52 STAT. 1060 (1938), 29 U. S. C. §§ 201, 204 (c) (1940), provides that the principal office of the Administrator of the Wage and Hour Division of the Department of Labor "shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place." Section 9 of the Act incorporates by reference the provisions contained in §§ 9-10 of the Federal Trade Commission Act, 38 STAT. 722 (1916), 15 U. S. C. §§ 49-50 (1940), under which the Commission may require the attendance and testimony of witnesses and production of books and records by subpoena, and the district court within whose jurisdiction the inquiry is carried on may issue an order requiring the appearance of contumacious witnesses, or the production of withheld records. Held, these statutory provisions do not give the Wage and Hour Administrator authority to delegate the subpoena power. *Cudahy Packing Co. v. Holland*, 62 Sup. Ct. 651 (1942).

Adhering closely to the reasoning and language in *Lowell Sun Co. v. Fleming*, 120 F. (2d) 213 (C. C. A. 1st, 1941), where the identical problem was in issue, the Court declared that § 4 (c) of the Fair Labor Standards Act could not be construed as permitting the Administrator to delegate all his duties, since this would mean that he could delegate duties involving administrative judgment and discretion which the Act has in terms given only to him. See *Fair Labor Standards Act, supra* § 5 (a). The section was interpreted to mean merely that the Administrator and his representatives may exercise within and without the District of Columbia such powers as each possesses, and not that he could delegate all or some of his powers, including the power to issue subpoenas. Though under the Act there could be no penalty for not obeying a subpoena before a judicial order of enforcement, the Court expressed grave concern over the consequences of permitting unlimited authority to delegate the power to issue it. Notwithstanding that it would be unenforceable *per se*, the subpoena was described as having the appearance of an official command, and as such it was said to exercise a coercive tendency.

In a dissenting opinion, subscribed to by four justices, it was observed that "if the
policy underlying the opinion is a desire to see a more restrictive and discriminating use of the subpoena power, the requirement that the Administrator alone exercise the power seems idle." 62 Sup. Ct. 651, at 657. The Act covers approximately 15,500,000 workers employed by more than 360,000 employers throughout the United States and its possessions. For the fiscal year 1941 there were 41,399 complaints, 48,499 plant inspections, and 6000 subpoenas issued. It is questionable that the head of such a vast undertaking could exercise an independent judgment of the subject matter, scope and course of any desired investigation for the purpose of deciding whether to issue a subpoena and determining what to request through it. The dissent states that it is sufficient for him to formulate a general policy which is to govern the issuance of subpoenas. An administrative officer may delegate his authority to some degree, so long as he supervises and directs the execution of his duties.

It is established that heavy administrative duties will warrant even the delegation of quasi-judicial functions—the gathering, sifting, and analyzing of evidence. Morgan v. United States, 298 U. S. 468, 481 (1935). See Nolde & Horst v. Helvering, 122 F. (2d) 41 (App. D. C. 1941). When a statute does not grant a general power to delegate duties the officer or board entrusted with its execution is not necessarily precluded from availing itself of the aid of subordinates. One of the issues presented in Southern Garment Mfrs. Ass'n v. Fleming, 122 F. (2d) 622 (App. D. C. 1941), Administrative Law (1942) 30 Georgetown Law Journal 375, was whether the Administrator of the Wage and Hour Division could delegate the duty to hold hearings on recommendations made by the industry committees created under the Act. The controlling section (FAIR LABOR STANDARDS ACT, supra § 208 (d)) reads in part: "Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report. . . ." It was unanimously held that this particular exercise of the grant of power to appoint aides, "a power which otherwise might be implied from the amount and diversity of work such an agency is called upon to perform," was a mark of sensible administration. Southern Garment Mfrs. Ass'n v. Fleming, supra at 625. See Opp Cotton Mills v. Administrator, 312 U. S. 126, 147 (1941). Section 11 (a) of the Act empowers the Administrator "or his designated representatives" to make investigations and gather data regarding the wages, hours, and other conditions and practices of employment, and for this purpose provides that he may enter and inspect such places and records, and question such employees "as he may deem necessary or appropriate to determine whether any person has violated any provision" of the Act. The majority found no causal relationship between this power of inspection at the employer's place of business and the power to issue subpoenas; it inferred instead that the specific grant of authority to delegate the power of inspection and the omission of the authority to delegate the subpoena power shows a legislative intent to withhold the latter. As against this view, the minority posits the conclusion that the power to make investigations must be implemented by the power to issue subpoenas, the latter being only a means of performing the statutory obligation to investigate, especially when this is impeded by a refractory employer.

Remedial statutes, like the one under consideration, are entitled to a liberal construction. Collins v. Kidd, 38 F. Supp. 634 (E. D. Tex. 1941); Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 40 F. Supp. 4 (N. D. Ala. 1941). If a particular provision is not clear and unambiguous the more reasonable of possible constructions should be adopted, as where a watchman on a bridge spanning navigable waters was said to come under the Act as one engaged "in any process or occupation necessary to the production" of goods for interstate commerce (FAIR LABOR STANDARDS ACT, supra § 3 (j)). Atkocus v. Terker, 30 N. V. S. (2d) 628 (1941). Watchmen
in plants, who had to fire an engine to keep up steam, have also been included as coming under the protection of the Act. *Wood v. Central Sand & Gravel Co.*, 33 F. Supp. 40 (W. D. Tenn. 1940); *Hart v. Gregory*, 218 N. C. 184, 10 S. E. (2d) 644 (1940). The construction which will facilitate performance of the administrative duties should govern, unless fundamental rights are thereby impaired. *Cudahy Packing Co. v. Fleming*, 122 F. (2d) 1005 (C. C. A. 8th, 1941).

The patent ambiguity of the Act on the question of who can make use of the subpoena power, resulting from the interpolation of provisions designed for a different organizational set-up, has resulted in a series of conflicting opinions on the question of the enforceability of subpoenas issued by subordinates of the Administrator. This practice has been upheld in *Fleming v. Lowell Sun Co.*, 36 F. Supp. 320 (D. Mass. 1940); *Cudahy Packing Co. v. Fleming, supra; Fleming v. Arsenal Building Corp.*, 38 F. Supp. 675 (S. D. N. Y. 1940). A contrary conclusion was reached in *Lowell Sun Co. v. Fleming, supra*, and in the principal case. A third conclusion evolved in another case is that the authority can be delegated to regional directors and acting regional directors but is not redelegable by them, so that a subpoena issued by an attorney attached to a regional office was adjudged a nullity. *Fleming v. Easton Pub. Co.*, 38 F. Supp. 677 (E. D. Pa. 1941). In the last case the court was fully confident that § 4 (c) gave the Administrator authority to delegate any of the powers invested on him but felt impelled to restrict the power to issue subpoenas to responsible officials, none lower than the acting regional director, because of the “vast power inherent” in the process. In effect the court whittled its own interpretation of the statute.

In the principal case statutes are cited to show a congressional purpose not to authorize by implication the delegation of the power. These statutes have to do with agencies administered by a commission of three or more members, the administrative burden on whom is lighter than if each were acting as sole head. The first pertinent section cited reads in part as follows: “... the commission shall have power to require, by subpoena. ...” *INTERSTATE COMMERCE ACT*, 25 STAT. 859 (1891), 49 U. S. C. § 12 (1940). Under this provision it was the practice of members of the Commission to sign subpoenas individually; this was before the power was extended by § 17 (3) of the act, not mentioned in the decision, and given specifically to each member, the Secretary of the Commission, and any member of a board in connection with work referred to it. Clearly there was here an assumption of implied delegation.

A footnote in the case states that “the actual issuance of subpoenas, though not their signing, is delegated to subordinates in some of these agencies.” The Court made no comment about this practice, but directed itself to the “signing and issuance of subpoenas” delegated by the Wage and Hour Administrator. One would have desired the Court to follow up this separation of the signing and issuance of subpoenas with an analysis showing the practical difference between them, if any. If there is any difference, and the issuance can be delegated, then a mere signing by the Administrator, without more, certainly would not be adequate to allay the fears of the court that the power may be used abusively. Even then the Administrator would spend considerable merely signing his name to subpoenas. Of course, if the signing could be delegated, the issuance also could be delegated, for it would be somewhat awry to expect the Administrator to do the arduous and laborious work and have his aides merely sign it. If there is no difference between the signing and the issuance and it is insisted that this function cannot be delegated, the execution of the Act might be seriously hampered because of protracted investigations and the inability of the Administrator to devote much time to other than subpoena work.

