SURFACE CARRIER PARTICIPATION IN AIR TRANSPORTATION UNDER THE CIVIL AERONAUTICS ACT

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No question before the Civil Aeronautics Board1 is more disputed than the extent to which surface carriers2 may engage in air transportation. It is not immoderate to state that today it represents one of the most controversial issues in the field of administrative law.3

The surface carrier problem is essentially one of statutory construction of the Civil Aeronautics Act.4 Its consideration began in 1940 when the Civil Aeronautics Board decided the American Export Airlines case.5 From that time to the present, representatives of surface carriers (principally steamship companies) have vigorously maintained to the Board

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The views herein expressed are those of the author, and do not necessarily reflect those of the Department of Justice.

1Hereinafter sometimes referred to as the Board.

2A carrier other than an air carrier, including steamship companies, railroads, and motor carriers.


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that the Civil Aeronautics Act contains no limitations, additional to those applicable to air carriers, on the right of surface carriers to engage in air transportation. A determined effort to establish this principle has been exerted not only before the Board but before Congress. During the past session three different bills were introduced in the House of Representatives the purposes of which were to preclude restrictions by the Board on surface carrier engagement in air transportation. Similar efforts were unproductive in 1944 before the 78th Congress.8

Representatives of air carriers and the United States Department of Justice have uniformly contended that surface carrier participation in air transportation, while not completely barred, is expressly conditioned and restricted by the terms of the Civil Aeronautics Act.9

In all cases except one where the surface carrier problem has been presented, the Board’s views have been dicta announcements of its general policy “for the guidance of future applicants” because the cases did not require decision of the issue. For this reason, the courts have as

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7H. R. 939, H. R. 3079, and H. R. 3134. Hearings on these bills were held contemporaneously with consideration of the single carrier or “chosen instrument” proposal. See Hearings before the House Committee on Interstate and Foreign Commerce, on Bills Relative to Overseas Air Transportation, 80th Cong., 1st Sess., April 22 - May 16, 1947. None of these bills was ordered favorably reported by the Committee.

8See Executive Hearings before the Committee on the Merchant Marine and Fisheries, on H. Res. 52, 78th Cong., 2d Sess. (1944).


10American Export case, cited supra, note 5.
yet had no occasion to pass upon the conflicting contentions regarding the Board's present policy.\footnote{This is subject to the explanation that the Board's present policy respecting surface carrier participation in air transportation represents a reversal of its previous interpretation of the Act at the time the Board issued its opinion in the American Export case. This case and the litigation which followed are discussed infra, pp.}

It is the purpose of this article to state the statutory problem and review the history of its consideration by the Civil Aeronautics Board, to analyze the principal contentions advanced in support of unrestricted surface carrier participation in air transportation, to discuss certain decisions by the Interstate Commerce Commission\footnote{Paradoxically, both surface carriers and air carriers rely principally upon the same source in support of their divergent contentions. Both point to the controlling effect of decisions by the Interstate Commerce Commission (hereinafter sometimes referred to as the Commission) construing provisions of the Interstate Commerce Act substantially identical to those in issue under the Civil Aeronautics Act.} and by the Supreme Court interpreting provisions of the Interstate Commerce Act\footnote{\textit{Provided further}, That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of Section 5 (8) of this title, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition.”} parallel to those in issue under the Civil Aeronautics Act, and through such analysis to demonstrate that a correct interpretation of Congressional intent under the Civil Aeronautics Act restricts surface carrier participation in air transportation.

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I.

The Statutory Problem and History of Its Consideration by the Civil Aeronautics Board

The problem of statutory construction can be simply stated. To what extent does the Civil Aeronautics Act permit common carriers other than air carriers to engage in air transportation? Resolution of this question involves construction of Sections 408 (b), 401, and 2 of the Civil Aeronautics Act.

Section 408\footnote{49 U. S. C. § 1 et seq. (1940).} relates to consolidations, mergers and acquisition of control of air carriers and requires approval by the Board of such transactions. The second proviso of Section 408 (b)\footnote{52 Stat. 1001 (1938), 49 U. S. C. § 488 (1940).} precludes approval by
the Board of applications by a carrier other than an air carrier unless three tests are met: (1) that the acquisition will promote the public interest; (2) that the aircraft will be used in surface carrier operations;\textsuperscript{16} and (3) that the acquisition of control will not restrain competition.'

Section 401 of the Act\textsuperscript{17} governs the issuance of certificates of public convenience and necessity to engage in air transportation. This section does not contain the restrictive language set forth in the second proviso of Section 408 (b). It simply provides that the certificate sought shall be issued if the Board finds the applicant to be fit, willing, and able to perform such transportation and to conform to the provisions of the Act and the regulations and requirements of the Board, and further finds that the transportation sought is required by the public convenience and necessity.

"Public convenience and necessity" are not defined in the Civil Aeronautics Act, but the declaration of policy set forth in Section 2 of the Act\textsuperscript{18} provides that the Board shall consider "among other things, as being in the public interest, and in accordance with the public convenience and necessity" recognition and preservation of the "inherent advantages" of air transportation, a fostering of "sound economic conditions" in such transportation, and "competition" necessary to assure the sound development of air transportation.

Accordingly the question posed is whether these separate provisions of the Civil Aeronautics Act, when read in context and in the light of


\textsuperscript{17}52 Stat. 987 (1938), 49 U. S. C. § 481 (1940). The pertinent provisions of Section 401 state:

"The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied." § 401 (d) (1).

underlying basic purpose of the legislation as a whole, require that direct applications by steamship companies and other surface carriers under Section 401 of the Act must meet the conditions contained in the second proviso of Section 408 (b). It is the contention of the writer that the Act must be so interpreted.

**History of the Board's Consideration**

In 1940 the Board handed down its first decision on the surface carrier problem in the *American Export* case. American Export Airlines, Inc. (hereinafter called Export) was organized in 1937 as a subsidiary of American Export Lines, Inc. (hereinafter called Steamship), a common carrier by water. Export filed an application for a certificate of public convenience and necessity under Section 401 of the Civil Aeronautics Act, requesting authority to establish airmail and passenger routes across the Atlantic. Export also filed an additional application seeking approval of the acquisition of Export by Steamship under Section 408 of the Act, if such approval was considered necessary. These applications were consolidated by the Board and heard together. Pan American Airways Company, an air carrier acting under a certificate of public convenience and necessity issued by the Board, was already engaged in air transportation across the Atlantic and opposed the issuance of a certificate to Export on the ground, among others, that under Section 408 the Board must approve the acquisition of Export by Steamship before granting the certificate. After hearings the Board issued a certificate of public convenience and necessity to Export, and dismissed the application for approval of acquisition under Section 408, holding that approval was not required inasmuch as Export was not an air carrier at the time Steamship acquired control. One member of the Board, Oswald Ryan, dissented, not on the ground of the Board's disposition of the certificate of public convenience and necessity, but from the majority's conclusion that the Board was without jurisdiction to approve or disapprove the corporate relationship under Section 408 (b) of the Act.

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21 Id. at 45-46, 49.

22 Id. at 49-52. It is interesting to note that the dissent during this phase of the proceedings before the Board does not contend that Section 401 is conditioned by Section 408.
The Board's decision and order in this case were appealed by Pan American Airways to the United States Circuit Court of Appeals for the Second Circuit.\textsuperscript{23} In its brief to the court Pan American contended \textit{inter alia} that the Board erred in issuing a certificate to a steamship controlled airline in the absence of a showing, as required by Section 408 (b), that the transaction would promote the public interest by enabling the steamship company to use aircraft to public advantage in its surface operations. The Board contended that the standards and requirements of the second proviso of Section 408 (b) need not be applied in issuing a certificate under Section 401. The court sustained the Board in this contention.

This case represents the only occasion on which a court has had to pass upon the precise issue here under discussion.\textsuperscript{24} It is important, therefore, to examine the basis of the court's holding, particularly since it is opposed to the interpretation which the Board subsequently adopted and also to the contentions advanced in this article.

In upholding the Board's construction of the statute that Section 408 (b) was inapplicable in a certificate proceeding under Section 401 even though the applicant was a surface carrier, the court said:\textsuperscript{25}

"Counsel for Pan American argue that the Board erred in issuing certificates to Export for foreign air transportation, when the latter was under the control of a steamship corporation, in the absence of a showing that the public interest would be promoted by enabling the parent company to use aircraft in its operations. This contention is based upon the supposed effect of decisions of the Interstate Commerce Commission in cases arising under the Motor Carrier Act. Section 213 (a) (1) of that Act, 49 U. S. C. A. § 313 (a) (1), from which Section 408 (b) of the Civil Aeronautics Act seems to have been derived, relates to applications for acquisition of control of a motor carrier by a railroad or other carrier, . . .

"Not only the terms of Section 213 (a) (1) of the Motor Carrier Act, but the


\textsuperscript{24}Since the \textit{American Export} case, no surface carrier applications to engage in air transportation have been granted by the Board. However, in each of the cases in which the Board has considered such applications, they have been denied on the basis of comparative superiority of the air carrier applicants. The Board's statements on the statutory problem have all been \textit{dicta} announced for the general guidance of surface carrier applicants and as information to the public of the Board's policy under the Act.

\textsuperscript{25}121 F.2d 810, 815-816 (C. C. A. 2d 1941).
decisions of the Interstate Commerce Commission show that a railroad or any carrier other than a motor carrier is not permitted to acquire control of the latter's operations without proof that the result will enable the other carrier to use service by motor vehicle in its own operations. See Greyhound Mergers, 1936, 1 M. C. C. 342. It is argued from this that the power to issue a certificate of public convenience and necessity in a case like the present was dependent not only upon proof that the public interest would be promoted thereby but that the Steamship Company might use air carriage by Export in its own operations. The decisions of the Interstate Commerce Commission under the Motor Carrier Act involve no such construction."

In support of this conclusion, the court cites and briefly discusses the Commission's decisions in Santa Fe Trail Stages, Inc., Common Carrier Application, 21 M. C. C. 725 (1940); and St. Andrews Bay Transp. Co., Extension of Operations, 3 M. C. C. 711 (1937).26 The court then went on to state:

"The foregoing would seem to indicate that the issuance of the certificates to Export was not dependent upon conformity with Section 408 (b), though the ability of Export to meet the standards therein might be considered by the Board and by the President in connection with granting certificates of public convenience and necessity. We find no provision of the Civil Aeronautics Act requiring the Board to withhold certificates until after approval of the control of Export by its parent company."27

The holding of the Commission in the Santa Fe and St. Andrews Bay

26Id. at 816. The court also cites the Commission's decision in Missouri Pac. Transp. Co., Extension of Operations, 9 M. C. C. 712, 717 (1938), and observes that "the Commission in that case went no further than to consider the effect of the operations of a motor carrier upon the business of the competitors of the Missouri Pacific as one of the elements to be weighed in passing upon the application of the motor carrier for a certificate of public convenience and necessity". On the contrary the Commission in denying the application pointed out (9 M. C. C. 712, 717 (1938)) the situation presented was "complicated by the fact that applicant is controlled by a railroad" and then went on to quote with approval from a previous report by Division 5 of the Commission which stated that "while we have heretofore found, in other proceedings under the act, that railroads should be given the opportunity of using motor vehicles to supply service that is auxiliary or supplementary to their rail service, there is no evidence that the bus line between Natchez and New Orleans would be used for such a purpose. On the contrary it invades territory of another railroad system." (Emphasis supplied). The full Commission in approving this determination by Division 5, that the application should be denied because among other factors the service proposed was not "auxiliary or supplementary" to the rail operations of the applicant's parent company, obviously was approving the application of Section 213 (a) (1) criteria in a certificate proceeding under Section 207. The court's citation of authority therefore not only fails to support the proposition for which it is cited but supports the contrary conclusion.

27121 F.2d 810, 816 (C. C. A. 2d 1941).
cases, that the restrictive standards of Section 213 (a) (1) are not applicable in a certificate proceeding under Section 207 by a rail carrier or a motor carrier controlled by a rail carrier, is incompatible with the Commission's now well established construction of the Motor Carrier Act. That these decisions stand alone and have not been followed but in fact rejected is demonstrated by the Commission's recent opinion in Rock Island Motor Transit Co.—Purchase—White Line Motor Freight Co., Inc., et al., 40 M. C. C. 457, 471-473 (1946). The St. Andrews Bay case was a very early decision under the Motor Carrier Act at a time when the Commission's now settled correlation of Sections 207 and 213 (a) (1) when rail-motor certificates are sought was not formulated as it has been since the Commission's decision in Kansas City S. Transport Co., Inc. Common Carrier Appl., 10 M. C. C. 221 (1939). The legal validity of the Santa Fe opinion was questioned at the time it was issued by Commissioner Eastman in a separate concurring opinion, 21 M. C. C. 725, 756 (1940). Conclusions by the Commission diametrically opposed to those contained in these cases have been relied upon by railroad litigants as well as the Commission itself in court cases involving simultaneous interpretation of Sections 213 (a) (1) and 207 of the Motor Carrier Act. Moreover, both the St. Andrews Bay and Santa Fe cases were decided by Division 5 of the Commission, and unlike the Rock Island case, supra, did not receive consideration by the full Commission.

Accordingly, the only ground upon which the Second Circuit based its conclusion that the restrictions of Section 408 (b) had no applicability in a certificate proceeding under Section 401 of the Civil Aeronautics Act would seem to be an invalid premise.

Although the court sustained the Board in its contention that the standards and requirements of Section 408 need not be applied in issuing a certificate under Section 401, it rejected the Board's position that Section 408 applies only to acquisitions of control of air carriers existing

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28Commissioner Eastman stated: "I concur in the results, but do not join in the report, which contains many statements and expressions of opinion with which I do not agree and by which I do not wish to be bound. In my judgment this is far from a clear case. In concurring in the results I am moved principally by the fact that under the so-called 'grandfather' clause applicant has the right to operate a very extensive motorbus system. The interim operations may fairly be regarded as extensions and improvements necessary to make this system a satisfactory operating unit, particularly in its capacity as an auxiliary of the Santa Fe railroad system." (Emphasis supplied).

29See the discussion infra, pp.
as such at the time of acquisition and held that such a view was an unduly literal interpretation of Section 408 (a) (5). Accordingly, the court remanded the case to the Board only with respect to its disposition of the application by Steamship for approval of control of Export under Section 408.

The Board’s decisions in the American Export case following remandment precipitated the controversy over the right of surface carriers to engage in air transportation. In these decisions the Board announced that in determining whether public convenience and necessity require the granting of an air certificate to a carrier in another field of transportation the Board must give substance to the term “public convenience and necessity” in accordance with the policy laid down by the Act as a whole. The Board reasoned that in considering an application by a carrier other than an air carrier under Section 401 of the Act, it would not construe public convenience and necessity as authorizing the issuance of a certificate unless the evidence indicated that the restrictive conditions of Section 408 (b) had been met by the surface carrier applicant. In the very teeth of a contrary construction by the court in the Pan American case, the Board reasoned that there appeared to be no sound basis for distinguishing between an undertaking by a carrier engaged in another form of transportation through a subsidiary and its undertaking to engage in the air transportation field directly, since “it seems clear that Congress must have intended the same principles to apply to both situations because there is no sound basis for distinguishing between these situations so far as the public interest is concerned.”

The Board attributes its complete reversal in construction of the Act to the court’s holding in the Pan American case that the Board was required to approve or disapprove control of Export by Steamship under Section 408 (b). The Board concluded that Steamship could not meet the conditions of Section 408 (b) because the proposed operations of Export were not “auxiliary and supplementary” to its surface operations as required by that section.

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121 F.2d 810, 815 (C. A. 2d 1941).
122 Id. at 817.
125 Ibid. The view is necessarily dictum because the precise issue was not then before the Board, the court having already sustained the position of the Board in the Pan American case that there was no necessary correlation of Sections 408 (b) and 401, thus validating the issuance of the certificate to Export beyond recall by the Board.
Because the court had already sustained the Board’s issuance of a certificate to Export under Section 401 of the Act irrespective of what the Board might decide on the issue of acquisition under Section 408 (b), the Board had no alternative but to order Steamship’s divestiture of its control of Export, which it subsequently effected. But the Board made quite clear what the court declined to hold—that it would never have issued the certificate to Export if it had considered the application for approval of acquisition simultaneously with its consideration of the application for a certificate. It seems obvious, as the Board’s opinion in the supplemental American Export decision suggests, that the Board must approve the control before granting a certificate under Section 401. Otherwise the very purpose of seeking approval is obviated and the plain intent of Congress in writing Section 408 (b) would be defeated. Accordingly, the court’s decision in the Pan American case seems unrealistic since it holds that the certificate granted Export should stand even though the Board might, as it did, subsequently disapprove the acquisition. For reasons later to be amplified, the same conclusion logically follows whether the attempt by a surface carrier to engage in air transportation is accompanied by an application for acquisition approval or sought directly by the surface carrier itself under Section 401 of the Act.

The Board’s supplemental opinion on reargument of the American Export case is of particular interest and significance not simply because it reaffirms the result reached by the Board in its 1942 decision following remandment by the court, but because it adopts the approach signaled by Mr. Ryan in his separate concurring opinion in that case

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39 See Henry, Acquisition of Control of an Air Carrier by Another Common Carrier Under the Civil Aeronautics Act 10 GEO. WASH. L. REV. 719, 725-726 (1942).


41 3 C. A. B. 619, 626-630 (1942). Mr. Ryan traces the history of congressional policy expressed in the Panama Canal Act, the Motor Carrier Act of 1935, and the Transportation Act of 1940, and finds in them an evident intention by Congress to keep the three forms of transportation (water, motor, rail) distinct so that each may operate in its own sphere. Identical provisions in the Motor Carrier and Civil Aeronautics acts should receive like interpretation, Mr. Ryan reasoned, and—contrary to the conclusions reached by the court in the Pan American case—he found that the Interstate Commerce Commission had permitted railroad participation in the motor carrier field only when such transportation was “auxiliary or supplementary” to the railroad operation.
by relying heavily in support of its conclusions on the history of Congressional policy expressed in the Interstate Commerce Act and related statutes, and translation by Congress of that policy into the Civil Aeronautics Act. By this supplemental decision the Board completed the cycle of its rejection of the court's reasoning in the *Pan American* case with respect to the applicability of the provisions of Section 408 (b) to surface carrier applications for certificates under Section 401.40

In short, by its supplemental decision in the *American Export* case the Board concluded that not only by reason and logic but also by reference to the administration and interpretation of the Interstate Commerce Act, the conclusion was inescapable that Congress intended the same restrictions and conditions to apply to a surface carrier seeking to engage in air transportation directly as it imposed on one seeking to enter that field by acquiring a subsidiary air carrier.