Some support for the suggestion of the dissenting justices that an historic accident possibly accounts for the absence of an expressed grant of authority to the Wage and
Hour Administrator to delegate the subpoena power can be gleaned from the Bituminous Coal Act, 50 Stat. (1937), 15 U. S. C. § 828 (1940), which was cited in the original decision but later deleted, as was an erroneous conclusion regarding the exercise of the subpoena power in this agency. Section 838 of this act reads in part "... for the purpose of conducting its investigations, said Commission shall have full power to issue subpoenas and subpoenas duces tecum. ..." The authority is enlarged by implication in § 838 (b), which states that no person shall be excused from testifying or from producing books and records "in obedience to the subpoena of the Commission or any member thereof or any officer designated by it." It may safely be assumed that Congress would have legislated ample safeguards had it anticipated that judicial microprobings were to impede its declared purpose.

GILBERT RAMIREZ

BILLS AND NOTES—Drawer of a Check Is Not Charged with Knowledge of the Payee's Signature under Ordinary Circumstances.

Plaintiff alleges that the drawee banks paid money on indorsements forged by an officer of the plaintiff. The background of the fraud was this: The plaintiff manufactured boilers and distributed them through local dealers. When a purchase was made the local dealer was given a note which was indorsed to the manufacturer, and the balance due the dealer would be paid by check after the boiler was installed. The assistant treasurer and credit manager misappropriated funds between 1935-1936 by having the accounting department issue checks to dealers who were actually owed nothing. The fraudulent officer obtained these funds by having the dealer draw a check payable to him personally. However, the names of the payees of the eleven checks in question were forged in the beginning of 1937, and plaintiff knew nothing of these forgeries until September of 1937. Held, judgment for plaintiff. In the absence of proof of negligence on drawer's part the drawee of a check owes a duty to the drawer that his funds will be paid only in conformance to his order and to the correct party. There is no duty under ordinary circumstances for the drawer to examine the signature of the payee. Fitzgibbons Boiler Co. v. National City Bank, 39 N. E. (2d) 897 (N. Y. 1942).

The defense in the instant case was predicated on three main grounds: (1) that with respect to certain checks the drawee was not liable as they were bearer instruments; (2) that the drawer-depositor was negligent in not discovering the fraud; and (3) that assuming no negligence on depositor's part, it is estopped from asserting its claim due to an account stated concerning the checks in question.

Negotiable Instruments Law § 28 (3) declares that an "instrument is payable to bearer: ... when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable." The court refused to admit an affidavit in evidence that "the great majority of checks were signed in blank" by the president as there was no evidence in the record to uphold such a finding. Still, if this affidavit had been admissible the jury would have had to find that the maker knew the instrument was payable to a fictitious or non-existing person and fraud in obtaining the instrument is relevant. Caledonian Insurance Co. v. National City Bank, 208 App. Div. 83, 203 N. Y. Supp. (1924).

Banks by their contract with a depositor impliedly contract that they will pay out his money according to his demands, and to the correct payee. In the absence of negligence or facts sufficient to warrant an estoppel a bank at its peril cashes a forged check. Labor Bank and Trust Co. v. Adams, 23 S. W. (2d) 814 (Tex. Civ.
App. 1930); Borserine v. Maryland Casualty Co., 112 F. (2d) 409 (C. C. A. 8th, 1940). In the case under consideration the contention was that the failure to discover the fraud before the checks in suit were issued amounted to negligence sufficient to bar recovery. All courts agree that negligence of the drawer of a check will protect the bank provided the bank itself uses due care, Prudential Insurance Co. v. National Bank, 227 N. Y. 510, 125 N. E. 824 (1920), and provided further that such negligence bears a proximate causal relation to the wrong. Provident Savings Bank and Trust Co. v. Western and Southern Life Insurance Co., 41 Ohio App. 261, 179 N. E. 815 (1931); Jordan Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 87 N. E. 740 (1909); Defiance Lumber Co. v. Bank of California, 180 Wash. 533, 41 P. (2d) 135 (1935). What will constitute negligence depends on the facts of each particular case. Erickson v. Iowa National Bank, 211 Iowa 495, 230 N. W. 342 (1930), (drawer held negligent on forged instruments over a period of years by a failure to examine records after a warning to examine returned checks); Defiance Lumber Co. v. Bank of California, supra, (drawer was charged with loss on forged instruments for failure to check time cards and fraudulent foreman-timekeeper over a period of two years). Mere passage of time alone, however, is not the governing test. Jordan Marsh Co. v. National Shawmut Bank, supra, (over a period of five years depositor’s employee had forged 170 checks). It is necessary as pointed out in the instant case that there be some notice, and as here the faithless officer had not forged the indorsements prior to these checks in suit, there was no chance of detection by an examination of the returned checks. Neither was the complaint of one of the dealers who had given the assistant treasurer a check sufficient notice as the dealer mainly complained of an overcharge. The contents of this complaint did not contain material sufficient to call attention to the plaintiff of misappropriated funds, which they were at that time rather than forgery. In addition, the depositor, though he must examine returned checks for forgery of his signature, under ordinary circumstances owes no duty to the bank to detect a forgery of the payee’s name. Often he has no knowledge of the payee's signature. Darling Stores Inc. v. Fidelity Bankers Trust Co., 156 S. W. (2d) 419 (Tenn. 1941); Shipman v. Bank of State, 126 N. Y. 318, 27 N. E. 371 (1891); Detroit Piston Ring Co. v. Wayne County and Home Savings Bank, 252 Mich. 163, 233 N. W. 185 (1930). Unusual circumstances may, nevertheless, give rise to a duty to examine.

The statements rendered by the bank to the depositor can under proper circumstances amount to an account stated. In the principal case, the bank delivered the statements the first of February and March for January and February respectively. These included the forged checks. This question related back to the second defense of a duty to examine indorsements. If there had been a duty, the passage of time from February 1937 to September 1937 might have been more than reasonable in which to notify the bank, but even so as one court has said, “an account stated can always be opened upon proof of mistake or fraud.” Shipman v. Bank of State, supra.

Holding the drawer banks liable here does not seem unjust under the circumstances, especially as the bank has means of protection. A bank can always require identification, or as pointed out in this case they could have obtained a guarantee from the party presenting the check that the prior indorsement is valid. The bank in this case undoubtedly was lulled into its predicament by the fact that the forger was a respected officer of a firm with whom they had had previous dealings.

JOHN A. KOTTE
CONFLICT OF LAWS—Removal of Inter Vivos Trust from One Jurisdiction to
Another Shifts Law Governing Validity

William Donner, a domiciliary of New York, created there an *inter vivos* trust. His wife and children were the beneficiaries. The trust agreement provided that a majority of the adult beneficiaries, with the approval of the donor during his lifetime, were authorized to change the trustee. Subsequently a Delaware trust company was validly appointed trustee and the money, securities and property constituting the *corpus* of the trust were transferred to Delaware. The question then arose whether the law of New York or Delaware governed the validity and effect of the provisions of the trust. *Held,* the power to appoint a successor trustee in another state authorized removing the *situs* of the trust from one state to another with a consequent change of the law governing the essential provisions of the trust, notwithstanding a change of the beneficiaries' rights thereby. *Wilmington Trust Co. v. Wilmington Trust Co.,* 24 A. (2d) 309 (Del. 1942).

The law is well settled that the validity of a testamentary trust of personality is ruled by the law of the testator's domicile. GOODRICH, CONFLICT OF LAWS (2d ed. 1938) 422. But what law is to govern an *inter vivos* trust of personality is not well established. Note (1941) 89 U. of Pa. L. Rev. 360. The courts have seized upon one factor or a combination of several factors in arriving at a selection of the applicable law. The important factors to be considered are: the *situs* of the trust corpus, Curtis *v.* Curtis, 173 N. Y. Supp. 103, 185 Am. Dec. 319 (1918); Hutchison *v.* Ross, 262 N. Y. 381, 187 N. E. 65 (1933); the place of administration of the trust, Wilmington Trust Co. *v.* Wilmington Trust Co., 15 A. (2d) 153 (Del. Ch. 1940); Hutchison v. Ross, supra; Robb *v.* Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359 (1906): *Contra,* Fowler's Appeal, 125 Pa. 388, 17 Atl. 431 (1889); the domicile of the trustee, *Wilmington Trust Co. v. Wilmington Trust Co.,* supra; Hutchison v. Ross, supra; and the law intended by the settlor, if it has a substantial connection with the trust, *Wilmington Trust Co. v. Wilmington Trust Co.,* supra; Hutchison v. Ross, supra. Some of the less important factors are: the domicile of the donor of the trust, Liberty National Bank & Trust Co. *v.* New England Investors Share, Inc., 25 F. (2d) 493 (D. Mass. 1928); Swetland *v.* Swetland, 105 N. J. Eq. 608, 149 Atl. 50 (1930); the place of the execution of the trust instrument, Mercer *v.* Buchanan, 132 Fed. 501 (C. W. D. Pa. 1904); the domicile of the beneficiaries, Shannon *v.* Irving Trust Co., 275 N. Y. 95, 9 N. E. (2d) 792 (1937). The controlling law has usually been selected by weighing different combinations of these factors and adopting the law of that jurisdiction which is most intimately connected with the problem.