This construction of the Act was consistently adhered to by the Board in several opinions released during the period 1943-1946. *Railroad Control of Northeast Airlines*, 4 C. A. B. 379, 385 (1943); *Local Feeder

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40It is interesting to note that the court's decision in the *Pan American* case did not give rise directly to a conclusion by the Board that Section 401 was necessarily conditioned by Section 408 (b) where surface carrier controlled subsidiaries were applicants for certificates. Although the Board purports in its decision following remandment to reach this conclusion as a necessary result of the court's construction of Section 408 (a) (5). See 3 C. A. B. 619, 624-625, its decision in American Export Airlines, Inc., *Temporary Certificate of Public Convenience and Necessity*, 3 C. A. B. 294 (1941), which was decided on December 19, 1941, five months after the court's decision in the *Pan American* case but before the Board's decision following remandment in American Export Case, 3 C. A. B. 619, July 30, 1942, tends to disprove this asserted reason for reversing itself. The application by American Export for a temporary certificate from New York to Foynes, Ireland, was granted by the Board. In its opinion the Board pointed out that Export was controlled by a steamship company which then had pending before the Board an application for approval of such control under Section 408 of the Act. The Board then went on to state: "Approval of control under Section 408, however, is not a prerequisite to the issuance of a certificate under Section 401 (d); the fact that the former proceeding is still pending and undecided is no bar to our taking affirmative action upon the present application. In overruling a contention to the contrary with regard to the same relationship as is here involved, the Circuit Court of Appeals for the Second Circuit has said: '... the issuance of certificates to Export was not dependent upon conformity with Section 408 (b), though the ability of Export to meet the standards therein might be considered by the Board and by the President in connection with granting certificates of public convenience and necessity. We find no provision of the Civil Aeronautics Act requiring the Board to withhold certificates until after approval of the control of Export by its parent company.'" (Emphasis supplied). 3 C. A. B. 294, 295-296 (1941). Seven months later the Board reached an opposite conclusion.
and Pick-up Service, 6 C. A. B. 1, 7-8 (1944); Additional Service to Latin America, 6 C. A. B. 857, 905-907 (1946).  

The Board also issued a number of additional decisions during this period which denied applications by surface carrier applicants but did so without comment on Section 408 (b). In each of these cases the Board stated that it was unnecessary to discuss the question of the applicability of Section 408 (b) because of its conclusions that on a comparative basis the air applicants were better able to meet the requirements of Section 401 of the Act.

The Board's opinion in the Latin American case is important because it involved reexamination of the Board's construction of the Act set forth in its supplemental opinions in the American Export case, and because it specifically sought to answer the argument, pressed by surface carriers since the Export decision, that Section 408 (b) can have no application to the requirements of Section 401 because on its face Section 408 clearly applies only to acquisitions of control and thus has no proper place in determining public convenience and necessity.

After restating its conclusion that in determining public convenience and necessity raised by the application of a surface carrier under Section 401 of the Act it was "required to consider, among other factors, the policy of Congress specifically expressed in the second proviso of Section 408", the Board stated:

"Our conclusion flows from well-established principles of statutory construction. As the United States Supreme Court recently said in Securities and Exchange Commission v. Joiner Corp., 320 U. S. 344, 350-1 (1943) the controlling doctrine of statutory construction is that "courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of

\[\text{In this decision the Board took pains to point out that the second proviso of Section 408 (b) was not a prohibition on surface carrier participation in air transportation but merely a restriction on such participation. The Board further stated that the inability in the past of an applicant to meet the requirements of Section 408 (b) did not mean that those requirements could not or would not be met in some future case in which the facts would show that the proposed air services would be auxiliary, supplementary and incidental to other transportation operations of the applicant. 6 C. A. B. 1, 7 (1944).}

\[\text{Commonly referred to as the Latin American case, discussed infra.}


\[\text{6 C. A. B. 857 (1946).}

\[\text{Id. at 905 (Emphasis supplied).}
the words fairly permits so as to carry out in particular cases the generally expressed legislative policy."

In emphasizing the significance of this resort to the principles of statutory construction, the Board pointedly referred to the declaration of policy contained in Section 2 of the Civil Aeronautics Act, and reasoned:

"The statutory test by which an application under Section 401 of the Act is to be judged is "public convenience and necessity". This standard is defined in Section 2 of the Act in broad and general terms, so that, in discovering the intent of Congress as to the meaning and application of this standard, we must look both to the general expression of broad policies set forth in Section 2 and to the indications of Congressional intent which appear elsewhere in the Act.

Thus, in Section 2 of the Act, the Board is instructed to preserve the inherent advantages of air transportation, to regard as in the public interest competition to the extent necessary to assure the sound development of an air transportation system adjusted to the national needs, to promote the development of air commerce, and to encourage and develop civil aeronautics. Thus, also, in other sections of the Act, Congress has imposed restraints on the maintenance of interlocking relationships between air and surface carriers (Section 409 (a)), has required disclosure by air carrier officials of stock interests held by them in surface carriers (Section 407 (c)) and in Section 408 (b) has limited the power of the Board to approve acquisitions of control of air carriers by surface carriers.

"To hold that the ability of a surface carrier to meet the restrictive requirements of the second proviso of Section 408 has no relation to an adjudication of that carrier's application for a certificate of public convenience and necessity under Section 401 could hardly be said to be consistent with this over-all legislative policy. On the other hand, a conclusion that such relation does exist is in accord both with the policy of the Act and with the decision of the United States Circuit Court of Appeals for the Second Circuit in Pan American Airways Co. v. Civil Aeronautics Board, supra. In that case the court held, contrary to the position taken by the majority of the Board, that Section 408 and, of course, the second proviso thereof, applied to the acquisition of a new

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"Id. at 905-906.


"6 C. A. B. 857, 906 (1946).

"This process of statutory construction of the true intent of Congress meets head on the principal contention of the surface carriers that Section 401 (d) (1) of the Civil Aeronautics Act prescribes no other criteria for determining grants of certificates to engage in air transportation than those of "fitness, willingness, and ability" and "public convenience and necessity". But this assumption by the surface carriers begs the question, since it leaves out of consideration the subsidiary criteria which are properly embraced within a determination of what constitutes "public convenience and necessity". As the Board indicated, such subsidiary criteria are contained in other provisions of the Act which implement and more fully explain the Congressional declaration of policy and intent contained in Section 2 of the Act."
air transport enterprise inaugurated through a subsidiary of a surface carrier. Thus, the court construed the intent of Congress in the Civil Aeronautics Act as applying the standards of Section 408 to a new air transport enterprise. In the same decision, the court also specifically ruled that the Board, in granting a certificate of public convenience and necessity to a subsidiary of a surface carrier, might consider the ability of the parent company to meet the standards set forth in Section 408 (b) of the Act.” (Emphasis supplied).

One curious and interesting feature of the Board’s reasoning that it is “required” to consider the restrictions of Section 408 (b) in connection with a surface carrier’s application for a certificate under Section 401 is the statement above quoted that such a conclusion is in accord with the decision of the Second Circuit in the Pan American case. But the sole basis for such a conclusion by the Board was the court’s observation that the Board, in granting a certificate of public convenience and necessity to a subsidiary of a surface carrier, might consider the ability of the parent company to meet the standards set forth in Section 408 (b) of the Act. When we contrast this statement of the court with its categorical holding that “the issuance of the certificate to Export was not dependent upon conformity with Section 408 (b)” and that “the certificates may not be questioned for lack of approval of the acquisition of control of Export by its parent corporation,” we perceive what a slim reed the Board is grasping in seeking support for its interpretation of the Act in the court opinion in the Pan American case. It should be recalled that the Board’s interpretation of the Act in the Latin American decision is the same interpretation which Pan American Airways urged unsuccessfully to the court in appealing the American Export decision, and it was the Board’s contention on that appeal, that Section 408 (b) had no relation to an adjudication of a surface carrier’s application for a certificate under Section 401, which the court adopted. The conclusion seems inescapable that if the Board is correctly construing Congressional intent under the Civil Aeronautics Act in the Latin American decision and also in the supplemental decisions by the Board in the American Export case, it is in spite of the court’s holding in the Pan American case rather than because of it.

The Board concluded its advisory views in the Latin American case by contrasting the logic of its approach to the question as opposed to the illogical result which would follow from a contrary view. It stated:

Pan American Airways Co. v. Civil Aeronautics Board, 121 F.2d 810, 816 (1941).

See the discussion supra, pp.

"The interpretation contrary to that which we adopt here would create an anomalous and illogical construction of the Act. It must now be agreed that a surface carrier cannot either acquire control of an existing air carrier, nor obtain an air transportation franchise for a subsidiary company organized for that purpose, without proving to the Board that the surface carrier will thereby be enabled to use aircraft to public advantage in its operation as surface carrier and that the transaction will not restrain competition. Surely there can be no valid distinction bearing upon the objectives of the Civil Aeronautics Act between a new air transport enterprise inaugurated by a surface carrier through a subsidiary and such an enterprise inaugurated by a surface carrier directly. If the Congress intended to apply the conditions of Section 408 to new air transport enterprises established through subsidiaries of surface carriers then it must have intended also to apply a similar policy to such enterprises when inaugurated by surface carriers directly. In either case the surface carrier would be engaging in air transportation; only the manner of its accomplishment would be different.

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"... To hold that the Congress intended the application of a different test to situations substantially similar would be to exalt form above substance, and we must reject such an interpretation". (Emphasis supplied).

If the above reasoning is correct—and the writer submits that it is—surely the court in the Pan American case reasoned incorrectly in ruling that in an acquisition proceeding the Board must apply the standards of Section 408 (b) but in a certificate proceeding by a surface carrier under Section 401 the Board is not required to do so but "might" if it so desired.

In its most recent opinion, Petition of American President Lines, et al., decided March 19, 1947, the Board reiterates its previous view that it must determine public convenience and necessity "in the light of all the appropriate criteria of the Act wherever they may be found" including "the restrictive standard set forth in the second proviso of Section 408 (b)". This proviso, the Board states, "clearly reveals a statutory intent to regulate carefully the participation of surface carriers in air transportation and the principle it contains must be given proper consideration in any determination of public convenience and necessity."

However, the Board's opinion also contains a significant departure of doubtful validity from its previous decisions. It states that the restrictions of Section 408 (b) are no longer viewed as legal conditions to the granting of a certificate under Section 401 but rather as standards which the Board has discretion to apply or not to apply. The Board

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53Not yet officially reported; see C. A. B. Doc. No. 2411 (1947).
54Contrary to its holding in the Latin American case, supra, the Board seemingly now
goes on to say that it clearly has the power "and the duty" to apply the restrictions in a direct application case "unless the record of the case were to reveal that the public interest required service by a surface carrier regardless of the circumstances that it was a surface carrier". 55

This seems to amount to a claim by the Board that if one of the three standards of Section 408 (b)—that of public advantage or public interest—should in a given case outweigh the other two standards (restraint of competition and limitation to auxiliary or supplementary service), the latter two standards may be ignored or waived by the Board. If the application of the standards were permissive or phrased in the disjunctive, there might be some sanction for the exercise of the discretion which the Board claims. But such is not the case. When Congress stated in Section 408 (b) that the Board "shall not enter an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operations and will not restrain competition", 56 it obviously defined a maximum participation which might be authorized within the Board’s discretion but which could not be exceeded through the exercise of that discretion. Even though the Board might find a proposed air service by a surface carrier to be in the public interest and not in restraint of competition, it does not lie within the Board’s permissible range of discretion to authorize air service which will not be incidental to the surface operations. However desirable it might appear in a given case to do otherwise, that question has already been decided by Congress.

55 From such a position Mr. Branch dissented. In his opinion no change was warranted from the previous views of the Board under which the provisions of Section 408 (b) were interpreted as substantive legal conditions which must be met before surface carriers can be granted certificates of public convenience and necessity. It is submitted that Mr. Branch’s opinion correctly interprets Congressional intent.

Admittedly, the Board, in the *application* of the standards, has the discretion to determine whether or not a proposed air service is or is not auxiliary or supplementary to surface carrier operations or whether it would be to public advantage or restrain competition. These are questions of fact peculiarly within the Board's competency and discretion to decide. But this is not the discretion of which the Board is speaking when it asserts the power to waive or apply the standards themselves. The standards are substantive. Clearly their application is mandatory whether the surface carrier seeks control of an air carrier under Section 408 (b) or a certificate to engage in air transportation under Section 401 unless we are prepared to "exalt form above substance" and conclude that Congress intended to permit directly what it has expressly prohibited to be accomplished indirectly through the application of different tests to situations substantially identical.

Surely the Board in making the necessary finding of public convenience and necessity under Section 401 must as a minimum requirement not only apply the standards expressly set forth in Section 2 but interpret these standards as they may be implemented by Congress in other sections of the Act in order that legislative policy may be basically consistent. In short, the Board should effect a statutory requirement, not apply an administrative policy.

II.

**Contentions Advanced by the Surface Carriers**

The principal contentions urged by surface carrier applicants for air operating rights may be summarized as follows:

1. Section 408 (b) of the Civil Aeronautics Act is applicable only where the surface carrier seeks acquisition of control of an existing air carrier, and there is nothing in the Civil Aeronautics Act which indicates an intention by Congress to restrict the right of surface carriers to participate directly in air transportation on a basis of equality with air carrier applicants.

2. There is no Congressional policy in the Interstate Commerce Act or in other transportation statutes that the several forms of transportation shall remain mutually independent, and the Interstate Commerce Commission has not restricted rail applications for motor carrier certificates.

The first argument, in short, is that Section 408 (b) was designed solely to prevent potential monopolistic tendencies of indirect control, and that if no element of indirect control is involved, then the standards of Section 408 (b) should be given no weight whatsoever in considering Section 401 applications.
The argument is specious. It ignores realities when it suggests that Congress intended the incongruous result of surface carrier participation in air transportation completely free of restrictions simply because of a difference in the method by which the surface carrier enters the field. As the Board stated in its Latin American opinion, supra, such an interpretation would "exalt form above substance" and create an illogical situation.\footnote{To the writer it seems equally illogical to contend, as does the Board in the President Lines opinion, supra, that although Congress has made the application of the conditions of Section 408 (b) mandatory in a proceeding where a surface carrier seeks to acquire control of an air carrier, their application is discretionary with the Board when the surface carrier seeks to enter the field directly.} Is it not anomalous to argue that Congress, having deliberately erected a hurdle in the way of surface carrier acquisition of an air carrier, intended a wholly contrary policy in connection with the right of a surface carrier itself to engage in air transportation? Is it logical or reasonable to support a construction of a statute by which Congress would undo with one hand what it had secured with the other? Such arguments overlook two paramount considerations.

In the first place, while Congress in enacting Section 408 (b) undoubtedly had in mind as one purpose the preclusion of monopoly and restraints of competition effected through consolidations, mergers, and acquisitions of control, that purpose was given expression in Section 408 (b) elsewhere than in the second proviso which relates specifically to surface carriers. In the first proviso of Section 408 (b) it is declared that the Board shall not approve any consolidation, merger, acquisition of control, etc., which would result in creating a monopoly and thereby restrain competition or jeopardize another air carrier not a party to the transaction. All acquisitions, consolidations, or mergers by surface carriers or by air carriers must meet this test. But where the applicant is a surface carrier, Congress went further and expressly provided the additional requirements that before the transaction could be approved by the Board it must be shown that the proposed service would not only be to public advantage and would not restrain competition but also that the service would be auxiliary or supplementary to the surface carrier operations.\footnote{This latter restriction is actually the crux of the controversy and the primary reason why the surface carriers wish to read out of consideration the second proviso of Section 408 (b) when an application is made directly for a certificate under Section 401. Their objective is to engage in air transportation which is not only auxiliary to their surface carrier operations but also competitive with such operations. It is this latter type of operation which is susceptible to abuse.}
In the second place, competition can be just as effectively restrained when the surface carrier enters the field of air transportation directly as when it acquires control of an existing air carrier. In both cases competing forms of transportation are brought under common control, and the potential economic danger is the same. It must be assumed that Congressional policy is directed to the abuse which springs from common control of two competing forms of transportation and not to the form or medium by which such control is achieved.

There is ample historical and legislative background since the enactment of the Panama Canal Act\(^\text{69}\) in 1912 which discloses a prevailing Congressional intent to keep the various forms of transportation mutually independent except under carefully designed conditions and restrictions.\(^\text{60}\) The reasons are obvious.

It seems fair to conclude that surface carriers would at times be under a strong incentive to act for the protection of their larger investment in surface transportation. By reason of superior financial and operating resources, they would often be in a position to crush the competition of independent air carriers. The history of transportation shows that where one service controls a competing service, which if allowed to freely develop would destroy the older service, the latter obstructs such development.\(^\text{61}\)

Economy and improved methods of service have been demonstrated to result from vigorous competition. In the absence of competition, management tends to become static because there is no incentive to adopt new and improved methods of operation.

Contrary to recent assertions of the surface carriers before the Civil Aeronautics Board and before Congressional committees, we can retain


\(^{63}\)For a full discussion of this legislative history, see the Board’s opinion in Amer. Export Lines, Control-Amer. Export Air., 4 C. A. B. 104, 106-107 (1943). See also Tomlinson, Surface Carrier Participation in Air Transportation, 34 Georgetown L. J. 64 (1945).