It is a rule based on practicality that whatever law governs the validity of a trust, problems of administration are governed by the law of the jurisdiction where the administration of the trust has its seat. *First National Bank v. National Broadway Band,* 156 N. Y. 459, 51 N. E. 398; Mercer *v.* Buchanan, supra; Swetland *v.* Swetland, supra; 2 BEALE, CONFLICT OF LAWS (1935) 1024. The instant case involves the validity of the trust provisions and is not a problem in administration.

At the time the trust was created in the instant case, the settlor was domiciled in New York; the trust corpus was there; the beneficiaries were there; the trustee was domiciled there; and the administration took place there. The settlor had not expressed an intention on the subject of the controlling law, but he made provisions so that another trustee might be appointed with the corpus shifted to him. Since all these factors related to New York, New York law governed all phases of the trust. But later when the corpus was shifted to Delaware, where the trustee was domiciled and the trust administered, the problem arose whether the law of New York or
Delaware applied. When the question of conflict of laws was first argued before the chancellor he reasoned that the change to Delaware was solely to affect administration and not to invoke a new body of law to govern the validity of the essential provisions of the trust. Wilmington Trust Co. v. Wilmington Trust Co., 186 Atl. 903, 910 (Del. Ch. 1936); (1937) 25 GEORGETOWN LAW JOURNAL 464.

When a trustee removes the corpus of a trust from one state to another the status of the trust is not changed, Swetland v. Swetland, supra; Beale, op. cit. supra, at 983. If, as in the instant case, the only distinguishing factor is a provision in the trust instrument that a new trustee may be appointed and the trust thereby removed to another jurisdiction, does it necessarily follow that there be "a consequent shifting of the controlling law"? It would hardly seem that it does under the prevailing law, unless there is a substantial difference in the situations (a) where there is provision in a trust instrument permitting a change of trustee which may result in shifting the trust to a different jurisdiction, and (b) where the trustee moves to another jurisdiction with the corpus, and the trust instrument has neither forbidden nor provided for the removal.

LEWIS A. MCGOWAN, JR.

COURTS—Federal Court Has Right to Enjoin Action in State Court Interfering with Back-pay Order

The National Labor Relations Board ordered the Sunshine Mining Company to make certain payments of back wages to employees. The District Court entered a decree enforcing the Board's order. The Board petitioned for an order restraining certain creditors of the employees from instituting, prosecuting or maintaining any action or proceeding to carry into effect writs or injunctive orders issuing from courts of the State of Idaho, which orders sought to restrain the Mining Company from paying directly to the employees the full amount of the back pay and to compel the Company to pay the whole or a part of such payments to persons other than the employees in satisfaction of claims of these third persons. A temporary injunction was issued with an order to show cause. The question presently before this court was whether the temporary injunction should be made permanent. The actions in the state courts are in the main suits by creditors of the employees to whom payment of back wages has been ordered by the Board. Writs of attachment and processes of garnishment arising from these suits had been served on the Mining Company. As a result of these suits and orders the Sunshine Mining Company was prevented from complying with the decree of the court enforcing the Board's order. Held, a writ of injunction shall be issued directed towards the persons bringing suit in the state courts of Idaho, permanently restraining all further proceedings by them against the Sunshine Mining Company. National Labor Relations Board v. Sunshine Mining Co., 125 F. (2d) 757 (C. C. A. 9th, 1942).

The problem presented to the court centers around the right inhering in a federal court to enjoin suits or proceedings in state courts. This question presents a very interesting judicial history. See Taylor and Willis, The Power of Federal Courts to Enjoin Proceedings in State Courts (1933) 42 YALE L. J. 1169; Warren, Federal and State Court Interference (1930) 43 HARV. L. REV. 345. Since the early days of our country's judicial history there has existed a federal statute expressly denying to federal courts the power to enjoin state proceedings. The original terms of this statute were unqualified: "... nor shall a writ of injunction be granted to stay proceedings in any court of a state." Act of March 2, 1793, § 5, 1 STAT. 334 (1793).
It has been suggested that this prohibition was due to the prevailing hostility to chancery practice. Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 Harv. L. Rev. 49, 96-100. However, it is submitted that the true cause, as indicated in *Oklahoma Packing Co. v. Oklahoma Gas and Elec. Co.*, 309 U. S. 4, 8 (1939), behind the prohibition was a desire to avoid friction between the federal government and the states. Regardless of the reason, the language of the statute indicates that a strict "hands off" duty was imposed upon the federal courts. However, there have been four subsequent legislative exceptions to the prohibitory provision: (1) in proceedings in bankruptcy; (2) by the terms of the Interpleader Acts; (3) by the Act to Limit the Liability of Shipowners; and (4) by the Frazier-Lemke Act. See *Toucey v. New York Life Ins. Co.*, 62 Sup. Ct. 139 (1941). The first of these exceptions, proceedings in bankruptcy, is the only section that has been incorporated directly into the prohibiting section of the Judicial Code. 36 Stat. 1162 (1911), 28 U. S. C. § 379 (1940). The words of the Interpleader Act of 1926, 44 Stat. 416 (1926), 28 U. S. C. § 41 (1940) leaves no doubt as to the federal courts' power to enjoin action in state courts under certain circumstances of interpleader: "Notwithstanding any provision of the Judicial Code to the contrary, said court shall have the power to issue . . . an order of injunction against . . . proceedings in any state court. . . ." See *Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 74 (1939).

On the basis that it was a "subsequent statute," *Providence and New York Steamship Co. v. Hill Mfg. Co.*, 109 U. S. 578 (1883), held that the Act to Limit the Liability of Shipowners, Rev. Stat. § 4285 (1875), 46 U. S. C. § 185 (1940), may be considered an implied legislative amendment to the statute prohibiting injunction. Because the Frazier-Lemke Act, 47 Stat. 1467 (1933), 11 U. S. C. § 203 (1940), gives the federal courts "exclusive jurisdiction" over the property of a farmer, upon the filing of a petition for relief, it is patent that this too must be an exception to the prohibition. *Kalb v. Feurstein*, 308 U. S. 433 (1940).

Through the Removal Acts, 1 Stat. 73 (1789), 28 U. S. C. § 71 (1940), which provide that when there should be a right to remove a suit from a state court to a federal court, upon the filing of a petition and the posting of a sufficient bond, the state shall "proceed no further in the suit", it has been held that the prohibition upon injunctions shall not apply to removal proceedings. *Dietzch v. Huidkoper*, 103 U. S. 494 (1880). This case relied upon *French v. Hay*, 22 Wall. 250 (U. S. 1874), which was the first case to hold that there could be an exception to the apparently absolute prohibition statute. See *Taylor and Willis, The Power of Federal Courts to Enjoin State Action*, supra.

Only one exception has grown up without the aid of statute, the so-called "res cases." *Toucey v. New York Ins. Co.*, supra. The underlying theory is that the court, federal or state, that first secures jurisdiction over the res withdraws it from the reach of the other. *Kline v. Burke Construction Co.*, 260 U. S. 226 (1922). Such an exception is salutary, for, in effect, it carries out the purposes of the original Act, viz., the prevention of physical friction. And, as was said in *In re Putnam*, 55 F. (2d) 73, 75 (C. C. A. 2d, 1932), "a scramble for possession would be an unedifying spectacle."