\(^{64}\)As observed by former Assistant Attorney General Thurman Arnold. Town Meeting, Vol. 9, No. 29, p. 17 (1943). A similar observation by Carleton Putnam, president of Chicago and Southern Air Lines, reasons: “The capitalization of the Pennsylvania Railroad alone is about $1,900,000,000. The whole air transport business is worth about $60,000,000. The Pennsylvania Railroad itself could put the entire air transport business in its vest pocket and not make a bulge. Does anybody in this audience believe that the railroad industry would do anything else except swallow the air line industry in short order for the protection of its railroad investment?” Town Meeting, Vol. 9, No. 29, p. 7 (1943).
the benefits of our characteristically American methods and deal effectively with foreign countries without adopting their patterns of economic life.62 The stimulus of competition is vitally essential to the commercial aviation of this country. It is an undeniable fact that our air industry has prospered by an adherence to the principles of free enterprise. It will continue to develop in inherent strength and efficiency only if monopoly and restraint of competition are avoided in this new and dynamic field. Independence of the competing forms of transportation is imperative to that end and must continue to be the prevailing policy of our Government.

This brings us to the second major contention of the surface carriers that the rulings of the Interstate Commerce Commission clearly disclose that there is no basic Congressional policy that the several modes of transportation remain mutually independent,63 and specifically that the Interstate Commerce Commission has not restricted the entry of rail carriers into the motor carrier field.

III.

DECISIONS OF THE INTERSTATE COMMERCE COMMISSION CONSTRUING PROVISIONS OF THE MOTOR CARRIER ACT COMPARABLE TO THE CONTROVERSIAL SECTIONS OF THE CIVIL AERONAUTICS ACT

The second proviso of Section 408 (b) of the Civil Aeronautics Act was borrowed practically word for word from Section 213 (a) (1) of the Motor Carrier Act of 1935,64 by which Congress sought to preserve the motor carrier field from domination by other forms of transportation which “might use the control as a means to strangle, curtail, or hinder progress in highway transportation for the benefit of the other competing transportation”.65 By 1938, when the Civil Aeronautics Act was enacted, Section 213 (a) (1) had received a sufficient amount of settled administrative interpretation and application for Congress to translate into Section 408 (b) of the Civil Aeronautics Act. The legislative history of the latter Act clearly shows this to be the reason for the adoption of almost identical language.66

62In any event, the practice of foreign countries has no proper relevance because in these cases the surface controlled air carriers are government controlled monopolies.
6On the general proposition, see footnote 60, supra.
6Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5234, 75th Cong., 1st Sess. 343 (1937); Hearings before Senate Subcommittee of Committee on Interstate Commerce on S. 2, 75th Cong., 1st Sess. 70 (1937).
Accordingly, the Commission's established interpretation of Section 213 (a) (1)\(^6\) of the Motor Carrier Act has been given considerable weight by the Board in determining Congressional policy under the Civil Aeronautics Act. The correlation is conceded by the surface carriers. But they seek to avoid its necessary effect by contending that the Commission treats applications by railroads under Section 207 of the Interstate Commerce Act\(^6\) on the same basis as motor carrier applicants without imposing restrictions contained in Section 213 (a) (1) or 5 (2) (b) which concern acquisitions.\(^6\)

On the contrary, it is the Commission's well settled practice to apply the restrictive criteria whether the rail carrier seeks certificates of public convenience and necessity under Section 207 or approval of acquisitions under Section 5 (2) (b). The Commission's decisions concerning applications by rail carriers for motor carrier certificates under Section 207 irrefutably show that such certificates are granted only when the Commission finds the proposed service to public advantage, not unduly in restraint of competition, and auxiliary or supplementary to the carriers' rail operations.\(^7\)

In Kansas City S. Transport Company, Inc., Common Carrier Application, 10 M. C. C. 221 (1940), the Commission was confronted with an application by an affiliate of the Kansas City Southern Railway Company under Section 207 for a certificate to operate as a motor carrier of general commodities over certain described routes. In reaching its conclusions of public convenience and necessity under Section 207, the Commission applied the standards of Section 213 (a) (1).

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\(^6\)Now Section 5 (2) (b), 54 Stat. 906 (1940), 49 U. S. C. § 5 (2) (b) (1940), as a result of the Transportation Act of 1940. The original language of Sec. 213 (a) (1) has been slightly modified by amendment, but the restrictions under discussion remain unaltered.

\(^7\)As contended by Baggett, *The Right of Steamship Carriers to Engage in Air Transportation*, 30 A. B. A. J. 503, 522-523 (1944).

\(^7\)In this connection, it is of interest to note that Section 202 (c) of the Interstate Commerce Act, 56 Stat. 300 (1942), 49 U. S. C. § 302 (1940) specifically exempts certain terminal area motor carrier operations of railroads from the restrictions of the Motor Carrier Act and states that they shall be considered as a part of the rail operation when performed by railroads and a part of water transportation when performed by water carriers. From the standpoint of statutory construction this would seem to be a further indication by Congress that except for these terminal area privileges rail carriers may not enter the motor carrier field unless they are able to show that the proposed operations meet the conditions set out in Section 5 (2) (b) of the Interstate Commerce Act (originally Section 213 (a) (1) of the Motor Carrier Act).
The Kansas City case was decided by the Commission in November 1938. From that date to the early part of 1940 it was followed consistently by the Commission in disposing of more than a score of railroad applications for motor carrier operating authority under Section 207 of the Motor Carrier Act.\textsuperscript{71} In all of these cases the restrictions imposed by Section 213 (a) (1) were applied—correlation which the surface carriers contend the Commission does not make.\textsuperscript{72}

By virtue of the Kansas City decision and numerous other opinions in proceedings under both Sections 207 and 213, the Commission's administrative construction of Section 213(a)(1) and of the declared policy of Congress as it affected proceedings under Section 207 as well as Section 213 was firmly established when the Transportation Act of 1940 was before Congress. Under such circumstances, the reenactment of Section 213 (a) (1) as a part of Section 5 of the Transportation Act of 1940 and the restatement of the national transportation policy without any change suggesting dissatisfaction with the Commission's established administrative construction of the effect and applicability of these sections in certificate as well as acquisition cases must be judged as approval by Congress of the Commission's interpretation.\textsuperscript{73} It is not only to be presumed,\textsuperscript{74} but, as stated heretofore, resort to the legislative his-

\textsuperscript{71}Rock Island Motor Transit Co.—Purchase—White Line Motor Freight Co., Inc., \textit{et al.}, 40 M. C. C. 457, 468 (1946). Conclusions similar to and consistent with the Kansas City decision were reached by the Commission in Texas & Pacific Motor Transport Co., Common Carrier Application—Louisiana, 10 M. C. C. 525 (1939); Illinois Central Ry. Co., Common Carrier Appl., 12 M. C. C. 485 (1939); Gulf, M. & N. R. Co., Common Carrier Appl., 18 M. C. C. 721 (1940); Missouri Pacific R. Co., Extension of Operations—Illinois, 19 M. C. C. 605 (1940); Willett Co. of Ind., Inc., Extension—Indiana, Illinois, and Kentucky, 21 M. C. C. 405 (1940).

\textsuperscript{72}For example, see Baggett, \textit{The Right of Steamship Carriers to Engage in Air Transportation}, 30 A. B. A. J. 503, 522 (1944); Baggett, \textit{Are Surface Carriers Grounded by Law}, 31 Va. L. Rev. 337, 347, 352, 356 (1945). As a matter of fact, the Commission not only applies the restrictive criteria of Section 5 (2) (b) in a certificate application by a railroad under Section 207, but also has made quite plain that it will take corrective action where necessary to compel a railroad to cease performing motor carrier service which is not auxiliary or incidental to its rail operations. See Texas & Pacific M. Transport Co. Com. Car. Appl., 41 M. C. C. 721, 724-727 (1946).


tory of the Civil Aeronautics Act clearly establishes that Congress intended that the comparable provisions of the Motor Carrier and Civil Aeronautics Act should receive like interpretation, application, and effect.\textsuperscript{75}

If there be any lingering doubt as to the Commission's established interpretation of Congressional intent in the Motor Carrier Act, it is firmly disposed of by the Commission's recent decision in \textit{Rock Island Motor Transit Co.—Purchase—White Line Motor Freight Co., Inc., et al.}, 40 M. C. C. 457 (1946). This case is an emphatic refutation of the argument which the surface carriers have advanced continually before the Civil Aeronautics Board that the Interstate Commerce Commission has applied the restrictions of Sections 213 (a) (1) or 5 (2) (b) only to acquisition applications and not to applications by railroads or railroad controlled affiliates for motor carrier operating rights under Section 207 of the Interstate Commerce Act. After reviewing in detail the history of its decisions, both on acquisition applications under Section 213 and common carrier applications under Section 207,\textsuperscript{76} the Commission said:\textsuperscript{77}

"From a regulatory standpoint motor-carrier operations conducted by a railroad affiliate should be the same whether the authority under which they are conducted was acquired by an application under Section 207 or by purchase. . . .

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"It is inconceivable that the same language 'auxiliary to, and supplemental of,' should be used in scores of our reports for the purpose of limiting or defining motor-carrier operating rights but with different meanings depending upon whether the operating rights were acquired by an application under Section 207 or by purchase. The original report in the \textit{Kansas City Southern} case filed by the same division as had decided the \textit{Barker} case,\textsuperscript{78} cites and discusses that case. Both this report and our report on reconsideration show a purpose, in the disposition of cases arising under Section 207, to give weight to the same considerations and to impose the same special safeguards as had been applied in the \textit{Barker} case.\textsuperscript{79} In these circumstances the lifting or borrowing of the lan-

\textsuperscript{75}See note 66 \textit{supra}.

\textsuperscript{76}Rock Island Motor Transit Co. - Purchase-White Line Motor Freight Co., Inc., \textit{et al.}, 40 M. C. C. 457, 462-469 (1946).

\textsuperscript{77}\textit{Id.} at 471, 473.

\textsuperscript{78}Pennsylvania Truck Lines, Inc.-Control-Barker, 1 M. C. C. 101 (1936). This is the leading case on rail-motor \textit{acquisition}. Surface carrier applicants before the Civil Aeronautics Board always distinguish the \textit{Barker} case on the ground that it is an acquisition case and as such has no relevance to certificate applications under either the Civil Aeronautics or Interstate Commerce Acts.

\textsuperscript{79}This language would appear to effectively overrule the decisions by Division 5 of the Commission in the \textit{St. Andrews Bay} and \textit{Santa Fe Trail} cases (upon which the Second
guage used in the *Barker* case to describe the approved service which might be
given the vendee under the acquired operating right, and the use of the same
language, 'auxiliary to and supplemental of', to define and limit the service
which might be given under the authority granted in the *Kansas City Southern*
case could not have been with any intent to use such words in the latter case
in any different sense than they had been used in the former case. . . .

"It is our opinion, originally indicated in the *Kansas City Southern* case and
confirmed by nearly a decade of experience in motor-carrier regulations, that
the preservation of the inherent advantages of motor carrier service and of
healthy competition between railroads and motor carriers and the promotion
of economical and efficient transportation service by all modes of transportation
and of sound conditions in the transportation and among the several carriers,
in short the accomplishment of the purposes forming the national transportation
policy, require that, except where unusual circumstances prevail, every grant to
a railroad or to a railroad affiliate of authority to operate as a common carrier
by motor vehicle or to acquire such authority by purchase or otherwise should
be so conditioned as definitely to limit the future service by motor vehicle to
that which is auxiliary to, or supplemental of, train service."

The *Rock Island* report is important to the issue under discussion not
only because of the foregoing quoted language but also because it is a
case wherein the full Commission reopened a proceeding to reconsider
the action of Division 4 of the Commission which had approved a rail
purchase application without restricting the future operations to service
auxiliary to or supplemental of the train service of the railroad.\(^81\) As

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\(^{80}\)Here the Commission's language directly rejects another fallacious argument frequently
urged to the Board by the surface carriers that cases involving applications by sub-
sidiaries have no applicability to cases involving direct applications by a carrier for operat-
ing certificates. See Further Memorandum by Petitioners *In the Matter of American

\(^{81}\)Another recent decision by Division 4 of the Commission, *Gulf Transport Co.—Purchase
—Tinsley, 40 M. C. C. 767 (1946)*, decided June 7, 1946, is not compatible with the views
expressed by the full Commission in the *Rock Island* decision. In the *Tinsley* case,
Division Four distinguishes the character of the limitations imposed upon the carriage
of freight by motor vehicle under railroad control and those appropriate to the carriage of
passengers. The opinion states that the limitation to operations which are "auxiliary to
or supplemental of train service" was intended to apply to the transportation of freight,
and that in the case of passenger service the "general policy has been, in such case, to
inquire whether the acquisition or extension is an invasion of territory outside the natural
territory of the railroad, although numerous exceptions to limiting the operations to such
territory have been made". The

The Motor Carrier Act does not support such a distinction. Its validity can only be
founded on unrestrained administrative discretion in the clear face of the competitive safe-
guards contained in Section 5 (2) (b). The Motor Carrier Act and the legislative history
a result of this reconsideration the authorized service was limited to operations auxiliary to or supplemental of train service together with a reservation of authority to impose such specific conditions in the future as the Commission might find necessary to insure only auxiliary and supplemental operations.

IV.

INTERPRETATION BY THE SUPREME COURT OF CONGRESSIONAL INTENT IN THE MOTOR CARRIER ACT

Another effective, and perhaps the most authoritative, rejection of the view that the Commission has treated rail applicants for motor carrier certificates on the same basis as motor carrier applicants without restrictions, is derived from a consideration of two recent decisions by the Supreme Court of the United States. Interstate Commerce Commis-

sion v. Parker, 326 U. S. 60 (1945); American Trucking Assns. Inc., v. United States, 326 U. S. 77 (1945). These were companion cases.

The Parker case involved an application under Section 207 for extension of motor carrier operating rights by a wholly owned motor carrier subsidiary of the Pennsylvania Railroad Company.82 In reversing the decision of the lower court which had set aside the Commission's order, the Supreme Court stressed the fact that the Commission had carefully restricted the certificate granted to motor carrier transportation which was "truly supplementary or auxiliary to the rail traffic".83 In discussing the permissible range of railroad participation in motor carrier operations, the court observed that it was clear from the legislative history of the Motor Carrier Act that it was not intended to "bar" railroads from the operation of motor vehicles but that limited operations could be authorized by the Commission. In defining the extent of these operations the court stated:84

"Section 213 (a) of the 1935 act specifically regulated acquisition of motor carriers by railroads. Provisions for such acquisitions appear now in § 5 of the Interstate Commerce Act, 54 Stat. 905. See McLean Trucking Co. v. United States, supra. Section 202 (c) (1) of the 1940 Interstate Commerce Act, part II, as amended, withdraws railroad operation of motor carriers in terminal areas of Sections 213 and 5 (2) (b) fail to provide the slightest justification for a distinction between freight and passenger service as a valid ground for ignoring the restrictions expressly provided by Congress for rail acquisition of motor carriers.

82No acquisition of control was involved in the case.

83326 U. S. 60, 63 (1945). The Court emphasized this point repeatedly throughout its opinion. Id. at pp. 62, 63, 67-68, 69-70, 72, and 73.

84Id. at 67-68.
from the scope of motor carrier regulation and leaves such operations under part I. Railroads may, therefore, in appropriate places operate trucks.” (Emphasis supplied).

Since the action of the Commission before the court was approval of an application for a certificate under Section 207 and no issue of acquisition was involved in the case, the foregoing observation obviously represents recognition by the court that the standards of Section 5 (2) (b) must be applied by the Commission in a Section 207 proceeding. This fact is further demonstrated by a succeeding observation by the court which states:85

"Since, however, on adequate evidence the Commission found that the motor service sought was of a different character from the existing motor service and not directly competitive or unduly prejudicial to the already certificated motor carriers, 42 M. C. C. 725-26, we hold that the Commission had statutory authority and administrative discretion to order the certificate to issue."86

In the course of his concurring opinion in the President Lines case, supra, Mr. Landis, Chairman of the Civil Aeronautics Board, refers to the Parker case in support of his conclusion that the Interstate Commerce Commission has “in some cases” restricted rail applications under Section 207 within the limits prescribed by Section 213 not because it was required to do so but solely as a matter of policy. He states that the “issue” of whether compliance with Section 213 is a legal prerequisite to the issuance of a motor carrier certificate to a rail applicant under Section 207 “though presented in the case” was not decided by the court.

Neither the opinion of the court nor the record of proceedings before the Commission or the court supports this conclusion. On the contrary, it is abundantly evident through reference to the transcript of record before the Supreme Court in the Parker case that the litigants were not in disagreement on the proposition that the Commission must apply the standards contained in Section 5 (2) (b) in authorizing a railroad to conduct motor carrier operations under Section 207. The brief filed on behalf of the Pennsylvania Railroad and its subsidiary, the Willett Company, is literally characterized by argument which directly refutes the position that the Commission does not or need not restrict motor carrier certificates granted to railroads or railroad subsidiaries under Section

85Id. at 69-70.

86At another point in the opinion the court stressed the fact that the Commission had the “power” to issue motor carrier certificates to rail carriers and their wholly owned subsidiaries “under facts and with limitations in the certificate” previously described by the court in its opinion. 326 U. S. 60 at 73 (1945).
207 within the limits prescribed by Section 5 (2) (b). Numerous quotations from this brief could be given but are unnecessary. They all amount to the same thing—unquestioning recognition of not only the right but the statutory duty of the Commission to apply the conditions and restrictions of Section 5 (2) (b) in passing upon certificate applications under Section 207 by railroads either directly or through motor carrier subsidiaries. One brief quotation from the railroad’s brief succinctly states its position. After quoting the national transportation policy of 1940 and the provisions of Sections 207, 213 (a) (1), and 5 (2) (b) of the Interstate Commerce Act, the Pennsylvania Railroad contended:

"The plain implication to be derived from all these provisions when read together is that a rail carrier may be permitted, either directly or through a motor carrier acquired by it, to supply service by motor vehicle in coordination with its own service where it is found by the Commission that such supplying of motor vehicle service will be to the public advantage in the operations of the rail carrier, and will not unduly restrain competition."88

It may be reasoned with some force that the Pennsylvania Railroad would not make such admissions of limitations on its operations if there was a reasonable doubt of the proper correlation of Sections 207 and 5 (2) (b) of the Interstate Commerce Act.

In the American Trucking Assns. case, a majority of the lower court had sustained the Commission’s order granting motor carrier operating rights on direct application of the Seaboard Airline Railway under Section 207.89 The crucial point in the case, stressed throughout by both the majority and dissenting opinions, was whether the Commission had applied the proper statutory criteria in arriving at its finding of public convenience and necessity. The majority of the lower court pointed out that the Commission had found that the granting of the certificates to the railroad applicant “would not create or tend to create a monopoly, nor restrain competition in the motor carrier field”90. It further pointed out that the proposed motor carrier service “differed rather widely from the application of a pure motor carrier (rendering exclusively motor service) and also from an application by a railroad

88Id. at 26.
90Id. at 399.
for permission to inaugurate motor service in a territory and field quite separate and divorced from its rail operations".\(^91\) Obviously these considerations would have been entirely irrelevant and immaterial if the direct application by Seaboard Railway should or could have been treated by the Commission on the same basis as an application by a motor carrier without reference to the restrictions contained in Section 5 (2) (b) of the Interstate Commerce Act. The very fact that the court emphasized the Commission’s findings that competition would not be restrained and that the proposed operations were strictly auxiliary to Seaboard’s rail operations\(^92\) proves beyond question that the court recognized that the application could not be granted unless the restrictions imposed by Section 5 (2) (b) of the statute were met.

If there be any doubt on this point, it is squarely presented in the opinion of the dissenting judge, whose views were adopted by the Supreme Court in reversing on appeal. The dissent went off on the basis that the Commission had denied the protesting motor carriers and the Department of Justice (which had intervened in the Commission proceeding) the opportunity to present evidence as to the effect of these combined operations on competition. The dissenting judge reasoned that this denial was a material error because competitive conditions could not possibly be determined except upon consideration of the operations as a whole and “by the further fact that under the statute, 54 Stat. 906 (1940), 49 U. S. C. A. § 5 (2) (b), the Commission is required to find that the granting of the application will be to public advantage and will not unduly restrain competition”.\(^93\) (Emphasis supplied.)

In reversing the court below, the Supreme Court pointed out that although the Commission had made the finding that the granting of the certificates authorized only motor carrier operations of a “specialized type coordinated with rail operations”;\(^94\) it had excluded certain evidence which was offered to show the economic effect on the existing motor carriers of the proposed railway operation of motor trucks.\(^95\) In finding the order invalid, the Court reasoned:\(^96\)

“It is not enough that the railroad’s motor operations are found by the Commission to be of a different character from over-the-road motor operations be-

\(^{91}\text{Id. at 398.}\)
\(^{92}\text{Id. at 396.}\)
\(^{93}\text{Id. at 402.}\)
\(^{94}\text{326 U. S. 77, 80 (1946).}\)
\(^{95}\text{Id. at 83-84.}\)
\(^{96}\text{Id. at 86.}\)
cause they are integrated with railroad operations.97 The Commission must also consider the disadvantage to the public of a serious impairment of the non-rail motor carriers.98 Those affected are entitled to fully develop the hearing of the proposals on the transportation agencies which are involved. The discretion of the Commission should be exercised after consideration of all relevant information." (Emphasis supplied).

Patently, this evidence would have been irrelevant were it not for the considerations required under Section 5 (2) (b).

The Parker and American Trucking decisions by the Supreme Court would appear to decisively answer contentions that the Commission has not or need not consider the restrictions of Section 5 (2) (b) in passing upon applications by railroads for motor carrier certificates under Section 207, and a fortiori the claim that the restrictions of Section 408 (b) of the Civil Aeronautics Act must not or need not be considered in passing upon applications by surface carriers under Section 401.

Conclusion

In the opinion of the writer the foregoing analysis demonstrates that surface carriers may engage in air transportation only upon meeting the restrictions and conditions provided by Section 408 (b) of the Civil Aeronautics Act. Analysis of the contentions urged by surface carriers in opposition to this process of statutory construction shows them to be unsound, legally unsupportable, and incompatible with the source authority upon which they purport to rely. It is submitted that the legal arguments of the surface carriers find no warrant or support in the language of the Civil Aeronautics Act, its legislative history, or from the administration of comparable provisions in the Interstate Commerce Act. The Civil Aeronautics Act prohibits both direct and indirect surface carrier participation in air transportation except upon the restricted basis expressly provided by Section 408 (b) of the statute. The obvious conclusion is that the legislative policy is economically unacceptable to the surface carriers but unassailable in law.

97The Supreme Court is here recognizing the necessity of one of the criteria found only in Section 5 (2) (b) of the Act, namely the Commission's interpretation that the words "in its operations" restrict the character of certificate granted to a rail applicant to the integrated or "supplementary and auxiliary" type.

98Here the Court is citing the need of the second required criterion found in Section 5 (2) (b), namely, "will not unduly restrain competition."
THE FULL FAITH AND CREDIT CLAUSE:
COLLATERAL ATTACK OF JURISDICTIONAL ISSUES

BADDIA J. RASHID

I. THEORY OF FULL FAITH AND CREDIT AND RES JUDICATA

The "full faith and credit" clause was the first important provision of the Constitution that prescribed "some method of adjustment" between diversified state laws and judgments. By virtue of that clause the question of the recognition and enforcement of the judgments of the courts of sister states became a federal question, and the states could not freely grant recognition or refuse enforcement of the judgments of sister states as they might otherwise have done. The Constitution provides that:

"Full faith and credit shall be given in each state to public acts, records and judicial proceedings of every state. And the Congress may by general laws prescribe the manner in which such acts, records and judicial proceedings shall be proved and the effect thereof."  

In order to make this clause effective, Congress passed the Act of May 26, 1790, 8 which made specific provisions for the authentication of the records, judicial proceedings and acts of the legislatures of the several states, and further prescribed that:

"... the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."  

The Act was extended on March 27, 1804, to include the territories of the United States and those countries subject to its jurisdiction.

These constitutional and statutory provisions did not make the judgments of other states domestic judgments to all intents and purposes, but merely gave them a general validity as evidence. However, when such judgments are duly pleaded and proved in a court of a sister state, they "have the effect of being not merely prima facie evidence, but conclu-

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4 U. S. Const. Art. IV, § 1.
6 Ibid. For a more complete historical approach to the subject, see Costigan, The History of the Adoption of Sec. 1 of Art. IV of the United States Constitution, 4 Col. L. Rev. 470 (1904); Abel, Administrative Determinations and Full Faith and Credit, 22 Iowa L. Rev. 461 (1937).
sive proof, of the rights thereby adjudicated". The refusal to accord them the force and effect which they had in the state where rendered would amount to a denial of full faith and credit.

Although the judicial proceedings of the federal courts were not explicitly included within the language of the clause, it has been held that state courts must give them the same recognition as would be required in the case of judgments of sister states. Likewise, full faith and credit must be accorded to the judgments of state courts when they are sought to be enforced in federal tribunals.

The underlying problem of full faith and credit constantly appears under varying circumstances. At first, questions involving the enforcement of money judgments in sister states occupied almost the entire field of inquiry. In more recent years, the Supreme Court has given much consideration to the question of the recognition of state laws. Still more recently,

"... the court has to an increasing degree limited or questioned the defenses which may still be open in actions on judgments and, even more significantly, it has given increasing attention to their effect as res judicata."

It is with the developments in this latter field that this article is concerned, and more specifically with the doctrine of res judicata as applied to jurisdictional facts. Other requirements and defenses such as finality of the judgment, conformity to the public policy of the forum, fraud, penal laws and enforcement of tax laws are outside the scope of this discussion.

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Huntington v. Attrill, 146 U. S. 657, 685 (1892). Caveat: the original court must have had jurisdiction to render the judgment before it is entitled to such recognition.

Hancock National Bank v. Farnum, 176 U. S. 640 (1900).

American Surety Co. v. Baldwin, 287 U. S. 156 (1932). A decision of a state court in a proceeding begun by motion to set aside a judgment for lack of jurisdiction over the parties is res judicata in federal court where defeated movant sought an injunction against enforcement of state court judgment.


Cheatham, op. cit. supra note 1, at 331.


See Roche v. McDonald, 275 U. S. 449 (1928); Fauntleroy v. Lum, 210 U. S. 230 (1908).

See Christmas v. Russell, 5 Wall. 290 (1866); Levin v. Gladstein, 142 N. C. 385, 55 S. E. 371 (1906).


The theory of res judicata is essentially that each party to a controversy should have his day in court, with a full and fair opportunity to present his legal views and his evidence. However, the dictates of public policy require that there should be a speedy end to litigation. Having contested an issue once before a competent tribunal, the parties should be precluded from thereafter relitigating the issue by a collateral attack in another court. Black on Judgments states two rules of res judicata:

"A point which was actually and directly in issue in the former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, cannot be again drawn into question in any future action between the same parties or their privies, whether the causes of action in the two suits be identical or different."16

And again

"A judgment rendered by a court of competent jurisdiction, on the merits, is a bar to any future suit, between the same parties or their privies, upon the same cause of action, so long as it remains unreversed."17

The fundamental function of the doctrine is to prevent the parties and their privies from contesting in a subsequent proceeding a controversy already determined by a prior valid judgment.18 In an early leading case, Justice Washington of the Supreme Court remarked that "public convenience seems to require, that a question, which has once been fairly decided, should not be again litigated between the same parties, unless in a court of appellate jurisdiction."19 Therefore, as a generalization, the rule of res judicata is that a judgment conclusively establishes all facts necessary to support it. However, the rule is subject to certain exceptions in the case of jurisdictional facts. Jurisdiction is a "prerequisite to the validity of a judgment and a court cannot create jurisdiction by its own judicial fiat."20

As between the states of the United States, the full faith and credit clause of the Constitution and the legislation enacted thereunder do not preclude an inquiry into the question of jurisdiction of the first court to render the judgment sought to be enforced in the second state. If the first court had in fact no jurisdiction over the person of the defendant or over the subject matter of the action, the judgment is not entitled

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16§ 504 (2d ed. 1902).
17Ibid.
18For a full discussion of the theory of res judicata, see Gavit, Jurisdiction of the Subject Matter and Res Judicata, 80 U. of Pa. L. Rev. 386 (1932).
19Croudson v. Leonard, 4 Cranch 434, 437 (U. S. 1808).
20Goodrich, Conflict of Laws 555 (2d ed. 1938).
to recognition in a sister state. The jurisdictional issue, therefore, would not be res judicata. The author proposes in this article to discuss the circumstances under which such jurisdictional facts would be considered res judicata by the courts.

Before proceeding to an analysis of the case law, it would be practical to determine exactly what is meant by jurisdictional facts in the field of res judicata. Fifty years ago, in Noble v. Union River Logging Railroad,\(^{21}\) the Supreme Court made an important distinction between strictly jurisdictional facts and quasi jurisdictional facts. In every judicial proceeding the existence of the former is necessary to the validity of the judgment, and without such a basis of jurisdiction the act of the court is a mere nullity. Examples of strictly jurisdictional facts are service of process upon the defendant in an in personam action, or the seizure and attachment of the res in a purely in rem proceeding. For want of jurisdiction over the person or the subject matter, the validity of the judgment may be attacked in a collateral action. But the Court continues:

"There is, however, another class of facts which are termed quasi jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts, the finding of the court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties."\(^{22}\)

Hence, diversity of citizenship in a federal court, or the amount in controversy would be quasi jurisdictional facts, because they are merely preliminary facts necessary to be proven to authorize the court to act, and are not such essential facts as would give the court actual control over the person of defendant or the subject matter of the suit. In the course of this paper, we will be concerned only with the strictly jurisdictional facts by which the court acquires control over the parties or the subject matter, since they alone are subject to collateral attack when a judgment is sought to be enforced in a sister state.

II. THE JURISDICTIONAL ISSUE IN GENERAL

The operation of every judgment depends primarily upon the power of the court to render it. Chancellor Kent, in his Commentaries, observed that "it is only when the jurisdiction of the court in another State is not impeached, either as to the subject matter or the person, that the

\(^{21}\)147 U. S. 165 (1893).

\(^{22}\)Id. at 173.
record of the judgment is entitled to full faith and credit.” Justice Story expressed this thought in his *Commentary on the Constitution*, when he stated that the conclusive effect of judgment “does not prevent an inquiry into the jurisdiction of the court, in which the original judgment was given, to pronounce it; or the right of the State itself to exercise authority over the person or the subject-matter.” This principle which permits the second court to reexamine the jurisdiction of the original court in rendering the judgment is a fundamental one in Conflict of Laws. Almost seventy-five years ago, Justice Bradley enunciated the general doctrine in *Thompson v. Whitman*.

In that case, Thompson, who was sheriff of Monmouth county in New Jersey, seized the sloop of Whitman and informed against her before two justices of the peace of said county, by whom she was condemned and ordered to be sold. The place of seizure was within the state of New Jersey, but outside the county of Monmouth. Whitman thereupon brought an action of trespass in a court of New York against Thompson, challenging the jurisdiction of the justices to make the seizure. According to the New Jersey law, the condemnation must be made by *two justices of the county where such seizure shall have been made*. Thompson produced a record of the proceedings before the justices which stated the offense as having been committed and seizure as made within the county of Monmouth, and claimed that this record was conclusive as to the jurisdictional facts recited therein. But the second court charged that the record was only prima facie evidence of the facts therein stated, and permitted the plaintiff to attack the jurisdictional issue. Upon review before the Supreme Court, the decision was affirmed in an opinion by Justice Bradley, who declared:

> “On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself.”

Once having established this power, the following problem arises: Suppose that the court of State B has examined into the jurisdiction

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23 *Kent, Commentaries* 281.
24 *Story, Commentary on the Constitution* § 1313.
25 *18 Wall. 457* (U. S. 1873).
26 *Id.* at 469. Nussbaum, *Jurisdiction and Foreign Judgments*, 41 Col. L. Rev. 221, 224 (1941), says: “The independence of the forum is further emphasized by the fact that the findings of the foreign court in respect to jurisdiction are not binding upon the forum.”
of the court of State A, and has made an erroneous determination as to the jurisdictional issue. May the decision of the court of State B be collaterally attacked in another proceeding on the ground that it has failed to give effect to the judgment of State A, where the question of jurisdiction was actually litigated? An identical problem was answered by the Supreme Court in the case of *Treinies v. Sunshine Mining Co.*

That case involved the distribution of particular stock and dividends of the Sunshine Mining Co., and the adverse claimants were Treinies, Pelkes and Mason. Suit was instituted first in the District Court of Idaho, and after an appeal to the Supreme Court of Idaho it was decreed that the stock and dividends belonged to Mason. Before the entry of the first decree of the Idaho District Court, Mason filed a petition in a Superior Court of Washington for determination of the question, and a judgment was entered upholding the ownership of Pelkes. Both the Idaho and Washington courts had jurisdiction over all the parties concerned. In the Idaho proceeding the Washington judgment was pleaded in bar, and it was argued that the Washington court's determination that it had jurisdiction over the subject matter was res judicata. However, the Idaho court declined to give effect to the Washington decree for lack of jurisdiction over the subject matter, and decided that it had jurisdiction over the stock controversy. At this point in the litigation the Sunshine Company filed a bill of interpleader, and the Idaho decree was pleaded in this proceeding as res judicata of the controversy. The Court of Appeals for the Ninth Circuit affirmed the Idaho decree as res judicata, and the Supreme Court upheld the decision upon review.

In its opinion, the Court cited the *Thompson* case for the proposition that "the power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question". Even though the question of jurisdiction had been actually litigated in the Washington court, it would not preclude the Idaho court from again determining the jurisdictional issue. In a footnote to the opinion, Justice Reed declared that "it is unnecessary to consider whether the Idaho determination as to the jurisdiction of the Washington court was properly made", because "even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court". The Court further indicated that if the issue of jurisdiction was decided

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27Id. at 66 (1939).
28Id. at 78.
29Id. at 77.
30Id. at 78.
erroneously in the Idaho tribunal, the right to review that error was in those proceedings on remittitur from the Supreme Court of Idaho. The failure to pursue that remedy does not afford the parties an opportunity to attack that judgment in a collateral action.\textsuperscript{31}

It is significant to note that the Restatement on Judgments adheres completely to the Court's interpretation of the law in the \textit{Treinies} case. The rule is stated as follows:

"Where defendant appears in an action to object that the court has no jurisdiction over the subject matter and his objection is overruled and judgment is rendered against him, and in a subsequent action between the parties the defendant contends that the judgment was void for lack of jurisdiction over the subject matter and the court so holds and gives judgment for the defendant, this judgment, although erroneous, is not void and is not subject to collateral attack."\textsuperscript{32}

The Restatement likewise applies the decision of the \textit{Treinies} case to identical situations involving questions of personal jurisdiction.\textsuperscript{33}

III. Collateral Attack of Jurisdiction Over Person and Subject Matter

It is well established that if a court rendering a judgment lacks jurisdiction over the person of the defendant, or over the subject matter in an \textit{in rem} proceeding, there would be a violation of the due process clause of the Constitution. A corollary to this principle recognizes that judgments so rendered are not entitled to full faith and credit. The jurisdictional issue may be attacked in a collateral action without violating the theory of res judicata. \textit{Bigelow v. Old Dominion Copper Mining and Smelting Co.}\textsuperscript{34} and \textit{Riley v. New York Trust Co.}\textsuperscript{35} are two cases which serve to indicate the status of the law in this field.

In the former adjudication, the Old Dominion Company filed bills in equity against Bigelow and his associate Lewisohn to recover secret

\textsuperscript{31}Although the \textit{Treinies} case has caused much confusion among legal writers, the foregoing interpretation appears to be the correct one. In the Brief of Respondents, Mason \textit{et al.}, pp. 17 to 20, it was argued that the Idaho determination, although erroneous, could not be attacked collaterally, but only by way of review in those same proceedings. Although petitioner sought a review from the decree of the Supreme Court of Idaho by petition for certiorari, it was denied because a final judgment was not involved. The case had been remitted to the District Court on new findings of fact and conclusions of law, from which decree no review was sought.

\textsuperscript{32}\textit{Restatement, Judgments} \textsection 10, comment e (1942).

\textsuperscript{33}\textit{Id.} at \textsection 9, comment d.

\textsuperscript{34}225 U. S. 111 (1912).