The instant case must be considered in the light of these established exceptions. It is patent that the statutory exceptions can have no application, for the facts at bar do not come under the aegis of any of the five statutes. Nor can the rule of the "res cases" be applied. Such application is impossible since the actions which are sought to be enjoined are *in personam*, and it is well established that the exception for the protection of prior jurisdiction applies only to actions *in rem*, not to actions *in personam*. *Kline v. Burke Construction Co.*, supra. The majority in the principal case, however, regard the six exceptions permitting injunction, as laid down in the
Toucy case, as not controlling here. They, it is submitted, rightly reason that the situation discussed in the Toucy case obtains only where there may be concurrent jurisdiction. Such situation is not found in the instant case. The award is the result of a statutory proceeding, over which, by the terms of the Act, the federal courts alone have jurisdiction. See Section 10 of the National Labor Relations Act, 49 Stat. 453 (1935), 29 U. S. C. § 160 (1940). There is no right or claim in the employees upon which the creditors can bring an action against the Mining Company, for the Board alone can take action to secure enforcement of its orders. Amalgamated Workers v. Edison Co., 309 U. S. 261, 264 (1939), and nothing in the Act authorizes an employee to make a claim. Agwilines v. N. L. R. B., 87 F. (2d) 146, 150 (C. C. A. 5th, 1936). The purpose of the Act is not the enforcement or creation of private rights, but is for public ends. See National Licorice Co. v. N. L. R. B., 309 U. S. 350 (1939); Agwilines v. N. L. R. B., supra. It is submitted that these public ends can best be served by a rule that discourages any attempt to interfere with the order of the Board. It is evident that the purpose behind the decision of the instant case was to protect the authority of the National Labor Relations Board and to guard its control over the award until such award is actually paid to the employee. The instant decision, in effect, carries out the evident spirit of the Act of 1793, which prohibited injunction.

THOMAS P. DALY, JR.

EVIDENCE—Plea of Guilty at Preliminary Hearing Inadmissible on Trial

Defendants were arrested for robbery. At the preliminary hearing they pleaded guilty while without counsel and without having been cautioned as to their rights. Later, upon being assigned counsel, they changed their pleas to not-guilty. At the trial the pleas of guilty were admitted in evidence against them. Held, a plea of guilty obtained at the preliminary hearing from a defendant who is without counsel and has not been warned concerning his rights cannot be used in evidence against him at the trial. Wood v. United States, App. D. C., March 9, 1942.

In this case is squarely presented a question the answer to which has varied almost from year to year and from jurisdiction to jurisdiction. As the court here said, “There is no controlling authority directly in point,” and, “Analogies from the most approximate decisions are perplexing.” In England the rule has been generally followed that confessions before the committing magistrate are competent evidence. This rule seems to have been adhered to even though the warning required to be given by the statute of 11 & 12 Vict. c. 42 s. 18 was not given. 2 Wigmore, Evidence (2d ed., 1923) § 848. In this country, “owing to the casual adoption of one and then another of the various competing principles, it cannot be said that the rulings . . . represent any marked attitude. On the whole they are liberal in spirit.” Ibid. § 852.

There is no question but that a confession voluntarily made by a person after an offense has been committed is admissible at the trial, subject only to the usual rules of competence. Subsequent withdrawal of the confession will affect only its probative value before the jury. The mere fact that the accused appeared in response to a subpoena and was not advised of his constitutional privilege has been held not to render the confession involuntary. Black v. United States, 301 U. S. 690 (1936); Powers v. United States, 223 U. S. 303 (1911); Thompson v. United States, 10 F. (2d) 781 (C. C. A. 7th, 1926).

However, there has been considerable condemnation of the practice of eliciting confessions by a magistrate at the preliminary hearing as inquisitorial and subversive
of the administration of justice. Brown v. Walker, 161 U. S. 591 (1895); Wilson v. State, 110 Ala. 1 (1895); Kelly v. State, 72 Ala. 244 (1882). Where there has been such a confession in the form of a plea of guilty and the court later allows the accused to change his plea to not-guilty, mere consistency would seem to require that the former plea be excluded. Kercheval v. United States, 274 U. S. 220 (1927); Jamail v. United States, 37 F. (2d) 576 (C. C. A. 5th, 1930). Coupled with the principle of consistency is the requirement of fair play. "The withdrawal of a plea of guilty is a poor privilege, if, notwithstanding its withdrawal, it may be used in evidence under the plea of not-guilty." White v. State, 51 Ga. 285, 289 (1873). See also United States v. Adelman, 107 F. (2d) 497 (C. C. A. 2d, 1939).

Although fairness and consistency would require the plea to be excluded, there is considerable authority for its admission. State v. Carta, 90 Conn. 79, 96 Atl. 411 (1916); State v. Briggs, 68 Iowa 416 (1886).

In the instant case, the court, after examining at some length the decisions bearing on the point, found that the true reason for the exclusion of the plea lies in the privilege against self-incrimination. The only purpose of the preliminary examination is to ascertain whether there is evidence to warrant the commitment and holding to bail of the accused. Beyond this the authority of the magistrate does not go. If the magistrate exceeds his authority and demands that the accused plead guilty or not-guilty, without first informing him of his constitutional privilege, the accused cannot be said to have voluntarily waived the privilege by speaking. "A prisoner, who is subjected to an inquisitorial examination, especially when he is unaided and unprotected by the presence of counsel, has his mind so oppressed by his calamitous situation as to be brought under the influence of disturbing forces against which it is the policy of the law to protect him." Kelly v. State, supra.

The preliminary hearing is an essentially judicial inquiry and constitutes a stage in the proceedings which finally determines the guilt or innocence of the accused. The court correctly holds that the privilege against self-incrimination, as guaranteed by the Fifth Amendment, applies to all of the proceedings against the accused, not merely to the actual trial. On this point the court says that the privilege would be worth little or nothing if the magistrate could force the accused on preliminary examination to speak his own conviction and this could be used against him on the final issue. This seems to be the true policy underlying the exclusion of the plea.

DONALD A. TURNER

LABOR LAW—Board Cannot Reinstaté Seamen after Sit-down Strike at Dock

In an election held on board petitioner's steamship, S.S. City of Houston, the National Maritime Union was elected the exclusive bargaining agency among the company's employees. Because its representative was excluded from attendance during the election, the petitioner refused to recognize the validity of the election and the certification of the National Maritime Union. It repeatedly refused to bargain collectively with the Union, and, as a consequence, a strike was called while the ship was at dock. For participation in this strike, a number of men were discharged. The N. L. R. B. found that the strike was caused by petitioner's unfair labor practice in refusing to bargain, and ordered the reinstatement of the men so dismissed. On appeal, held, the discretionary power of the N. L. R. B. to reinstate employees, discharged because of their participation in a strike provoked by employer's unfair labor practice, does not extend to cases where the strike amounted to mutiny in violation of §§ 292, 293 of United States Criminal Code, 35 Stat. 1146 (1909), 18 U. S. C. §§ 483, 484 (1940). Southern Steamship Co. v. N. L. R. B., 62 Sup. Ct. 886 (1942).
Though recognizing the undisputed power of the Board under § 10 (c) of the National Labor Relations Act, 49 Stat. 449 (1935), 29 U. S. C. § 151 et seq. (1940), to reinstate employees who are unjustifiably discharged for engaging in a strike, the Court refused to extend this authority to instances where the conduct of the strikers was unlawful or criminal. The case turns on the peculiar relationship between master and seamen. Conduct ordinarily irreproachable, e.g., the peaceful strike without a show of violence in the instant case, when manifested on board vessel within the maritime jurisdiction of the United States is mutinous and cannot be condoned by the courts.

Principal authority for this view is *Fansteel Metallurgical Corp. v. N. L. R. B.*, 306 U. S. 240 (1939), when the Supreme Court refused to permit the reinstatement by the Board of employees who struck against employer's use of labor spies, since the resulting violence, seizure of key buildings, and sit-down strike were in violation of state law. "To justify such conduct because of the existence of labor disputes would be to put a premium on the resort to violence instead of legal remedies, and to subvert the principles of law and order which lie at the foundations of society." *Fansteel v. N. L. R. B.*, supra at 253.


Nor does this Act interfere with employers' right to discharge for other than union activity. *N. L. R. B. v. Jones & Laughlin*, supra. As Mr. Justice Roberts said, "The Act does not require that petitioner retain in its employ an incompetent editor. The Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employers." 301 U. S. at 132.

It has been held that the power of the Board to command positive action is remedial and not punitive. A limitation on the Board's power, inherent in the very policies of the Act, was pronounced by the Supreme Court when it stated, "The authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practice." *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 235 (1938). The Board was held to be without authority to invalidate contracts between the Brotherhood and its locals, independent labor organizations. But *N. L. R. B. v. Greyhound Lines, Inc.*, 393 U. S. 261 (1938), sanctioned the Board's action in ordering the employer to withdraw recognition from a company dominated union.