\textsuperscript{35}315 U. S. 343 (1942).
profits realized by them as promoters of the company. Bigelow was sued in the courts of Massachusetts, while Lewisohn was sued separately in the courts of New York. In the New York litigation demurrers were interposed and sustained, and consequently the bills were dismissed. The final decree in one of the New York cases was pleaded in a supplemental answer in the pending Massachusetts cases as a bar to the suits against Bigelow. However, the latter court declared that Bigelow was neither a party nor a privy to the New York suits, and hence the judgment was not entitled to full faith and credit so as to afford any protection to Bigelow. Affirming the conclusion of the Massachusetts court, the Supreme Court said that:

"... the Massachusetts court had the legal right to inquire, not only whether Bigelow was a party to the New York judgment in the sense that he might have appeared and defended, or appealed from it, but whether the cause of action and the relation of Bigelow to it, or to the parties, was such that the New York court could pronounce a judgment which would bind him, or conclude the plaintiff from suing him upon the same facts."86

According to the Court's opinion, Bigelow was confessedly not a party to the New York suit; he did not voluntarily appear; he had no legal right to introduce evidence, control the proceedings, nor appeal from the judgment. Therefore, the New York court had no jurisdiction to render a judgment in personam against him, which would be entitled to full faith and credit in another state.87

The Riley case, on the other hand, settled the doctrine that the courts of one state are not required to regard as conclusive any judgment of the court of another state which had no jurisdiction of the subject in an in rem proceeding, where there was no basis for personal jurisdiction. The controversy involved the distribution of stock of a Delaware corporation in a testamentary proceeding. The Georgia executors and the New York administrator asserted respective claims to the stock. Original domiciliary probate was obtained in Georgia, with all the beneficiaries and heirs at law actual parties by personal service, but the New York administrator was not a party. This court determined by a judgment purely in rem that the testatrix was domiciled in Georgia. Subsequently, in an interpleader action in Delaware, the Supreme Court of that state concluded that New York was the domicile of testatrix. In this litiga-

86See note 34 supra, at 136.
87The Court also discussed the argument that Bigelow was privy to Lewisohn and therefore the estoppel of the adverse judgment in the suit against Lewisohn protected Bigelow as well, but discarded the defense.
tion the Georgia judgment was pleaded and proven, and the petitioners claimed that it was entitled to full faith and credit. The administrator, however, denied its binding effect. Accepting the conclusion of the Delaware court that the testatrix was in fact domiciled in New York, the Supreme Court undertook to decide

"... whether this Georgia judgment on domicile conclusively establishes the right of the Georgia executors to demand delivery to them of personal assets of their testatrix which another state is willing to surrender to the domiciliary personal representative, when another representative, appointed by a third state, asserts a similar domiciliary right."\(^{38}\)

Under the full faith and credit clause, Georgia and New York "might each assert its right to administer the estates of its domiciliaries to protect its sovereign interests".\(^{39}\) According to the facts, the New York administrator was not a party to the Georgia proceedings, nor was he represented by those who were actual parties. Hence, Georgia courts could not bind him by an *in personam* decree. Characterizing the Georgia litigation as a proceeding *in rem*, and accepting the fact that the situs of the stock was in Delaware, it follows that Georgia had no jurisdiction over the subject matter. Therefore, the Court concluded that the judgment rendered in Georgia, without jurisdiction over the *res* and with no basis of personal jurisdiction over the administrator, would not preclude another state from redetermining the domiciliary issue.

Another principle, equally important, is that "a judgment rendered against a litigant who has either entered an appearance or formally engaged in the prosecution or defense of a cause of action cannot be collaterally attacked on the question of personal jurisdiction."\(^{40}\) The only remedy available to such a litigant is an appeal from the judgment, going ultimately to the Supreme Court. Having once contested the issue with a fair opportunity to be heard, the matter becomes *res judicata*. Individual instances of hardship are outweighed by the general policy which favors a termination of litigation.

In *Baldwin v. Iowa State Traveling Men's Association*,\(^{41}\) suit was instituted in Missouri against the respondent, who appeared specially

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\(^{38}\)See note 35 *supra*, at 348. Note: In Delaware, which had not adopted the Uniform Stock Transfer Act, for all purposes of title, the situs of capital stock of Delaware corporations was regarded as being in that State.

\(^{39}\)Id. at 355.

\(^{40}\)Goodrich, *op. cit. supra* note 20, at 154.

\(^{41}\)283 U. S. 522 (1931).
and moved to dismiss the case for want of jurisdiction over its person. After a hearing on affidavits and briefs, the motion was overruled and the cause proceeded to judgment for the amount claimed. There was no motion to set aside the judgment nor sue out a writ of error. Thereafter, an action upon the judgment was brought in a District Court of Iowa, and respondent again introduced the defense of lack of jurisdiction. Justice Roberts of the Supreme Court determined that the judgment amounted to res judicata. The respondent could have elected not to appear in the original action, and then attack the judgment collaterally in the Iowa suit. Or it had the right to appeal from the decision. Since it elected to pursue neither of these courses, it cannot demand a second hearing upon its contention. In the words of the Court,

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."42

The application of this rule to questions involving jurisdiction over the subject matter is found in Stoll v. Gottlieb.43 In a proceeding to reorganize a corporation under § 77B of the Bankruptcy Act,44 the federal district court had approved a plan of reorganization providing inter alia for discharge of the debtor's bonds and cancellation of a personal guaranty thereof. The guarantor had appeared and approved the reorganization as proposed. One of the holders of the guaranteed bonds, Gottlieb, had received notice of the hearing in the district court upon the proposed reorganization, but failed to appear. He brought an action in a state court against the guarantor. Pending this litigation, he had unsuccessfully petitioned the district court to set aside or modify its order upon the ground that it had no jurisdiction to extinguish the guaranty. In the state court Stoll defended on grounds that the release of the guaranty by the district court was res judicata of the controversy. The Supreme Court agreed with this defense, stating that there was:

"... no reason why a court, in the absence of an allegation of fraud in

43 305 U. S. 165 (1938).
obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation.”

There was some argument whether a strictly jurisdictional or a quasi jurisdictional fact was involved in the proceeding. Gottlieb alleged that it was a strictly jurisdictional issue, and therefore subject to collateral attack. However, the Court intimated no opinion in this respect, because it was unnecessary due to the fact that “... in an actual controversy the question of the jurisdiction over the subject matter was raised and determined adversely to the respondent.”

The Restatement on Judgments incorporates these interpretations into its rules and comments. It is unusual to discover that a Restatement of the Law adheres so closely to actual case decisions. It is therefore settled that a judgment rendered by a court, where the question of jurisdiction over the person or the subject matter was actually litigated and determined, cannot be attacked collaterally in a second proceeding which seeks recognition of that judgment. However, if the first court had no jurisdiction over the defendant in an in personam action, or no jurisdiction over the subject matter in an in rem action where there appears to be no other basis of jurisdiction, then the judgment is not res judicata as to that particular issue in another court. These rules nevertheless remain subject to the decision of the Treinies case, that a reexamination of the jurisdictional issue by the second court, no matter how erroneous, can be attacked only by direct appeal from that determination.

"See note 43 supra, at 172. The Court further added: "After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined."

"Id. at 177.

"Restatement, Judgments § 9 and comment a (1942): "Where a defendant appears in an action to object that the court has no jurisdiction over him and the court overrules the objection and judgment is rendered against him, the parties are precluded from collaterally attacking the judgment on the ground that the court had no jurisdiction over the defendant." In the comment to this section, it is said: "Where an action is brought against a defendant over whom the court has no jurisdiction, and the defendant does not appear in the action and judgment is rendered against him by default, the judgment is void."

§ 10: "Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction."
IV. Aftermath of the Chicot County District Case

A fundamental question still remains: if a court has personal jurisdiction over the parties in a controversy, are the latter concluded by the court's judgment as to jurisdictional issues which were not expressly litigated? In other words, assuming that the parties are before the court, do jurisdictional issues become res judicata if they were not, but might have been, litigated? Three different views have been adopted by the courts in the application of this doctrine to substantive law: (1) only those facts actually litigated are foreclosed; (2) all facts that might have been litigated under the pleadings are finally concluded; and (3) all facts that might have been litigated in any way are beyond collateral attack.48 By a broad dictum in Adams v. Saenger49 the Court answered the problem in the negative with this statement:

"... in a suit upon the judgment of another state the jurisdiction of the court which rendered it is open to judicial inquiry, ... and when the matter of fact or law on which jurisdiction depends was not litigated in the original suit it is a matter to be adjudicated in the suit founded upon the judgment."50

However, Chicot County Drainage District v. Baxter State Bank51 resolved all doubts in this respect. Bondholders of a state drainage district were parties to a proceeding under the Act of Congress of May 24, 1934,52 for a readjustment of its indebtedness. At that proceeding they did not question the constitutionality of that statute, but did not comply with the provisions of the decree for retirement of their bonds within a limited time. In a subsequent action on their bonds, the petitioner pleaded this former decree as res judicata. Respondent argued that the decree was void, because in the meantime the same court in another case had declared the Act unconstitutional.

When the case came before the Supreme Court, Chief Justice Hughes in his opinion indicated that the bondholders had an opportunity to present their objections to the first proceeding, and to argue the validity of the statute under which the action was brought. Since no questions were raised at that time, the parties proceeded on an assumption that the statute was valid. There was no appeal from the decision and no attempt to seek a review. The question, therefore, was "whether re-

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48 Note 53 Harv. L. Rev. 652, 659 (1940).
49 303 U. S. 59 (1938).
50 Id. at 62.
51 308 U. S. 371 (1940).
spondents, having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit". The Court replied in the negative, stating the well-settled principle that "res judicata may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end'.

The Restatement on Judgments declares that res judicata is applicable not only where the question of the jurisdiction of the court over the subject matter was actually litigated, but also where it was not so litigated, the court and the parties assuming that it has jurisdiction. The Chicot case is thereby approved. In Heiser v. Woodruff, decided six years later, Chief Justice Stone likewise reaffirmed this principle of the Chicot decision.

The Supreme Court has, without hesitation, indicated its favorable disposition to the theory of res judicata by the extension of its application. The Chicot case has extended the applicability of res judicata to all situations where the issue of jurisdiction over the subject matter has neither been contested nor determined by the original court. A judgment is now conclusive upon the question of the court's jurisdiction over the subject matter in every case where the defendant received proper notice of the suit and failed to contest the issue. The burden is now placed upon the parties to raise the jurisdictional issue in the original action or else they are deemed to have waived it.

In Jackson v. Irving Trust Co. a suit was instituted in the District Court of the United States in New York under Section 9 (a) of the Trading with the Enemy Act. A decree was entered directing payment to the plaintiffs of a stated amount out of property of a German corporation seized by the Alien Property Custodian. There was no

55See note 51 supra, at 378.
54Ibid.
53Restatement, Judgments § 10, comment c (1942).
52327 U. S. 726 (1946).
51Id. at 735, the Court said: "In general a judgment is res judicata not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit."
5040 Col. L. Rev. 523 (1940); Note, 49 Yale L. Rev. 959 (1940).
49311 U. S. 494 (1941).
4840 Stat. 411, 419 (1917), as amended, 42 Stat. 1511 (1923); 50 U. S. C. App. § 1 et seq.
appeal, and the award was paid. Subsequently, the United States moved to set aside the decree, contending that the court was without jurisdiction and arguing that this issue had not been contested nor adjudicated. The motion was overruled, and this action was affirmed by the Supreme Court. Citing the *Chicot* case, Chief Justice Hughes said that "whether a particular issue was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree."\(^{61}\)

One of the most interesting cases which stamped the mark of approval upon the *Chicot* case was *Morris v. Jones*,\(^ {62}\) decided in 1946. An unincorporated association was authorized by Illinois to transact an insurance business there and in other states. It qualified to do business in Missouri. Petitioner sued the association in a Missouri court. Subsequently, but before judgment was obtained in Missouri, an Illinois court appointed a liquidator for the association, and issued an order staying suits against it. All assets of the association were vested in the liquidator. With notice of the stay order, petitioner continued to prosecute the Missouri suit, but counsel for the association withdrew and did not defend it. Petitioner obtained judgment in Missouri and filed a copy as proof of his claim in the Illinois proceedings. The claim was disallowed. Petitioner argued that the Missouri judgment was entitled to full faith and credit in the Illinois court. The Supreme Court by a six to three decision upheld the petitioner’s contention that the Missouri judgment was "... res judicata as to the nature and amount of petitioner's claim as against all defenses which could have been raised."\(^{63}\)

This decision has been bitterly attacked by some legal writers on three principal grounds: (1) there is a confused and inadequate analysis of the rule that the Missouri judgment must be given the same effect in Illinois as it has "by law and usage" in Missouri; (2) the Missouri judgment creditor will be treated in Illinois in a better way than he would be treated in his own state had a liquidator been appointed there, and will gain a priority over the Illinois creditors; and (3) the decision permits Missouri to defeat the Illinois policy of ratable distribution by enforcing its own contrary policy.\(^ {64}\) There are other objections also which shall be treated in the course of this discussion.

\(^{61}\)See note 59 *supra*, at 503.
\(^{63}\)Id. at 552.
\(^{64}\)The most recent criticism of Morris v. Jones can be found in Harper, *The Supreme
The Court referred to certain Missouri cases to establish that the judgment obtained in Missouri was a final determination of the nature and amount of the claim. Critics of the decision argue that these cases did not involve legal problems similar to that of the Morris case. Nevertheless, the judgments there considered were all final determinations, and the courts rendering them had jurisdiction over the parties or the subject matter. The essential principle of the full faith and credit clause is merely that the judgment for which recognition is sought must be a final adjudication, by a court of competent jurisdiction, wherein the parties were afforded an opportunity to defend. The Missouri judgment in the Morris case claims such a finality under the circumstances and conditions then existing in that State. The contention that the Missouri judgment would not have been conclusive if the liquidator were appointed there, overlooks the principle that the full faith and credit to which a judgment is entitled is "not the credit that under other circumstances and conditions it might have had".

The argument that the Missouri creditor gains a priority over Illinois creditors appears to be without merit. The proof and allowance of claims are matters quite distinct from the distribution of the assets. As the Court declares:

"The establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have."

The petitioner seeks only the right to prove his claim in judgment form so that he will be relieved of the onerous task of again relitigating the issue in a second court. Although he had notice of the liquidation proceedings, he was not required to recognize that decree since it was not pleaded as a defense in the Missouri action. The proof of the claim at its face value does not demand that the Illinois liquidator distribute to the Missouri creditor that portion of the assets. It merely entitles that creditor to share ratably with the Illinois creditors in the assets upon distribution, whatever the ultimate percentage may be. The Missouri judgment only determined the amount of the claim, leaving

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Court and the Conflict of Laws, 47 Col. L. Rev. 883 (1947). His attack follows the pattern of the three principal grounds discussed above.

*State ex rel. Robb v. Shain, 347 Mo. 928, 149 S. W.2d 812 (1941); Central Trust Co. v. D'Arcy, 238 Mo. 676, 142 S. W. 294 (1911); Pitts v. Fugate, 41 Mo. 405 (1867).*

*See note 62 supra, at 551.*

*Id. at 549.*
to the Illinois proceedings the right to adjust the distribution of the property on a percentage basis in proportion to the claims of all the creditors.\textsuperscript{68}

The dissenting opinion of Justices Frankfurter, Black and Rutledge suggests that Missouri and the petitioner contrived to defeat the public policy of Illinois as embodied in the statute regulating insurance liquidation.\textsuperscript{69} As to the contention that the Illinois decree was entitled to precedence, it need only be said that the opportunity to rely upon that defense was in the Missouri proceedings, where the question would have been subject to review by the Supreme Court.\textsuperscript{70} Furthermore, once a valid judgment had been rendered in Missouri, the Illinois liquidator could not argue that its recognition would be opposed to the law or public policy of Illinois, even if that judgment was founded upon a misapprehension of Illinois law.\textsuperscript{71} It is obviously true that "... a State may determine the method and manner of proving claims against property which is in its jurisdiction and which is being administered by its courts or administrative agencies."\textsuperscript{72} However, such power remains subject to constitutional provisions,\textsuperscript{73} and in the event of a collision with the full faith and credit clause, the former must give way to the supremacy of national law.

The facts of this case do not present a situation where the Illinois liquidator had already distributed the assets to Illinois creditors, nor where the Missouri judgment would dismember the Illinois estate to such an extent that Illinois creditors would be placed at a disadvantage. Under such circumstances, the Court admitted that "... Illinois would have such a large interest at stake as to prevent it."\textsuperscript{74} In that event, the courts would probably carve out another exception to the doctrine

\textsuperscript{68}Harper, \textit{op. cit. supra}, at 888 says: "... petitioner gains a standing in the liquidation proceedings which gives him a tremendous advantage over what he would have had if he had had to relitigate his claim therein. ..." Such a remark seems to indicate that Illinois might in some fashion have discriminated against the outside creditor.

\textsuperscript{69}The dissenters stated at 558: "But the Full Faith and Credit Clause does not imply that a judgment validly procured in one State is automatically enforceable in another, quite regardless of the consequences of such enforcement upon that State's policy in matters peculiarly within its control."


\textsuperscript{71}Fauntleroy v. Lum, 210 U. S. 230 (1908).

\textsuperscript{72}See note 62 supra, at 553.

\textsuperscript{73}See Broderick v. Rosner, 294 U. S. 629 (1935).

\textsuperscript{74}See note 62 supra, at 554. Also Clark v. Williard, 294 U. S. 211 (1935).
of the Chicot case, under the theory that a countervailing public policy requires that domestic creditors be satisfied originally or that the liquidator be protected when acting under judicial orders. However, it must be remembered that such situations involve the distribution, as distinguished from the proof and allowance, of claims. The decision of the Morris case should be restricted to the facts therein presented.

Another controversial point deals with the question of privity and abatement of actions. Justice Frankfurter considered that the dissolution of the association and the transfer of assets to the liquidator made the latter "a stranger to the Missouri judgment", and consequently it could not be invoked against him. There are two distinct rules with regard to this issue. The Illinois rule holds that

"... a creditor, who proceeded to obtain judgment by default against the corporation in a foreign state, could not have his claim established in Illinois by proof of his judgment, as the Constitutional provision for giving full faith and credit to foreign judgments could not apply to make the judgment binding on the receiver, who was not a party to the action."