What recourse to labor action then is permitted seamen on board ship, which keeps them within the discretionary power of the Board to reinstate for unlawful discharge? The federal criminal statutes describing mutiny prescribe those limits. 35 Stat. 1146 (1909), 18 U. S. C. § 484 (1940). Engaging in a sit-down strike in defiance of a ship's officer was at least *prima facie* evidence of mutiny. *Peninsular and Occidental S.S. Co. v. N.L.R.B.*, 98 F. (2d) 411 (C. C. A. 5th, 1938). In *U. S. v. Hamilton*, 26 Fed. Cas. 93, No. 15,291 (C. C. Mass. 1818) the court found seamen guilty of "endeavoring to make a revolt" for failure to obey the captain's orders.
while the ship lay in the main stream of Salem Harbor. This classic opinion of Mr. Justice Story has been reaffirmed in a long list of decisions. United States v. Keefe, 26 Fed. Cas. 685, No. 15,509 (C. C. Mass. 1824). The fact that the strike was at dock or in the harbor does not take it out of the mutiny statute. United States v. Gardner, 25 Fed. Cas. 1258, No. 15,188 (C. C. Mass. 1829); United States v. Cassidy, 25 Fed. Cas. 321, No. 14,745 (C. C. Mass. 1837); United States v. Thompson, 28 Fed. Cas. 102, No. 16,492 (C. C. Mass. 1832).

In 1920 the Supreme Court denied certiorari in the case of Hamilton v. United States, 254 U. S. 645 (1920), the circuit court having found that the master's command was usurped by the crew's agreement to refuse to work because the time fixed in their shipping articles had expired. Doubt was cast on the problem in the recent decision of Weisthoff v. American-Hawaiian Steamship Co., 79 F. (2d) 124 (C. C. A. 2d, 1935), when the court found that the refusal to work while the ship was in New York harbor did not cause a forfeiture of their earned wages. There was a reluctance to prosecute for mutiny, the court describing their conduct merely as ill advised and showing bad judgment. By indirection this has been held by some critics as affirming the principle of a peaceful strike by seamen while the vessel is moored in a port of safety. Rothschild, Legal Implications of a Strike by Seamen (1936) 45 Yale L. J. 1181.

Finally in affirming the conviction for mutiny on board the steamship Algic, the circuit court reiterated the absolute need for discipline on board ship, and the distinctive nature of the master-seamen relationship. Reis v. United States, 95 F. (2d) 784 (C. C. A. 5th, 1938). That labor's foremost weapon of the strike does not extend to seamen is now well established. Peninsular & Occidental S.S. Co. v. N. L. R. B., supra; Willmott, Sit-down Strike on Ship-board (1938) 23 Corn. L. Q. 302.

It is immediately apparent that if the Court took the liberal view adopted by some authorities, holding that there can be no mutiny at the dock and sanctioning a peaceful strike while in a port of safety, the case would have been decided differently. Shapiro & Frank, Mutiny at the Dock (1936) 25 Calif. L. Rev. 41; Note (1938) 38 Col. L. Rev. 1294. See also, Rothschild, op. cit. supra. The Court repeatedly asserts that the denial of the Board's authority to reinstate is founded not upon employee's conducting a simple strike, standing alone, but on the complicating factor that the strike constituted the crime of mutiny. Southern Steamship Co. v. N. L. R. B., supra.

In dissenting, Justice Reed construed the Fansteel case as meaning that there are some extremes of employee conduct beyond which the Board's discretionary power of reinstatement does not extend. But those limits are not exceeded by a peaceful strike, though technically unlawful in the case of seamen. In conclusion, one asks why seamen should be barred from reinstatement under the Act, where both employer and employee appear before the court with unclean hands, especially since their only crime was to exert a right guaranteed other laborers everywhere by law. A trend may be indicated by the one vote margin of the decision, after the 6-2 vote in the Fansteel case.

DONALD P. MCHUGH

LABOR LAW—Peaceful Picketing—State's Right to Enjoin Not Abridgement of Free Speech

A restaurant owner engaged an independent contractor to construct a building one and one-half miles from the restaurant, the contract not requiring employment of union labor. When the independent contractor did not employ union carpenters and
painters, that union picketed the restaurant with placards reading, "The owner of this cafe has awarded a contract to erect a building to W. A. Plaster who is unfair to the carpenters . . . and painters union . . ." The result was a curtailment of 60% of the restaurant business. A Texas court held the picketing violated a state anti-trust law and enjoined the picketing. The state court of last resort refused a writ of error. Held, the injunction did not violate the federal constitutional guarantee of free speech because the picketing union and the business picketed were not engaged in the same industry, and because the decree did not forbid picketing elsewhere nor communication of the facts by means other than picketing. *Carpenters & Joiners' Union v. Ritter's Cafe*, 62 Sup. Ct. 807 (1942).

Almost without exception in labor cases the Supreme Court has carefully declared that a state may, in certain circumstances, limit or regulate picketing. The circumstances have never been explicitly enumerated. Therefore, since picketing has been held to be an exercise of free speech (*Thornhill v. Alabama*, 310 U. S. 88 (1940)), protected against state regulation (*Schneider v. State*, 308 U. S. 147, 160 (1939)), a fascinating legal problem, vitally important to capital and labor alike, has been presented.

In the principal case Mr. Justice Black, with Mr. Justice Douglas and Mr. Justice Murphy concurring, wrote one of the two dissenting opinions in which he developed a theme expressed in *Bridges v. California*, 62 Sup. Ct. 190 (1941), 30 GEORGETOWN LAW JOURNAL 406, that the First Amendment demands the broadest possible scope in prohibiting any law abridging freedom of speech or of the press. This doctrine indicates a belief that the only right reserved to the states is the state police power, and that the permissible range of that power is limited to the regulation of the use of its streets or the conduct of those rightly on them. The reasoning and background of this limited reservation of state power was expressed in the *Schneider case, supra* at 161, where it was said, "Mere legislative preferences or . . . public convenience may well support regulation directed at other personal activities, but be insufficient to justify" the diminution of the exercise of the rights of free speech and free press.

As a result of *Davis v. Massachusetts*, 167 U. S. 43 (1897), it was for many years thought that, although a city is a subdivision of the state, it is also a property owner so far as its parks and streets are concerned, and an owner's right to control property is also protected by the 14th Amendment of the Constitution. However, *Hague v. C.I.O.*, 307 U. S. 496 (1939), held unconstitutional an ordinance providing for censorship of speeches given in such places. Thus where equal constitutional guarantees conflict it would appear that civil liberty provisions are preferred. *Lovell v. Griffin*, 303 U. S. 444 (1938), and *Schneider v. State, supra*, were to the same effect in relation to handbill distribution ordinances. The commercial character of the handbills made no difference. The freedom to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment was protected. *Near v. Minnesota*, 283 U. S. 697 (1931).

Subsequently in *Thornhill v. Alabama*, 310 U. S. at 102, a case which the Court has invariably used as a text in picketing cases (e.g., *Allen Bradley Local, No. 1111 v. Wisconsin Employment Relations Board*, 62 Sup. Ct. 820, 826 (1942)), it was held that the dissemination of "facts involved in a labor dispute must be regarded as within the area of free discussion." And this is true whether the dissemination be "by pamphlet, by word of mouth or by banner." *Carlson v. California*, 310 U. S. 106, 113 (1940). Using this as a spear-head the cause of labor advanced with more success than it had achieved in many years. The legal representatives of capital tried with little avail to discover and effectuate some permissible restriction of picketing.

In treating the question of permissible state regulation the bench and the bar alike, for a time, seized upon the phrase "labor dispute." However, under the terms of the
Norris LaGuardia Act, 47 Stat. 70 (1932), 29 U. S. C. §§ 101-115 (1940), a “labor dispute” has such a broad scope that in New Negro Alliance v. Sanitary Groc. Co., 303 U. S. 552 (1938), it was decided that “a person against whom relief was sought” was protected so that no injunction could issue to prohibit picketing by any such person, who had even an indirect interest in the trade, industry, craft or occupation of the business being picketed. Accord: Lauf v. E. G. Shinner & Co., 303 U. S. 323 (1938). This, of course, was in marked contrast with the interpretation that had been put on the anti-injunction provision in § 20 of the Clayton Act, 38 Stat. 730 (1914), 29 U. S. C. § 52 (1940). Under the interpretation in Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921), and Bedford Cut Stone Co. v. Journeymen Stone Cutters’ Ass’n, 274 U. S. 37 (1927), the Clayton Act required an employer-employee relationship to exist before a “labor dispute” could arise. Many states had anti-injunction statutes substantially the same as the Clayton Act. See 2A C. C. H. Labor Serv. (3d ed.) ¶43,601 (compilation of all state anti-injunction laws).

After the Court in Senn v. Tile Layers Protective Union, 301 U. S. 468, 476 (1937), held that the question of what constitutes a “labor dispute” under a state anti-injunction statute was a state question, it was thought that state statutes substantially similar to the Clayton Act, supra, could at least reduce the class of persons who would be entitled to picket. Illinois had such a statute. It had been interpreted to allow peaceful picketing only where there was an employer-employee relationship between the pickets and the business picketed. Swing v. A. F. of L., 372 Ill. 91, 22 N. E. (2d) 857 (1939), affirming, 298 Ill. App. 63, 18 N. E. (2d) 258 (1938), cert. denied, 309 U. S. 659 (1940). Upon reconsideration of this case certiorari was granted and in A. F. of L. v. Swing, 312 U. S. 321 (1941), the Court held that a statute limiting peaceful picketing by labor unions to disputes between an employer and his employees was an abridgement of free speech guaranteed by the 14th Amendment. As if to sound the final requiem of the Senn case, supra, on the same day the principal case was decided, Mr. Justice Douglas said in a concurring opinion, “since ‘dissemination of information concerning the facts of a labor dispute’ is constitutionally protected, a state is not free to define ‘labor dispute’ so narrowly as to accomplish indirectly what it may not accomplish directly.” Bakery & Pastry Drivers v. Wohl, 62 Sup. Ct. 816, 820 (1942) (concurring opinion).

In Milk Wagon Drivers’ Union v. Meadowmoor Dairies, Inc., 312 U. S. 287 (1941), decided on the same day as A. F. of L. v. Swing, supra, it was held that peaceful picketing could be enjoined immediately following picketing which was enmeshed in violence. The effect of this latter decision has been weakened by Hotel & Restaurant Employees’ International Alliance v. Wisconsin Employment Relations Bd., 62 Sup. Ct. 706 (1942), where in an analogous case the approved decree merely forbade violence but permitted peaceful picketing. However, as was said of the Thornhill case, the Meadowmoor case, suggested that acts of picketing “occasioning imminent and aggravated danger to a person’s life or property will properly justify an anti-picketing injunction.” (1940) 29 GEORGETOWN LAW JOURNAL 379, 380. See also A. F. of L. v. Swing, supra; American Steele Foundries v. Tri-City Council, 257 U. S. 184, 205 (1921).

In other words, peaceful picketing, even where practiced by a stranger to the employer-employee relationship, is an exercise of free-speech. Like other exercises of that guaranteed right, the test, until the decision in the principal case, has been thought to be whether or not the utterance, pamphlet, or banner created a “clear and present danger” of inciting violence or illegal acts. See Carlson v. California, supra; Herrdon v. Lowry, 301 U. S. 242 (1937); DeJonge v. Oregon, 299 U. S. 353 (1937); Stromberg v. California, 283 U. S. 359 (1931). Mr. Justice Reed suggested this theme in his dissenting opinion in the principal case.
Both that dissenting opinion and the majority opinion in the principal case discussed Bakery & Pastry Drivers v. Wohl, supra, decided the same day. There the drivers' union picketed the bakeries which supplied the plaintiff and other independent jobbers, owning a single truck driven by themselves, who bought pastry from the bakeries and sold such goods to retail stores at a middleman's profit. Under the New York statute no labor dispute existed, but the Supreme Court held "one need not be in a labor dispute as defined by state law to have a right under the 14th Amendment to express a grievance in a labor matter" by picketing, and reversed the New York courts' injunction decree.

On a single day, therefore, the Supreme Court passed on two anti-picketing statutes, one in the form of an anti-trust law, the other under the name of an anti-injunction statute. Four justices thought that the result should have been the same; but the majority of the court adopted a new test by which to gauge the permissible area of this form of free speech.

Using the approach that the public is a third party beneficiary (see textual treatment in Jaeger, Cases and Statutes on Labor Law (1st ed. 1939) 299), Mr. Justice Frankfurter, writing for the Court, indicated that government either through the legislature or the Court has attempted to balance the conflicting interests of capital and labor. "And every intervention of government in this struggle," he said, "has in some respect abridged the freedom of action of one or the other or both" (62 Sup. Ct. at 808); and, quoting from Mr. Justice Brandeis' dissent in Truax v. Corrigan, 257 U. S. 312, 362, at 363 (1921), declared, "Courts were required, in the absence of legislation, to determine what the public welfare demanded;—whether . . . the contestants should be permitted to invoke the aid of others not directly interested in the matter in controversy . . ." 62 Sup. Ct. at 808. With that confession of judicial legislation as a premise, the Court held that the due process clause gives the states authority to translate local public policies into law, but that the limits of this power cannot be determined in advance, but are fixed from time to time by decisions.

Mr. Justice Reed in his dissent declares (62 Sup. Ct. 812), "The legal kernel of the Court's present decision is that the 'sphere' of free speech is confined to the 'area of the industry in which a labor dispute arises.'" Many have felt that this confining process has been too greatly delayed; but as stated in DeJonge v. Oregon, supra, at 364, state legislative intervention with respect to the right of free speech finds constitutional justification only by dealing with the abuse of the right. Right itself cannot be curtailed. See American Steele Foundries v. Tri-City Council, supra, at 205. Since the Swing case, supra, the question has not been the scope of a "labor dispute" but the abuse of the guaranteed right of free speech. Confinement to a particular industry, therefore, at first glance seems to have little to do with free speech. Always, however, it has been known that the allowable exercise of that right has varied with the war or peacetime character of the country.

The Texas statute probably owes it confirmed constitutionality to two factors: (1) The fact that community and public loss involved in labor strikes is felt so keenly in times of war that a wide range of the exercise is more readily regarded as an abuse of the right. (2) The regulatory order merely curbed abuse and did not prohibit entirely the exercise of the right. The New York statute probably owes its condemnation to the fact that it absolutely prohibited the picketing, and to the fact that the circumstances involved were almost identical with those in Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc., 311 U. S. 91 (1940), although that case was not mentioned in the opinion.

JAMES PETER P. HEALY, II
TAXATION—Alimony Annuity—Income Taxable to Wife

Separation agreement between petitioner wife and her husband provided for monthly payments to her for life, but discharged him completely if he purchased annuity to cover such payments. After the husband purchased such annuity, the couple obtained a Texas divorce, in which neither alimony nor a property settlement were mentioned. Held, income from the annuity was taxable to the wife. *Pearce v. Commissioner*, 62 Sup. Ct. 754 (1942).

Whether the wife or the husband is taxable on the income from an alimony trust or annuity is a question which appeared to be settled, not without criticism, prior to the decision in the instant case. *Douglas v. Willcuts*, 296 U. S. 1 (1935), held the husband taxable where he had set up an irrevocable trust a few days prior to the divorce decree, the trust providing that his wife was to get all of the income up to a certain amount with any excess payable to him. He was also to make up any deficiencies if the income from the trust fell below the stated amount, and on the death of the wife the corpus of the trust reverted to him. Added to these elements was the all-important fact that, under Minnesota law, a husband was under a continuing obligation to support. In holding the husband liable for the tax on the income from the trust the Court stated that the amounts paid a wife under a decree for alimony are not income to her but are paid in discharge of his legal obligation to support. Thus, the amounts taxed are no different than if the husband had received them himself and paid them over regularly to the wife.

Any doubt concerning which of two possible grounds the Court used to reach that decision—(1) that the husband was liable because the trust benefited him by discharging a legal duty, or (2) that he was liable because the obligation was a continuing one and was being continually discharged by the trust income—was laid to rest in *Helvering v. Fitch*, 309 U. S. 149 (1940). The test there applied was whether there was clear and convincing proof that local law and the alimony trust gave the divorced husband a full discharge and left no continuing obligation, however contingent it might be.