On the other hand, the Federal receivership rule permits the continuance of suits in other courts at least where they were pending at the time of the appointment of the receiver. The majority of the Court felt that the latter rule was the more liberal to be applied, because the proof of a claim, as distinguished from distribution, does not deal directly with the property, and hence should not come under the exclusive control of the court where the statutory liquidator was appointed. Although in Pendleton v. Russell it was held that the dissolution of a corporation operates as an abatement of the suit, such an infirmity does

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75Morris v. Jones, 329 U. S. 545, 563 (1946). Harper, op. cit. supra note 64, at 888 states: "It is therefore appropriate to apply the same reasoning to a judgment taken after the 'death' of this entity as applies to a judgment against a dissolved corporation."


7735 Georgetown L. J. 551 (1947).

78Riehle v. Margolies, 279 U. S. 218 (1929); Dickinson v. Universal Service Stations, 100 F. 2d 753 (C. C. A. 9th 1938); Chicago Title & T. Co. v. Fox Theatres Corp., 69 F. 2d 60 (C. C. A. 2d 1934).

79In the Restatement on Conflict of Laws (1934), § 577, the following rule is laid down: "Where, after the appointment of a receiver of an association, a judgment is rendered in a suit by or against the association, in a state in which no receiver has been appointed, the judgment binds all receivers whether appointed prior or subsequent to the rendition of the judgment, and the facts thereby established are res judicata as to all receivers."

80144 U. S. 640 (1892).
not appear in the *Morris* case, because the Supreme Court of Illinois "... did not hold that the appointment of a liquidator for Chicago Lloyds operated as an abatement of the suit." The Court inferred that the application of the federal rule in receiverships established privity between the liquidator and the association. Since the Missouri judgment represented a liability of the association, and the claims being administered by the liquidator were those against the same organization, the liquidator should not be discharged of his responsibilities or obligations in defending pending actions. This position appears to be sound, because a creditor who, in reliance upon his right, spends time and money in litigation in a foreign state, should not be required to commence a second action merely because his efforts have not resulted in a judgment at the time of the liquidator's appointment.

No matter how forceful the attacks against this decision may be, *Morris v. Jones* will assuredly have a salutary effect upon this field of the law. It will become the foundation of a uniformity in liquidation proceedings. In effect the Court has adopted the theory of the Uniform Reciprocal Liquidation Act, and from it has fashioned an impartial rule of law that will govern such procedures in all jurisdictions. According to that Act, claims against insolvent insurance companies of one state may be proved in ancillary proceedings in any "reciprocal" state. And *Morris v. Jones*, supra, has established a similar rule to this effect.

"A judgment obtained in the courts of another state not shown to be without jurisdiction over the parties and subject matter, against a foreign unincorporated association, after the appointment of a statutory liquidator for the association in its home state and the issuance of an order in the proceeding staying suits against it, must nevertheless under the full faith and credit clause be accepted as conclusive of the existence and amount of the claim upon which it was based."

Although Congress has the power to enact legislation in this field, uniformity of regulation through judicial interpretation is none the less advisable.

V. Exceptions to Doctrine of Res Judicata Over Subject Matter

The *Chicot County* case appeared to be the last step in the dismemberment of the principle of collateral attack. "The opinion might have

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82 Ill. Laws 1941, p. 832-837.
produced unyielding refusal to inquire whether any judgment involved subject matter beyond the powers of the court. But this possibility was cut off by the decisions in Kalb v. Feuerstein and United States v. U. S. Fidelity & Guaranty Co. It has been discovered that there may be situations in which the considerations of public policy underlying the doctrine of res judicata may be outweighed by countervailing considerations of public policy of an entirely different nature. These exceptions remain in a formative stage and are not susceptible of being stated in abstract language.

Consequently, the courts have developed certain exceptions to the rule of the Chicot case, where the public policy of the forum might be controlling, and have explicitly reserved them from the doctrine of res judicata. In Stoll v. Gottlieb, the Supreme Court paved the way for such a possibility by saying that "the rule applied here may or may not be applicable in instances where the courts with jurisdiction of the later controversy are passing upon matters of status and real estate titles". In the same year that the Chicot opinion was delivered, the Court expressly approved two exceptions which limited the application of the rule announced therein: (1) the dominant rule of res judicata may be overridden by a prevailing policy embodied in an Act of Congress; and (2) where a countervailing policy requires that a court yield its jurisdiction over a res to a superior tribunal with plenary jurisdiction over the subject matter, the adjudication of the original court will remain subject to collateral attack. Such an approach seems proper wherever public interest in limiting a court’s jurisdiction overbalances the policy of terminating litigation.

In Kalb v. Feuerstein, a judgment of foreclosure was entered in a state court upon foreclosure proceedings instituted by defendants as mortgagees. The mortgagor had meanwhile filed a petition in a federal court pursuant to the Frasier-Lemke Act, which was dismissed. After the mortgagees had proceeded in the state court, a sheriff’s sale was held which was confirmed by the court upon due notice. There was no

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Boskey & Braucher, Jurisdiction and Collateral Attack: October Term, 1939, 40 Col. L. Rev. 1006, 1029 (1940).
308 U. S. 433 (1940).
309 U. S. 506 (1940).
See Note, 49 Yale L. Rev. 959 (1940).
See note 84, supra.
appeal taken from the judgment of confirmation. Just prior to confirmation, however, the mortgagor’s petition in the bankruptcy court was reinstated pursuant to the second Frasier-Lemke Act.\textsuperscript{90} Subsequently, the mortgagor commenced an action against the mortgagees to expunge from the records the sheriff’s deed, and an action against the sheriff for damages for the eviction. The defendants in this proceeding relied upon the judgment of confirmation as res judicata, but the Supreme Court overruled the defense. The plenary power of Congress over bankruptcy includes the power to render subject to collateral attack any judicial acts taken with respect to the person or the property of the debtor in a state court, said the Court. Accordingly, the first exception was carved from the \textit{Chicot} case:

“Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer-debtor. . . . Considerations as to whether the issue of jurisdiction was actually contested in the county court, or whether it could have been contested, are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this act.”\textsuperscript{91} (Italics supplied.)

The second exception was pronounced in the \textit{U. S. Fidelity} case, where the United States had sued to recover from the defendant, as surety of a lessee of certain tribal lands, royalties and rentals due under the lease. As a bar to recovery the defendant pleaded a former judgment rendered by a federal district court in proceedings for the reorganization of the corporate lessee, wherein the court had decreed that the royalties owed amounted to only $2000 and the credits due the lessee amounted to $11,000 or more. No review was sought from this former litigation. In the present controversy, the government argued that the judgment was not entitled to full faith and credit because the original court was without jurisdiction to render any decision against the United States, because of the rule of sovereign immunity from suit. Upholding the contention of the Government, the Court said:

“In the \textit{Chicot County} case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination to the effect of a subsequent invalidation of the applicable jurisdictional statute upon an existing judgment in bankruptcy. To this extent the case definitely extended the area of adjudications that may not be the subject of collateral attack.”\textsuperscript{92}

\textsuperscript{91} Kalb v. Feuerstein, \textit{supra} note 84, at 444.
\textsuperscript{92} United States v. U. S. Fidelity Co., \textit{supra} note 85, at 514-515. (Such a conclusion is certainly not to be gathered in reading the generalizations found in the \textit{Chicot} case!)
It was further indicated that the Chicot case was not made applicable to judgments concerning status, nor to instances involving the extraterritorial action of courts. In conclusion, the Court stated:

"No solution was attempted of the legal results of a collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit. We are of the opinion, however, that without legislative action the doctrine of immunity should prevail."93

With these two decisions as a basis, the courts will undoubtedly evolve numerous situations where the theory of res judicata over the subject matter will be made inapplicable. It is impossible to make any definitive classifications at this early date, but one legal writer has stated that the following situations probably will be immune to the doctrine of the Chicot case: (1) labor disputes; (2) naturalization; (3) suits against the military; (4) habeas corpus; (5) cases of exclusive federal jurisdiction; and many others.94 The Restatement on Judgments agrees that "Various factors may enter into the determination of the question whether there are sufficient grounds of public policy for denying to the determination of the court the effect of res judicata."95 Among the factors to be considered, the following are listed:

1. whether the lack of jurisdiction over the subject matter is clear or doubtful;
2. whether the determination as to the jurisdiction depended upon questions of fact or of law;
3. whether the court was one of general or of limited jurisdiction;
4. whether the question of jurisdiction was actually litigated;
5. the strength of the policy underlying the denial to the court of jurisdiction.96

The last factor is certainly the most significant, since it is not susceptible of precise limitations and leaves to the courts an extensive range for interpretation.

VI. AN APPLICATION OF ERIE R. CO. v. TOMPKINS

The doctrine of Erie R. R. v. Tompkins,97 that federal courts exercising jurisdiction on the ground of diversity of citizenship in matters of substantive law must apply the rules established in the state courts

93Ibid.
94Boskey & Braucher, supra note 83 at 1024.
95Restatement, Judgments § 10 comment b (1942).
96Ibid. The Court in the Kalb and Fidelity cases did not consider all of these factors; hence, the Restatement in this respect goes beyond actual case law.
97304 U. S. 64 (1938).
of their district, still encounters problems whenever it reappears in varying forms. It has been made applicable to situations involving burden of proof,\textsuperscript{98} conflict of laws,\textsuperscript{99} and even the statute of limitations.\textsuperscript{100} Perhaps no other decision in the field of Conflict of Laws has been discussed so frequently in legal periodicals.\textsuperscript{101} Once again the\textit{ Erie} case has become the central pivot of a controversy, involving the now dominant theory of res judicata.

A citizen of Virginia sued a citizen of North Carolina in a state court of North Carolina for a deficiency judgment on notes for the purchase price of land in Virginia, secured by a deed of trust on the land. The defendant entered a demurrer to the action, relying upon a North Carolina statute which provides that the holder of such a note "shall not be entitled to a deficiency judgment". The demurrer was overruled by the trial court, following which action an appeal was taken to the Supreme Court of North Carolina. The plaintiff contended that the Federal Constitution precluded the state of North Carolina from closing the doors of its courts to him. Disclaiming any intention of passing upon any question of substantive law, the State Supreme Court held that the statute denied to the state courts jurisdiction to grant the relief sought. The decision of the trial court was, therefore, reversed and the suit was dismissed. Without appealing from that determination, the plaintiff instituted a suit in the Federal District Court of North Carolina, on the ground of diversity of citizenship, seeking the same relief on the same claim against the same defendant. The district court held that, since the identical issue was finally adjudicated in the state courts and the cause of action was barred there, it could not be relitigated in the federal courts. By a six to three decision in\textit{ Angel v. Bullington},\textsuperscript{102} the U. S. Supreme Court affirmed this decision, with Justices Reed, Jackson and Rutledge dissenting.

One legal writer has severely criticized the decision on the ground

\textsuperscript{98}Sampson v. Channell, 110 F.2d 754 (C. C. A. 1st 1940); cert. denied, 310 U. S. 650 (1940).
\textsuperscript{100}Guaranty Trust Co. v. York, 326 U. S. 99 (1945).
\textsuperscript{102}330 U. S. 183 (1947), 67 S. Ct. 657 (1947).
that "... the power of federal courts to hear diversity cases is now lodged in state legislatures". The dissenting justices argued that the majority opinion was confused in connection with the principle of res judicata, and also in its characterization of the North Carolina state court action as an adjudication on the merits. It would seem profitable, therefore, to analyze the decision in some detail and to consider its ultimate effect upon the power of federal courts.

Three specific problems confronted the Court: (1) whether the plaintiff had a full opportunity to litigate the federal question of the constitutionality of the state statute; (2) whether the action in the state courts was an adjudication on the merits and hence res judicata of the controversy; and (3) whether the federal court was required to follow the North Carolina state law and policy under the doctrine of the Erie case.

It was argued that the plaintiff had no opportunity to litigate the constitutionality of the North Carolina statute because the courts of that state refused to entertain the suit, and therefore, the federal court should have permitted him to bring the action therein. But the majority of the Court felt that the plaintiff could have asserted this right by an appeal to the Supreme Court of the United States directly from the final determination of the state courts. A state "cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent." As Justice Brandeis once said:

"The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution."

Merely because an intermediate tribunal has decided against him, a litigant should not discontinue the assertion of his rights, but should be impelled to carry his fight through the highest court which is the final arbiter of constitutional questions. Since the plaintiff elected not to pursue this remedy, there is no reason why he should be afforded alternative opportunities to relitigate the identical issue.

The dissenting justices contended that "the withdrawal of jurisdiction surely does not make a judgment one upon the merits," although they admitted that if it were considered a judgment on the merits, it would be binding on both the federal and state courts under the rule of res

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109 Angel v. Bullington, supra note 102, at 196.
judicata. However, the only issue in the state courts was whether all courts of the state were closed to the litigation, and the State Supreme Court held that they were, thereby denying enforcement of an asserted federal claim. Although it is generally acceded that a dismissal of a suit on grounds of lack of jurisdiction is not an adjudication on the merits, if the judgment determines that the plaintiff has no cause of action then it should be characterized as a judgment on the merits. If the judgment for the defendant is based upon the ground that the plaintiff is not entitled to maintain an action in the state in which the judgment is rendered, that is tantamount to saying that plaintiff has no cause of action in the state, and the merits of the controversy are adjudicated in the only sense that is relevant to the principles of res judicata. As the majority opinion stated:

"An adjudication declining to reach . . . ultimate substantive issues may bar a second attempt to reach them in another court of the State. Such a situation is presented when the first decision is based not on the . . . distribution of judicial power among the various courts . . ., but on the inaccessibility of all the courts of the State to such litigation." 107

The most severe attack against the decision was based upon the fact that the majority of the Court required the federal tribunal to follow the state law and policy, notwithstanding the state court's disclaimer of any intention to pass on any question of substantive law. Justice Frankfurter, speaking for the majority, declared that "if North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment." 108 The controversial issue revolves around a technicality of the distinction between substance and procedure, as exemplified by one statement from the minority opinion:

"North Carolina might have declared, by statute, that no cause of action would be recognized in North Carolina for the recovery of a deficiency on a mortgage indebtedness. Instead of this, . . . North Carolina has withdrawn the jurisdiction of its courts from such a cause of action. This produces quite a different situation." 109

However, Erie R. Co. v. Tompkins 110 was not meant to produce a

107 Id. at 190.
108 Id. at 191.
109 Id. at 197.
110 See note 97, supra.
technical line of demarcation between substance and procedure, from which there is no avenue of escape.

"The intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."111

As Justice Holmes once said, "Whenever we trace a leading doctrine of substantive law far enough back, we are likely to find some forgotten circumstances of procedure at its source."112 Any attempted distinction between procedural and substantive law will be purely artificial. Oftentimes, the remedy is so closely associated with the right that to deny the former would in effect amount to a denial of the latter. The mere fact that a litigant is entitled to insist upon a remedy or some procedural machinery to enforce his right, is in one sense a phase of substantive law.113

In Guaranty Trust Co. v. York,114 the Court was confronted with the problem whether the federal tribunal should apply the statute of limitations of the state to bar recovery. The following observation was made:

"The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?"115

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111Guaranty Trust Co. v. York, supra note 100, at 109.
113Chamberlayne, The Modern Law of Evidence § 171 (1911): "The remedy and the predetermined machinery, so far as the litigant has a recognized claim to use it, are, legally speaking, part of the right itself. A right without a remedy for its violation is a command without a sanction, a brutum fulmen, i.e. no law at all. While it may be convenient to distinguish between the right or liability, the remedy or penalty by which it is enforced, on the one hand, and the machinery by which the remedy is applied to the right, on the other, i.e., between substantive law and procedural law, it should not be forgotten that so far as either is law at all, it is the litigant's right to insist upon it, i.e., it is part of his right. In other words, it is substantive law."
114326 U. S. 99 (1945).
115Id. at 109.
And the Court further stated:

"Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law."116

Such is the foundation that is laid for the problem in the Angel case, where the statute on its face and in unmistakable terms declares that an action for a deficiency judgment cannot be maintained in any court of the state. It is submitted that the statute in the Angel case makes the right of recovery unavailable in the State just as forcibly as the statute in the Guaranty Trust Co. case. There is no apparent reason why the doctrine of the Erie case should not be made applicable to both.

Justice Reed, in his dissent in the Angel case, relies upon Luptons' Sons Co. v. Automobile Club117 to establish the rule that "... when a state denies power to its courts to adjudicate a cause, that denial does not affect the power of the federal courts to decide the case."118 However, that case presents an entirely different situation. There, the New York statute provided that no foreign corporation could maintain any action in the state without a certificate that it had complied with certain state requirements to do business in the state. It was not an absolute denial of the right to maintain an action, as in the Angel case, but merely a qualified denial that became ineffective as soon as the necessary certificate was secured.

It does not appear, therefore, that the decision in the Angel case is as striking an innovation of the law as some would believe. Federal courts are not deprived of their power to hear diversity cases by the mere whim of state legislatures. Whenever such a situation again presents itself, the litigant concerned still has the saving opportunity to appeal to the United States Supreme Court on the question of the statute's constitutionality. And if the Court renders a determination favorable to him, he can successfully institute his action in the courts unhampered by a state law which makes recovery wholly unavailable. The instant decision is merely an amplification of Guaranty Trust Co. v. York.

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116Id. at 110.
117225 U. S. 489 (1912).
118See note 102, supra at 200.
VII. Summary of Principles

The full faith and credit clause of our Constitution establishes a useful means for ending litigation between adverse parties. Once the issues have been determined, the adjudication is brought to rest. If this constitutional provision had not been adopted, "adversaries could wage again their legal battles whenever they met in other jurisdictions", and the states of our Union would be unable to project their judicial determinations beyond their own boundaries. In its essential aspects,

"That clause compels that controversies be stilled, so that, where a state court has jurisdiction of the parties and subject matter, its judgment controls in other states to the same extent as it does in the state where rendered."