In theory then, the basis for taxation is likened to a debtor's transfer of income-producing property to a creditor. If transfer of the property is in itself full satisfaction of the debt, the debtor is not liable for income from the property, but if the income from the property transferred discharges the debt, such income confers a direct benefit on the debtor and should be taxable to him. Similarly, if the state divorce court does not have continuing jurisdiction over the couple after the decree, any property settlement made or enforced by the decree would seem to have the effect of discharging the husband once and for all from all liability and the income received by the wife from any annuity or alimony trust would not be in discharge of any obligation of the husband, would be of no benefit to him, and would, therefore, be income to the wife. But if a husband is liable by the state law for continued support of the wife after the decree, the alimony trust becomes a security device to guarantee the payment of the stipulated amounts to the wife. In the *Fitch case, supra*, Iowa law was uncertain as to the continuing liability of the husband, and the Court required that he prove he was given a full discharge before releasing him from tax liability. Since the Iowa law was uncertain, he was unable to maintain his burden of proof and was held taxable. The same result was reached under New York law in *Helvering v. Leonard*, 310 U. S. 80 (1940). In *Helvering v. Fuller*, 310 U. S. 69 (1940), Nevada law provided that the divorce court retains no power to modify the obligation to support unless it so specifies in the decree. Proof that the court did not so specify rebutted the presumably correct assumption of the Commissioner that the husband was liable for the tax.
Thus, under the doctrine of the cases following the *Douglas case, supra*, the husband was taxable on the income from the trust whether the state law specifically retained the power to modify the husband’s obligation, or whether it was uncertain on the question of such power. Conversely, if the wife could show doubt or uncertainty with respect to the power of the court to alter the decree, she maintained her burden of rebutting the presumably correct determination of the Commissioner that she was liable. On this theory the axe had only one cutting head. The Commissioner could proceed against only one of the parties with fair prospects of success. *See* Paul, *Five Years With Douglas v. Willcuts* (1939) 53 Harv. L. Rev. 1.

Under the doctrine of the instant case the Commissioner is given a double-bit axe and he can cut whichever way he swings. The majority decided that the test depended not only on the divorce court’s power to modify the decree, but also on whether the court retained control over the particular annuity or trust so as to be able to modify it in the future. Thus if the Commissioner proceeds against the husband, he must, to avoid the tax, prove clearly that he had no obligation to support at all after the property settlement or agreement already made. But if he proceeds against the wife, she must show that the state court did, or that it was doubtful or uncertain that it did, retain jurisdiction, not only over the husband generally, but also over the particular trust or annuity in question. In many states no jurisdiction is given the divorce court over the particular property settlement, but control is reserved over the couple generally. In such instances the Commissioner can select the spouse who will have to pay the higher surtax. Proceeding against the husband, the Commissioner would argue that the court retained jurisdiction generally, while in the case against the wife he could ignore the issue of continuing obligation to support and force her to assume the burden of showing that the court retained some control over the particular settlement—an impossible task in view of the present state of the law in some jurisdictions.

Thus, while professing to uphold the doctrine of the cases construing *Douglas v. Willcuts, supra*, the majority of the Court actually changed it in favor of the government. As pointed out in the dissent of Mr. Justice Frankfurter, “liability under the tax law is made actually to depend upon whether the Commissioner elects to go against the husband or the wife. Having closed the front door to determination of tax liability by caprice, the Court allows caprice to enter through the back door of ‘presumption’.” 62 Sup. Ct.

In the Revenue Act of 1941 it was proposed to tax all wives on alimony payments received by them, but Congress postponed its decision on that proposal until the Income Tax Act of 1942, presently before Congress. If the proposal is adopted, the uncertainty into which the instant decision thrusts divorced spouses will be removed and the problems of *Douglas v. Willcuts, supra*, and the cases following it will become moot.

LESTER W. RUBIN
BOOK REVIEWS

MY PHILOSOPHY OF LAW—by Various Authors, Boston Law Book Company, Boston, 1941. Pp. xii, 321. $5.00.

The purpose of this book is to present to the public a fairly representative picture of what outstanding legal philosophers in America hold as to the nature of law, its origin and its ends or goal. To make it American, foreign writers were excluded. To make it an adequate picture, representatives of the various schools of legal philosophy in America were made contributors. To make it really distinctive, only the elite in the various schools were selected. To make the contributors present their philosophical views concisely and simply, each contribution was restricted to a few thousand words. To make no distinction, suggestive of weights and measures, the contributors' articles are arranged alphabetically according to their names. The collected gems of thought are given an appropriate setting; large, easily legible type on substantial paper; an excellent binding, rich but not gaudy, a rich simplicity for simple riches. In a word, the book exhibits an impressive title, impressive names, in an impressive attire. It stands for an ambitious experiment even though a mortifying one. A glance at the list of contributors verifies the assertion that the various schools of Jurisprudence are given representation. Following the alphabetical order they are: Joseph Walter Bingham, Morris P. Cohen, Walter Wheeler Cook, John Dewey, John Dickinson, Lon L. Fuller, Leon Green, Walter B. Kennedy, Albert Kocourek, K. N. Llewellyn, Underhill Moore, Edwin W. Patterson, Roscoe Pound, Thomas Reed Powell, Max Radin and John H. Wigmore. Some prominent names are missing. Realists grab off the lion's share. This may be justified on the ground that Realism is in the headlines today, or because there seems to be as many diverse forms of Realism as there are Realists.

Kennedy presents Scholastic Natural Law and takes a healthy swing at Realism in passing. Pound swings around the historical circuit again and again ends up with the satisfaction of interests. It is rather remarkable that he fails to explain or to stress that Ought in law, which he in his more recent writings considers so important to a philosophy of law. It is even more remarkable in view of his opposition to the Realists whose elimination of the Ought constitutes the real critical problem. Kocourek was included among the contributors by the editors for the purpose, I imagine, of waving a sad farewell to vanishing Indians. Wigmore gives us four snapshots of the pathways around the old legal mansion. He christsens the paths and their branches with derivations from the classical languages. It makes the simple classification of pathways so dignified that one not familiar with the classical languages might even be
awed. Whatever one may call the contribution, it is certainly not philosophy. It is regrettable that one who has achieved richly merited eminence in his own legal field should have attempted such a contribution under the title "philosophy". Lon Fuller and Dickinson are trying to keep their feet on the ground without being quite sure where the ground is. At any rate, they are avoiding the marshes and evident quicksands.

Realism in all its designs predominates. Bingham, as usual, is the most frank and outspoken of the Realists. He bluntly informs us that Government by law is just rot. Government is by men. Moore gives another loud "toot! toot!" for social institutions, with dynamic behaviorism supplying the steam. Dewey and his man Friday are running back and forth across a tiny barren mid-ocean island and give us scientific assurance that they are getting somewhere. They are ongoing instrumentalists. Green's contribution whispers the secret explanation into your ear for nine or ten pages. Law is just wisdom, power and progress. It, like government, is just a growing plant. In fact, it has just started to grow. Of course, plants come from seeds. The seed—well, that's social activity, for after all, the end of living is only activity. Powell's contribution is just Powell all over. The editors should have made an exception to the alphabetical order and have put Powell's contribution last, so that the reader could have a good laugh before his confused fingers turned down the back cover on the elite in American legal philosophy.

To summarize the ramblings of all the contributors would be fruitless. The music goes round and round. What comes out is mostly confusing noises. It seems too bad that some of the contributors permitted themselves to be intrigued into writing such nonsense. Most of them are really outstanding scholars in their particular fields. A few of the articles are worth reading. Many are just learned jargon, concealing rather than disclosing real thought. Only those familiar with the jargon and the verbal dexterity know what the animal hidden up the sleeve really looks like. As a whole the book approaches closer to zero in intellectual content that one would have expected. This is not the fault of the editors. They had an excellent idea. They wished to present a fair picture of the state of legal philosophy in America among Americans. They probably also had an idea that the resulting picture would prove a real contribution to knowledge and wisdom. The book does present a fair picture of legal philosophy in America. To that extent, it has real value. It is the content, which contributes little or nothing to either knowledge or wisdom, that fills one with dismay.

Because of the imposed limitation to a few thousand words, one would have expected that each contributor would be forced to state his position
as to the nature, origin and end of law, succinctly, clearly and adequately at least as regards the essentials of his philosophy. If a contributor really had a philosophy to state, he should have had little space for verbiage, diffusion, unnecessary overstufing with details and amplification. Evidently the editors expected such a definite and clear exposition. Few of the contributors can be given credit for a clear, concise statement of their views, and the reasons substantiating the same. Most of the contributions give the impression of having been written in a very light spirit about a very light subject. One would never gather that the philosophy of law cuts ice, as one eminent jurist said, or that decisions are only a reflection of a court's philosophy, as was stated by another.

However, the book really has a value. It quite graphically depicts the wild confusion that prevails in contemporary American legal philosophical thinking, or should I call it just plain intellectual horseplay. Scepticism and sophistry, whose progeny is confusion and division, have been running amuck in legal philosophy for some time. The book shows that we are beginning to reap the harvest. There are almost as many ideas as there are writers. The exception comprises those who haven't any ideas, but write anyway, as though they had, and in the writing almost outstrip the former in their superb scientific exposition of cryptic inanities. The book should be read. It may confuse you, or disgust you, amuse you or sadden you. At any rate, it certainly will enlighten you. After all it represents what the elite in legal philosophy think and teach as to what law is or ought to be. What the elite think should in time affect the law and its growth. The growing law has at least some connection with the state of the nation present or future. The state of the nation is going to affect your interest in life, liberty and property. There, I have proved my case. You must read the book and learn about the state of the nation. What you do with the book afterwards,—well that's your business.

FRANCIS E. LUCEY, S.J.*


The scope of this book is much less ambitious than would be assumed from its title. The author has limited himself to American Labor Law, and has concerned himself almost exclusively with its development during the decade of the thirties, referring to the earlier statutes and cases mainly

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as a background for the changes that took place in the period of the depression and the New Deal. The transitional character of our labor law is indicated by the fact that the discussion of the privilege of picketing is already out of date since the recent decisions of the United States Supreme Court basing it on the right of free communication guaranteed under our Constitutions. While that guaranty does not free peaceful picketing from all regulation, it does require a very different approach to the problem from that adopted when picketing was regarded as a form of intentional injury inflicted by the union on the employer, which was legal only if some affirmative justification for it could be shown.

The author in his subscription to the preface describes himself as Professor of Marketing and Management at the University of North Dakota, and we must, therefore, judge his work as that of a trained layman, rather than as that of a lawyer. His purpose has apparently been to bring home to the lay reader the significance of the great changes which took place in our labor law during the thirties, without concerning himself much with the economic and legal factors which induced and governed the changes, or the precise conclusions the labor administrative bodies and courts would reach today in specific cases. This purpose has been largely achieved though it seems that more attention might have been given to the reaction against the laws favoring labor which the author recognizes as having taken place at the end of the decade. Of course, a study as brief as this one can only be a broad survey, without a straining for meticulous accuracy in details, and this limitation must be kept in mind in reading and criticizing the book. In spite of this caution, it is hard to see why no discussion is found of the Minnesota law of 1937, which contains many features quite different from those of the ordinary labor relations act and which has had a period now of very substantial success. It would seem that the whole subject of state legislation could have been more adequately and intelligibly treated by grouping together those states which have largely or entirely followed the National Labor Relations Act and contrasting with them the laws of the few states that have embarked on experiments of their own. Certainly the latter group have more significance for the future development of the law than have the former.

Probably the author, as a layman, should not be too severely criticized for some inaccuracies in the interpretation of court cases, or for a general tendency to rely on short quotations from the opinions without giving the context, or the facts, but a careful student should be warned not to

take too blindly the statements of the author as to the holding of particular cases. In this connection, the omission of the author to mention in connection with his discussion of the decisions of the New York Supreme Court and Appellate Divisions in the *Feintuch case*, the opinion of the Court of Appeals, modifying the injunction directed by the Appellate Division, is one hard to excuse.

The book begins with an introduction stating in general the significance of the decade of the thirties in the development of labor law, and then discusses in order the nature of labor contracts, the struggle for greater bargaining power by both employers, (in connection with which a chapter is devoted to the use by the employers of the injunction) and by employees, and then a consideration of laws protecting primarily the interests of the public. In general the organization of the material under each of these topics is clear and logical, though it is somewhat surprising to find the provisions of the Wagner Act for the protection of the right of collective bargaining treated as a provision for the protection of the public to a greater degree than as one incident of the employees' struggle for greater bargaining power. The text is accompanied by a bibliography, a table of cases and an index. The value of the second of these aids to study is almost nil because of the omission of any indication of the pages of the text on which the cases listed are cited.

H. L. MCCLINTOCK*


In the preface, the author particularizes the group of readers for whom the book is intended: “The following pages have been written with the hope that they will bring to social workers and interested laymen a better understanding of the fundamentals of our legal system and of the reasons back of its development.” The purpose of the volume is still further focused: “These pages are designed to create a tolerance born of greater understanding of the law and to further the belief that legal, economic and social points of view, far from being opposed, are in accord on important issues of mutual concern.” A limitation appears as to the topics on which emphasis is laid: “Those sections of the law which affect the family most directly.”

Any book which purports to simplify the mysteries of a field of highly

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*P. 94.

*276 N. Y. 281, 11 N. E (2d) 910 (1937).

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specialized human activity for the benefit of readers in another profession must be prepared in such a way as to surmount certain obstacles and anticipate certain criticisms. Where the "interested layman" is to be brought in as a reader the problem becomes more complex. Among these complications are: inevitable reactions by the professional expert that the work is superficial; realistic risks that some reader believing himself qualified to advise others or to act on the basis of the information contained in such a treatise may do irreparable damage to himself or a fellow human in need of help or may violate unauthorized practice statutes; annoying controversies arising from misunderstanding of the significance of words, phrases and concepts. The professional man has learned a set of symbols which evoke significant and far reaching overtones inaudible to the untrained ear. The layman unfamiliar with fine technical distinctions may find the meaning of many terms elusive and may even be misled.

In spite of such considerations, there are reasons why sincere efforts like this one should continue to be made to bridge a gap between the man in the street and the specialist. The public at large should be as aware of and as interested in the social utility of the law and the quality of the administration of justice as it is in the work of any other professional group. In recent years, preventive medicine has recognized a place for the informed laymen and has labeled it "first aid". All too little has been done to create a foundation for a similar partnership between lawyer and informed nonlawyers in the functioning of what, for want of a better term, may be called "legal first aid". If such a mutual understanding is important with respect to the whole field of law, it is particularly desirable that present attention be given to the legal aspects of domestic relations and the family. Rules of law in this area are said by some critics to be twenty years behind the times and imperatively to require a complete re-examination. Various groups of persons, not trained in legal disciplines, are seeking to apply non-legal remedies to the human family problems with which the law also deals. Some of them work in cooperation with the agencies established by law and others do not. At least an elementary knowledge by these laymen of the law and of its objectives is essential if the leaders of thought in a modern democratic community are to avoid confusion and delay in setting up and carrying out adequate interprofessional programs for public service.

From this viewpoint the material has justification. It is not a handbook for the social work practitioner, nor a textbook for the student. It is a contribution to cultural literature and may be viewed from the standpoint of an effort to awaken interest and arouse curiosity. The reader may feel encouraged to improve his acquaintance with the subject, to ascertain the point at which his contact with a legal problem should
terminate and the matter be placed in the hands of a competent attorney.

The chapter headings are: Development of Law; Legal Rights and Wrongs; Legal Machinery for Settling Disagreements; Marriage and Divorce; Rights and Obligations After Marriage; Rights and Obligations of Parent and Child; The State and the Child; Guardianship; Adoption; Security Legislation; A Home for the Family; Criminal Law; Court Procedure; Evidence; Conclusions. The interviewer found particularly interesting Chapter Ten on Security Legislation. It deals with fresh material mostly recent Federal Statutes. This topic makes possible a definiteness not always practicable in some of the other chapters where generalizations as to what is done in the forty-eight states tend, somewhat, to blur the picture. To attempt to catalogue all the exceptions and local points of view would result in an unwieldy mass.

Illustrations in the form of decided cases are clear. They force the reader to the conclusion that legal principles are constantly being laid down by the courts. Too often the lay reader in search of “the law” finds himself limited to what the legislatures have enacted.

Chapter Fifteen on Conclusions, no doubt for reasons of space, is all too short. The interviewer hopes that the author, fortified by the experience gained in preparing this volume, will attempt another devoted to a social interpretation and evaluation of the existing rules of law relating to the Family. To expound the specific rules and their economic and social background is a legitimate objective for a contributor to “legal first aid” literature. But beyond this there is a need for the public and particularly for members of other related professions constantly to examine the effectiveness of modern law critically and constructively. All too little has been written to this end.

The interviewer would suggest two additions to the selected bibliography: Vernier’s American Family Laws, a careful, discriminating and authoritative compilation of the legislation in the field; Brown’s Lawyers and the Promotion of Justice, a concise and able description of the place of the legal profession in present day civilization in the United States.

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