Through the impact of the full faith and credit clause, the doctrine of res judicata has, to an increasing degree, become a part of our national jurisprudence.

From this survey, we can conclude, therefore:

1. The jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state; and if the first court lacked jurisdiction over the parties in an *in personam* action or over the subject matter in an *in rem* action, then such judgment is not entitled to full faith and credit.

2. Where the second court reexamines the jurisdiction of the original court, and decides against the validity of the original judgment, then that determination, although erroneous, cannot be attacked in a collateral proceeding, but only upon appeal from that decision.

3. Where a party voluntarily appears in the action and litigates the question of jurisdiction over the person, the issue becomes res judicata and cannot be collaterally attacked in the second court.

4. Where a judgment is rendered by a court in an *in personam* action, without the necessary jurisdiction over the person of the defendant, such judgment is void and not entitled to full faith and credit.

5. In an actual controversy in one court, where the question of the jurisdiction over the subject matter was raised and determined adversely to a party, that judgment is res judicata generally as to the jurisdictional issue.

6. If a judgment is rendered in an *in rem* proceeding, where the

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120*Id.* at 349.
121Thompson v. Whitman, 18 Wall. 457 (U. S. 1873).
122*Id.* at 349.
court has no jurisdiction over the res, and there appears to be no basis of personal jurisdiction, it is subject to collateral attack in another court without violating the full faith and credit clause.126

7. The principle of res judicata may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, but also as respects any other available matters which might have been litigated.127

8. However, the foregoing rule is not without exception. Where a countervailing public policy embodied in an Act of Congress demands that a court yield its jurisdiction over a res to a superior tribunal with plenary jurisdiction over the subject matter, the proceedings of the first court remain subject to collateral attack.128 And, when there is a collision between the principle of res judicata and the policy of sovereign immunity from suit, the determination of the first court must give way to sovereign immunity, and is not necessarily entitled to recognition or enforcement.129

9. The decision of a state Supreme Court, from which no appeal was sought, interpreting a state statute, that an action for a deficiency judgment cannot be maintained in the courts of that state precludes a suit not only in state courts, but also in a federal court based upon diversity of citizenship, because a federal court in such an action must follow state law and policy, and is likewise precluded by the doctrine of res judicata.130

The most recent approaches in the field of res judicata continue to assure each litigant one full and fair opportunity to present his arguments before an impartial arbiter. Technical informalities should not be asserted to allow him a second or third opportunity. The prospects for a national uniformity in the treatment and recognition of judgments appears possible, especially in the light of the decisions handed down by the Supreme Court this year. The doctrine of res judicata, coupled with the full faith and credit clause, has truly become a national unifying force. To use the words of Chief Justice Stone, they have

"... altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application."131

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THE words "national or international labor organization" appeared for the first time in federal legislation on June 23, 1947, with the passage of the Labor Management Act, 1947, an amendment to the National Labor Relations Act, over the veto of the President of the United States. There is therefore no settled judicial interpretation of these words upon which to base compliance with the statute. The importance of this deficiency becomes immediately evident when from a study of the provisions of the act, and in particular Sections 9 (f), (g), and (h), it is established that before a labor union is permitted to institute a proceeding to either obtain representation or seek relief from an unfair labor practice the union must, as a condition precedent, in compliance with Section 9 (f), and (g), file with the Secretary of Labor, periodically, financial and other reports, and in compliance with Section 9 (h) file with the Board an affidavit signed by each officer of the petitioning union stating that the affiant is not a Communist. But in addition to these documents, reports must be filed by

"... any national or international labor organization of which such labor organization is an affiliate or constituent unit. ..."4

and non-Communist affidavits must be signed by

"... the officers of any national or international labor organization of which it is an affiliate or constituent unit. ..."5

before the case of the petitioner will be processed. Thus with a lack of judicial precedent it became of extreme importance that it be ascertained what organizations were to comply. The urgency of the situation was revealed by the fact that at the close of the last day of the administration of the National Labor Relations Act there remained 600 cases pending decision of the Board and 3000 pending in the Board's field offices. The unions involved were informed that they would have 20

693 Cong. Rec. 7500 (1947).
See note 4 supra, at §§ 9 (f) and (g).
See note 4 supra, at § 9 (h).
days after the effective date of the Act (August 22, 1947) in which to comply with the requirements of Sections 9 (f), (g), and (h). There have been three rulings upon these sections to date, but before considering them it is first necessary to analyze the organization of labor as it exists in the United States today.

LABOR ORGANIZATION IN THE UNITED STATES TODAY

The smallest unit of labor organization is the local union. There are some local unions which are independent, having no connection whatsoever with any other, but the vast majority are affiliated in varying degrees. "These local unions have lateral and vertical affiliations, the most important of which is the national unions. The national unions in turn, may be federated with other national and international unions." The two large federations which exist today are the American Federation of Labor and the Congress of Industrial Organizations (hereinafter referred to as either the A. F. of L. or the C.I.O.) These are policy making, fact finding bodies which exert very little, if any, real power over the national unions. Besides these two large federations those national or international unions affiliated with the A. F. of L. may also be federated into the various departments of the A. F. of L., which departments again have very little real power.

The national or international unions may be federated together, as noted above, or totally independent. "The most important unit in the American labor movement—both A. F. of L. and C.I.O.—is the national or international union. An international union is so designated because it frequently has locals in Canada and Mexico." "The international

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7Ibid. Later this period was extended to October 31, 1947. N. L. R. B. Press Release, R-3, Sept. 19, 1947.

8PETERSON, SURVEY OF LABOR ECONOMICS 503 (1947).

9"Although the C.I.O. tends to exert more control over its affiliated unions than does the A.F. of L., neither federated organization has any direct authority over the internal affairs or activities of its member unions so long as they do not impinge upon the jurisdiction of another affiliated union. The federated organizations' only actual power is that of expulsion from the central body." PETERSON, supra note 8 at 504.

10The five departments of the A.F. of L. are The Building and Constructions Trades Department, The Metal Trades Department, The Railway Employees Department, The Union Label Trades Department, and The Maritime Trades Department. The C.I.O. is not divided into departments, since most of its unions are of one nature, industrial.

11TAFT, ECONOMICS AND PROBLEMS OF LABOR 494 (1942). The distinction between a national and an international union may be further observed in the following definitions: "NATIONAL UNION, A union having broad regional coverage but with no foreign membership; INTERNATIONAL UNION, In this country, 'International' refers to unions
and national unions are the autonomous self-governing units of the labor movement. Even though an international union is affiliated with a larger body such as the A. F. of L. or the C.I.O., it retains its independence as a self-governing organization so far as its internal affairs are concerned. "International unions are mainly concerned with wages, hours, and working conditions. Furthermore, they deal with issues of internal management, such as qualifications for admission to the union, rules of apprenticeship, internal discipline, the unit of government, and control of the right to strike. The international usually administers the beneficiary funds and supervises the subordinate locals which it has chartered." 

International unions have not only the power of expulsion of locals, but also the expulsion of individuals. It has control over strikes and where a defense fund has been established to be used as a strike fund it has control over that. These are very real powers and are possessed only by national or international unions. Earlier in the history of the labor movement the local union was autonomous, but with the change in economic conditions and the resulting need for centralized bargaining power the national union has emerged as the source from which these local unions derive their power, making them in fact subordinate units.

In addition to this vertical organization there has developed a lateral organization wherein local unions are formed into city, state, and sectional labor bodies. The power, jurisdiction, and authority held by these organizations varies with the community and while some appear to be little more than political in nature, others are in fact bargaining agents for their member-locals. These organizations are in turn affiliated with the large federations or with internationals. It should be noted that the parent federations have much broader powers over these organizations than they do over national or international unions. The exception to the entire organization is that of the Federal Labor Unions (referred to in the C.I.O. as Local Industrial Unions). These are local unions, not a part of any national or international labor organization, but directly affiliated and chartered under the federations, being having membership in Canada as well as in the U.S. Who's Who in American Labor 469, 470 (1946).

Peterson, op. cit. supra note 8, at 508.

Taft, op. cit. supra note 11, at 495.


Ibid.
under the direct control of the president and his council. These unions may be members of city, state, or sectional groups.

**INTERPRETATIONS OF SECTIONS 9 (f) (g) AND (h)**

To date these sections have been interpreted upon three occasions: (1) by the General Counsel in his instructions to regional directors,\(^1\) (2) by the United States District Court for the Northern District of Texas in a petition for a mandatory injunction\(^17\) and, (3) by the National Labor Relations Board in an appeal from a dismissal by the regional director of a representation petition.\(^18\)

(1) The General Counsel.

The General Counsel made his decision upon the sections in his capacity as general supervisor of the regional directors.\(^19\) This was in the form of a press release wherein he stated that "officers of national, international, and parent organizations should file the affidavit forms with the Washington office of the Board".\(^20\) The words in themselves leave room for conjecture as to which would be included as parent organizations but the regional directors accepted the most obvious meaning and refused to further process cases of those unions affiliated with the A.F. of L. or C.I.O., which organizations had not as yet complied. The regional directors were later provided with form letters which they were to forward to those unions with cases pending allowing them 20 days within which to comply with the statute for failure of which their cases would be suspended.\(^21\)

(2) The District Court for the Northern District of Texas.

In the case of *Oil Workers v. Elliott*,\(^22\) the Plaintiff, Oil Workers International Union, petitioned for a mandatory injunction to compel the regional director, Elliott, to count the ballots of an election, which he had refused to do because of the failure of the C.I.O. to comply with Sections 9 (f), (g), and (h). The court refused the injunction. The

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\(^{16}\) Oil Workers v. Elliott, Dist. Ct. (N. D. Texas) No. 1418 Civil (Sept. 8, 1947).

\(^{17}\) See note 16 supra. In this release General Counsel further stated that the term "'officer', shall include all persons described as 'officers' in the international, national and/or local Constitutions and by-laws".

opinion does not attack the problem of whether the A. F. of L. or C.I.O. are included within the meaning of "national or international union", but merely assumes without question that they are and then reasons to the right of Congress to make such demands upon labor organizations. It therefore sheds little light upon our question.

(3) The National Labor Relations Board.

The Board was first confronted with the question when it was appealed to in pursuance of Section 10 (b) as the final authority in the processing of representation cases. Local Union No. 1215 of the International Brotherhood of Electrical Workers, affiliated with the A. F. of L., had a consent election outstanding on August 22, 1947 (the effective date of this Act). The date for this election had been set for September 3, 1947 as the result of a signed agreement entered into by the union and the Northern Virginia Broadcasters on July 30, 1947 following the filing of a petition by the union on July 17, 1947 with the regional director. This being one of the cases still pending the regional director sent the form letter provided by the General Counsel to the union.\(^{23}\) The union later informed the regional director that both Local No. 1215 and the I.E.E.N. had complied but following the interpretation of General Counsel, the regional director dismissed the petition because of the failure of the A. F. of L. to comply. The union appealed to the Board. Held, a union is in full compliance with the registration and non-Communist requirements of the Labor Management Relations Act where such requirements have been met by the local union involved and the national body to which it is directly affiliated, whether or not the top-level parent body (e.g. A. F. of L. or C.I.O.) has met such requirements.\(^{24}\)

**Ratiocination of the Board**

The board based its decision upon the following reasoning. At the very least, the sparse legislative history upon the subject is ambiguous.\(^{25}\) This no doubt is a result of the existing situation at the time of passage of the bill. So many problems arose that little or no consideration was given to whether or not parent federations would be required to comply. Turning to the words "national and international union" it appears that

\(^{23}\)See note 21 supra.

\(^{24}\)See note 18 supra.

\(^{25}\)For further reference to the legislative history see H. R. Rep. No. 510, 80th Cong., 1st Sess. 49 (1947); 63 Cong. Rec. 6602 (June 5, 1947); 63 Cong. Rec. 4795 (May 7, 1947); 63 Cong. Rec. 4801 (May 7, 1947).
in ordinary labor relations parlance these words have a definite, and almost technical meaning and refer to such labor organizations as the International Brotherhood of Electrical Workers, an international union, an autonomous, self-governing unit of the labor movement. The Board was familiar with no use of the term "national or international" which includes parent federations such as A. F. of L. or the C.I.O. Since the legislative history does not show Congressional intent to give a different meaning to these words, the Board would not extend them to include the parent federations. In the absence of clear expression of legislative intent to the contrary, Congress, when legislating on a specialized subject, is deemed to have used words in the sense in which they are commonly understood by those who deal daily with that subject. Finally the Board considered the obvious purpose of Congress in enacting Section 9 (h): to eliminate Communist influence from the labor movement, by subjecting any Communists to punishment for perjury or by refusing their unions the use of the Board's machinery, the natural result of which would be, it was hoped, their ouster from office by the union rank and file. The relationship of these parent officers is too remote, and control by local unions too slight to effect their removal. On the other hand the natural result under the ruling of the General Counsel was that if one officer of the parent organization does not comply, none of the lesser officers need comply since it would be to no avail. The very purpose of forcing a committal would be thwarted. The Board therefore held under these facts that the statute had been complied with when Local No. 1215 and the I.B.E.W. had complied and further processing of the case would not be refused because of the failure to comply of the A. F. of L.

Board Member Murdock, in a concurring opinion, pointed out that the A. F. of L. in its relation to national labor organizations does not come within the meaning of labor organization as defined in the Act in Section 2 (5) which is as follows:

"The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."28

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28 Sutherland, Statutes and Statutory Construction 437 (3rd ed. 1943).
27 The decision of the five-man Board was 4-1. Board Member Murdock wrote a concurring opinion and Board Member Gray dissented with a written opinion.
28 See note 1 supra at § 2 (5).
He noted without deciding that there may be other cases in which the 
A. F. of L. would be a labor organization within the terms of the Act 
as when its Federal Labor unions were petitioners. 29 

Board Member Gray, in a dissenting opinion, reasoned that since the 
A. F. of L. could be deemed a labor organization in some circumstances 
that the words in the definition above in whole or in part would include 
the A. F. of L. as a labor organization at all times. He strengthened 
his argument by the fact that the word any before national or internat 
ional unions in Sections 9 (f), (g) and (h) would call for an exten 
sion to include all those unions of similar nature. 

CONCLUSION 

It is the opinion of the writer that the Board has come to a fair and 
logical conclusion. But like all judicial decisions it is confined to the 
precise question involved and there still remain the open questions of 
whether these parent organizations will be included when the petitioner 
is a directly affiliated union and whether the city, state, or sectional 
organizations may be included under some circumstances. 

It would appear from the concurring opinion that the parent organi 
zation would be included where the petitioner is a directly affiliated 
union and this would appear to be a natural conclusion. 30 The A. F. of L.
is international in scope and would be within the definition of a labor 
organization. Although it is not within the technical meaning of a 
national or international organization its relationship to the local union 
is such as to put it within the same general category. 

The question as to city, state and sectional organizations will not 
arise until such time as regional directors demand from them compliance 
with the statute before processing cases of affiliated unions. Clearly if 

29The definition of a labor organization in § 2 (5) is identical with that definition in 
the original Act. It should be noted that, although the A. F. of L. has been recognized as 
a bargaining agent for its employees by the Board under the original Act, in none of these 
cases was an international labor organization involved. Duke Manufacturing Company, 
53 N. L. R. B. 1239 (1943); Curtiss-Wright Corporation Airplane Division, 57 N. L. R. B. 
1125 (1944). 

30The A. F. of L. acting upon this assumption has altered its Constitution so that it no 
 longer has vice-presidents designated as “officers” (see note 20, supra) and now its federal 
labor unions may take advantage of the Statute in spite of the reluctance of some of the 
of A. F. of L. 505 (Oct., 1947). No similar action has been taken by the C.I.O., probably 
because very few of its unions are still directly affiliated, having gradually been absorbed 
by its internationals.
a case were to arise with a city, state or sectional organization as petitioner, compliance would be necessary, but under other circumstances where such organization might be deemed within the definition of a labor organization it would appear that it could not be included within the Act since it would be neither national nor international in scope, nor within the technical meaning of a national or international labor organization.

The General Counsel and the Board have revealed their good faith by their immediate and studied treatment of the subject. The question still remains open in some aspects, but the sound reasoning has indicated a norm for future questionable situations. The decision of the Board had the result in delaying any attempt by those who would attack the constitutionality of these sections by an appeal from the Board.31

But more than the treatment of the question in hand the rulings of the General Counsel and the Board have a broader aspect. This represents their first split of opinion. At first blush it would appear that the Board is the ultimate source of authority within the administration set up by the Act, but this is not true. In an attempt to remove much of the burden of administrative matters the Congress has granted to the General Counsel final authority in the issuance of complaints and the dismissal of charges. He is also charged generally in Section 3 (d) with the direction and supervision of all the field offices. There is a marked difference between a complaint action and a representation action, the latter still being under the final authority of the Board as provided in Section 9 (e) 1. Since the case in question was not a complaint but rather a petition for representation, the Board had final authority, but its decision cannot extend to complaint cases, which are exclusively within the province of the General Counsel. It has appeared from subsequent action of the General Counsel that he does not intend to follow his original decision in regard to the issuance of complaints and thereby has averted an anomalous situation wherein the requirement for compliance with the statute would differ according to the type of action, not because of any requirement in the Act, but rather because of a difference of opinion by two separate final authorities which have been set up by the Act. The regional directors under the supervision of the General Counsel, however, are still the representatives of the

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31On October 31, 1947, the final deadline for compliance, four international unions with cases pending had not as yet complied. Appeals of their cases may eventually test the constitutionality of these sections.
Board in representation cases. The administration of this Act calls for the fullest cooperation of the Board and the General Counsel or the administration will fall of its own weight. This was noted by the present General Counsel in a speech delivered before the American Bar Association on September 23, 1947. "Operationally, this division of functions is a far from perfect arrangement so far as being foolproof is concerned. It can work successfully only so long as the Board and the General Counsel mutually want it to work. There are bare spots in the picture, and there are spots where a protracted division of opinion between the Board and the General Counsel could lead to fantastic results."32

CARLTON SICKLES

THE ADMINISTRATIVE PROCEDURE ACT APPLIED

The Federal Administrative Procedure Act1 became law on June 11, 1946. Its passage marked the end of lengthy and earnest consideration by successive Congresses over a period of more than ten years. What has evolved is intended to be a comprehensive, though brief, "charter of private liberty and a solemn undertaking of official fairness".2 Prior to the Act, opinion as to what was fair administrative procedure was widely divergent. An example in the field of evidence best illustrates this. On the one hand3 it is felt that reliance even on "incompetent evidence" should be permitted wherever the reliance is reasonable and necessary because other better evidence is not available. On the other hand,4 Judge Stephens feels and strongly "... that necessity the common excuse for not taking pains, may be the mother of conjecture as well as of invention". He submits that even the expert commissioner

\[\text{\textsuperscript{32}}\textit{\textsuperscript{N. L. R. B. Press Release, R-4, Sept. 23, 1947.}}\]

\[\text{\textsuperscript{1}}\textit{Federal Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. A. \$ 1001 (Supp. 1946), referred to herein as "the Act".}\]

\[\text{\textsuperscript{2}}\textit{Foreword, Legislative History III. The legislative history of the Act is compiled as \textit{Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946). It includes the Act, the Senate Judiciary Committee Print of June 1945, the House Judiciary Committee Hearings, the Report of the Senate Judiciary Committee, the Report of the House Judiciary Committee, proceedings from the Congressional Record, and indices of sections of the Act, of subjects, of names, agencies, and organizations. Reference hereafter will be Leg. Hist.}\]


\[\text{\textsuperscript{4}}\textit{Stephens, Administrative Tribunals and the Rules of Evidence 103 (1933).}\]
should receive incompetent evidence sparingly and should not sacrifice the testing value of a cross-examination. He further argues that much of the so called “relaxation of the rules of evidence or of the formalities of court procedure” is in fact a denial of a hearing. To the writer, the provisions of the Act seem to be written from the latter point of view. It is described as “An Act to improve the administration of justice by prescribing fair administration procedure”.

More than a year has passed since the effective date of the major provisions of the new law. Undoubtedly prompted by the welter of controversy arising during consideration of the measure, the Attorney General organized an Intradepartmental Committee on litigation involving the Administrative Procedure Act—“To insure that [the Department of] Justice adopts a uniform approach to cases arising under it”. The workability of a uniform procedure in such a diversified field as administrative law was one of the basic considerations in the preparation of the bill. But its workability was tested by an elaborate analysis and its utility tentatively approved by representative groups of the people most concerned. At this early date we can hardly intimate what the ultimate regard for the measure will be. But how certain agencies are interpreting various provisions of the Act in light of its legislative history and judicial decisions prior thereto, proves interesting and informative.

The Act has already been ably and thoroughly analyzed. Section 10, on judicial review, has been treated searchingly in at least two instances. The rule-making provisions have been examined at length in an analysis of some definitions under the Act. In view of these works, this article will focus upon other provisions for the most part.

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6Preamble to the Act.
8Leg. Hist. 297.
DEFERRED EFFECTIVENESS

In a rate-making case before the Department of Agriculture, an order changing rates for a particular stock yard was held to be a "rule" and the deferred effective date provision, as prescribed by Section 4c of the Act, was applied in the absence of a showing of good cause for allowing the rule to take immediate effect. Section 4c reads as follows:12

"(c) Effective dates—the required publication or service of any substantive rule . . . shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule."

From a reading of the section it seems clear that generally the thirty day deferment is to govern. But from a reading of this case one feels that deferment is the exception, not the rule, and that the rule would not be applied if the slightest good cause were shown. It is submitted that the intent of the law is for affirmative application of the rule, not permissive application, absent good cause shown. In a close situation the approach followed might lead to results opposed to the meaning of the statute.

That affirmative application of the rule for deferred effectiveness is the intent of the law is clear from the legislative history. The Attorney General's Committee recommended "A statute providing for the deferred effectiveness of all Federal administrative regulations which have statutory effect . . . for the purpose of providing a general safeguard . . . exception of this character seems necessary to prevent undue delay and hazards to effective administration in emergency situations . . ." (italics supplied).13 The Committee report accompanying the Bill furnishes even stronger support to the contention. "The other exception—upon good cause found and published—is not an 'escape clause' which may be exercised at will but requires legitimate grounds supported in law and fact by the required finding." Though the report goes on and explains that agricultural marketing "orders" may on valid grounds take effect in a shorter period, nevertheless, it further states that "In any event, however, no rule requiring action may be made effective until a legally reasonable time after its issuance as judged in the light of all the cir-

11In re Mississippi Valley Stock Yards Co., 2 Pike & Fischer Ad. Law § 33c.61-1 (1947).
12The Act, § 4c.
14Leg. Hist. 235.
cumstances." (Italics supplied).

In a subsequent case, stock yard rates were made effective within two days. Deferred effectiveness was held waived for good cause shown—because the rate-making was uncontested and a wage agreement had been entered into with the union just prior to that time. But further in the case it is stated that, however, the policy will be to comply with the deferred effectiveness provision of the Administrative Procedure Act, and calls attention to the fact that notice to this effect was published in the Federal Register of April 8, 1947. However, in a later case, the ruling was conformable to the holding in the St. Joseph case. A question, For what purpose the notice in the Federal Register? might be warranted.

In a recent case before the SEC the same provision was under consideration. An application for an order approving a plan for the exchange of stock of a holding company was involved. The Commission held that it was doubtful if Section 4c applies since—"Order does not involve promulgation of a standard of conduct of general applicability"—but if it does—then the order is "relieving restriction" and there is "good cause" since any delay in effectiveness of the order might prejudice the consummation of the exchange and any objecting shareholder has had ample notice of what the company is trying to accomplish and should have acted before now. To all appearances, here is a genuine consideration of the provision in question, followed by a holding that the deferred effectiveness provision of Section 4c is not applicable on many grounds, all expressly stated. Yet this certainly was not an "emergency situation" of the type referred to by the Attorney General's Committee.

EVIDENCE

In an N.L.R.B. case, the Pillsbury Mills filed a motion to dismiss the complaint on the grounds: "... (2) the Trial Examiner failed to exclude irrelevant, immaterial, and unduly repetitious evidence as required by Section 7(c) of the Administrative Procedure Act." The motion was denied and it was held that non-reliance on the improperly

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18 Id. at 260.
21 In the Matter of the Commonwealth & Southern Corp. (Del.), 3 Pike & Fischer Ad. Law § 41m.52-3 (1947).
admitted evidence causes no injury and meets the requirements of 7(c).
This Section follows in part.

"(c) Evidence—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof, as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence."

The meaning of this section is clearly that agencies must adopt policies excluding the type of evidence referred to above, but also the section is declaratory of settled administrative procedure, that it is not the evidence received, but the evidence on which the finding is based that is material. This latter must be "competent, relevant, and material"; that is, the finding must be made on "substantial evidence".

The Committee report on this section is confirmatory of the view taken. "Thus, the mere admission of evidence is not to be taken as prejudicial error (there being no lay jury to be protected from improper influence) although irrelevant, immaterial, and unduly repetitious evidence is useless and is to be excluded as a matter of efficiency and good practice; and no finding or conclusion may be entered except upon consideration by the agency of the whole record or so much thereof as a party may cite and as supported by and in accordance with evidence which is plainly of the requisite relevance and materiality—that is, 'reliable, probative, and substantial evidence.' It is without doubt then that the Pillsbury Mills case supra was decided in strict compliance with the section involved.

Availability of Record to Parties

Section 7(d) seems explicit in the matter that all papers in a proceeding shall be made available to the parties therein.

"(d) Record—The transcript of testimony and exhibits together with all papers and requests filed in the proceeding, shall constitute the exclusive record for

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20The Act, § 7c.
23Leg. Hist. 270.
decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties."

In a proceeding before the Federal Power Commission,\(^{24}\) prior to the Act a copy of the trial examiner's report was denied to the opposing party. The reasoning was that under the Natural Gas Act an aggrieved party might except to the Commission's findings and, moreover, the report was not binding either on the FPC or the parties. Thus it was held that the report would serve no useful purpose in the aggrieved party's hands. A nice question would arise if such a situation were to present itself at this time. The section at first blush is mandatory and an aggrieved party would unhesitatingly tender it in support of his contention. But the questions would be, Is it meant to include the examiner's report as a "paper filed in the proceeding"? and, Is it mandatory? A search of the legislative history is of little assistance. The Committee Report\(^{25}\) and the proceedings in the House\(^{26}\) both point to abolishing the type of situation corrected in the \textit{Ohio Bell Telephone} case.\(^{27}\) In view of this it is submitted that the holding above would be reaffirmed. Since the provisions of the pertinent act supply the necessary safeguard, the parties have no cause for complaint.

**Conclusion**

The administrative process is a necessary adjunct to the successful operation of government. Since 1887 when the Interstate Commerce Commission was created\(^{28}\) administrative law has developed and administrative agencies have multiplied. From the nature of these organizations, their size, and the volume of business they must accomplish within relatively short periods of time, authority must of necessity be delegated to echelons far removed from the principal officer.\(^{29}\) When it is remembered that the rulings of these former have the effect of law on freedom and property, it is obvious that stringent safeguards must be provided.

With the growth of the agencies, the need for uniformity in proceedings before them became apparent. Strict uniformity was obviously impossible because of the diverse functions involved. But the Adminis-

\(^{24}\) \textit{In the Matter of Hope Natural Gas Co.,} 3 Pike & Fischer Ad. Law § 46b.35-1 (1941).
\(^{25}\) \textit{Leg. Hist.} 271.
\(^{26}\) \textit{Id.} at 365.
trative Procedure Act was finally passed and created at least minimum standards to be followed for the sake of uniformity.

Success or failure of any measure depends on the attitude of those concerned with its enforcement. From the few instances herein discussed an attempt was made to reflect what appeared to be the attitude of some of the agencies toward compliance with the Act. A reading of the proceedings in which the Act has been considered leaves one with a well grounded impression that the agencies are aware "... that improvement in the administrative process is as much the duty of those concerned with it as the improvement of court procedure ought to be a duty of the legal profession".30

JAMES R. MORRIS

FEDERAL LEGISLATION
THE UNION SHOP UNDER THE TAFT-HARTLEY ACT

THE year of 1946 was a high water mark in the history of industrial strife. During that year 116,000,000 man days of labor were lost as a result of strikes, and the United Steel Workers staged the largest single strike in history. It was in these turbulent times that the 80th Congress started to work on the labor legislation that was to succeed the National Labor Relations Act of 1935.¹

The Labor Management Relations Act of 1947,² better known as the Taft-Hartley Act, became law in June of 1947, being passed over the President's veto in the closing days of the Congressional session. The labor unions had been conducting a vigorous publicity campaign against the bill, and they were quick to label it as a "slave labor" law.³ Its proponents, on the other hand, proclaimed it an eminently fair measure which restored the balance between labor and capital which had been disturbed by the National Labor Relations Act of 1935. The true character of the new law probably can be found somewhere between these opposing opinions. However, in the final analysis this law must be tested by its ability to provide industrial peace.

The law, in form at least, is an amendment of the National Labor Relations Act,⁴ and it displays every evidence of careful and skillful drafting. However, it is a lengthy document which probes into every corner of the entire field of labor relations, and such a sweeping revision is bound to have loose ends and to raise a host of questions. Moreover, much of the case law built up over the past twelve years would appear to be inapplicable to the present situation.⁵ The National Labor Relations Board and the courts must set about redefining and redrawing the lines between fair and unfair, between permitted and forbidden.

⁴ See note 2 supra at § 101. "The National Labor Relations Act is hereby amended to read as follows: ... ."
⁵ Many of the cases concerning employer unfair labor practices decided under Section 8 of the National Labor Relations Act remain valid, and decisions from states having statutes similar to the Taft-Hartley Act, such as Minnesota, Utah, Colorado, and Pennsylvania, will furnish some guidance.

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Only after this task is accomplished and the distinctions established can the law hope to provide the sought-after stability and guidance.

The term "class legislation" is frequently applied to the Act by its opponents. It is, however, precisely the same kind of law as the Wagner Act varying only in its choice of beneficiaries. Labor does gain a few new rights. Union men may refuse to cross a picket line around another employer's plant; one union may file charges with the NLRB for "coercive" raiding of membership by another; and a union may sue an employer in the courts for the breach of a collective bargaining agreement. However, in the main this law may be characterized as the first attempt to delineate labor's duties correlative to the rights obtained in the last two decades.

**Specific Provisions and Prohibitions of the Act**

The critical section of the new law is Section 8, which defines the unfair labor practices of both employer and union. The restrictions of the section applicable to employers remain substantially the same as those imposed by the National Labor Relations Act. However, the entire new subsection 8 (b) has been inserted to define union unfair labor practices.

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*President Truman's veto message of June 20, 1947, contains a bitter attack on this change of beneficiaries. "The Bill taken as a whole would reverse the basic direction of our national labor policy, inject the Government into private economic affairs on an unprecedented scale, and conflict with important principles of our democratic society." P. 1. Such arguments must be considered as mere statements of policy. This law amends the Wagner Act and changes its policy, but it has been accepted that such is the prerogative of Congress. Chief Justice Hughes in sustaining the Wagner Act said: "But we are dealing with the power of Congress, not with a particular policy or with the extent to which policy should go. We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid cautious advance, step by step, in dealing with the evils which are exhibited in our activities within the range of our legislative power." N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 46 (1937). The subject law can only be regarded as the step following the Wagner Act.

*See note 2 supra at § 8 (b) (4).

*Id. at § 301. Thus is settled the long standing question as to the legal enforceability of labor contracts. The jurisdictions split on this question. The courts which refused to enforce could not find consideration on the part of the union. Shelley v. Portland Tug & Barge Co., 158 Ore. 377, 76 P.2d 477 (1938). Other courts found no such lack of mutuality as would preclude enforcement. Murphy v. Ralph, 165 Misc. 335, 299 N. Y. S. 270 (1937).

*It is to be noted that the Act places no restrictions on the individual employee. The prohibitions are directed to the union and the employer.
It is made an unfair labor practice for a union to coerce or restrain employees in their rights either to join in union activities or to refrain from so doing, except that such rights may be limited by a lawful union shop agreement.\textsuperscript{10} Nor may a labor organization influence an employer in his choice of a bargaining agent.\textsuperscript{11} Further, the duty to bargain collectively is now a mutual one imposed upon union and employer alike.\textsuperscript{12}

Labor's valued right to strike shows the effect of the most telling blows. The right to strike, as such, is not impaired. However, Section 8 (b) sets up a series of purposes for which a union may not strike, thus indirectly limiting the right. No longer may a union strike to force an employer to bargain through a particular representative;\textsuperscript{13} nor may the employer be "coerced" into recognizing one union once another has been certified by the Board.\textsuperscript{14} Jurisdictional strikes and secondary boycotts\textsuperscript{15} whether to force the assignment of work to a particular group or for any other purpose are outlawed.\textsuperscript{16} "Feather-bedding" or forcing an employer to pay for work that is not done also is made unlawful.\textsuperscript{17}

There are other restrictions and limitations on the union and its activities contained in other sections of the Act but they are largely secondary, and either modify and define the prohibitions of Section 8 or establish procedures for enforcing them. Provisions such as those contained in Section 301, which allow a union to sue and be sued as an entity are interesting and important, but they are not within the scope of this article.

**The Importance of Union Security Clauses to Labor**

"Union security clause" as a generic term encompasses a wide range of variations on a single theme. However, all versions have as their basic

\textsuperscript{10}See note 2 supra at § 8 (a) (1).

\textsuperscript{11}Id. at §§ 8 (b) (1) (B) and 8 (b) (4). This means that an employer may bargain through a nation-wide trade association, etc., as he sees fit.

\textsuperscript{12}Id. at §§ 8 (a) (5) and 8 (b) (3).

\textsuperscript{13}See note 11, supra.

\textsuperscript{14}See note 2 supra at § 8 (b) (4).

\textsuperscript{15}Secondary boycotts are prohibited by the so-called "Hot Goods" section 8 (b) (4) (A). The opponents of the measure contend that this section as written prohibits all boycotts. See Sen. Rep. No. 105, 80th Cong., 1st Sess., Part 2, 20 (1947), and Senator Pepper's remarks in committee, 9 Cong. Rec. 4323 (1947).

\textsuperscript{16}See note 2 supra at § 8 (b) (4).

\textsuperscript{17}Id. at § 8 (b) (6). This provision was added to the Senate Bill in conference and would appear to be the result of an attempt on the part of the House to incorporate some of the provisions of the "Petrillo Act", 60 Stat. 89 (1946), 47 U. S. C. A. § 506 (Supp. 1946). See Senator Taft's remarks in committee. 11 Cong. Rec. 6598 (1947).
purpose the complete unionization of a shop and maintenance of that status by bars against the employment of non-union labor. These clauses ran the gamut from the "closed union shop", wherein the employer agreed not to hire any but union members and to discharge any person who terminated his membership, to preferential hiring arrangement.18 This latter type merely required an employer to give preference to union members and employ them if qualified and available. The significance of statutory limitations on these clauses will be seen immediately when it is noted that some 70% of all existing labor agreements, which affect about 8,200,000 persons, contain some sort of union security clause.19

To understand the high evaluation placed on the union security provisions by the unions and the violent protests against their circumscription, it is necessary to examine some of their characteristics. The true closed union shop operated as an absolute monopoly. The union dictated who might be employed and upon what terms. Union membership meant a job, and discharge from the union resulted in immediate loss of employment. Under such conditions labor leaders exercised a powerful control over individual members. They could effectively police the membership, secure prompt payment of dues and force conformity with union rules and regulations. There was little opportunity for a rival union to secure a foothold in the face of a closed union shop. These qualities contributed greatly both to the union's economic strength and its power to engage in effective strikes.

The benefits to the individual employee are a little more difficult to see; but if it be assumed that the fortunes of the individual laborer vary directly with those of the labor organization, then at least the majority of laborers stand to gain from the use of closed shop contracts. In the final analysis, the advantages of the closed shop, and to a lesser degree the other forms of union security clauses, are those of monopoly.20 The union shop allowed under the Taft-Hartley Act has none of this potent monopoly power. The most that can be required is that an employee join the union thirty days after employment, and discharge for termination of union membership can be forced only under very

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18The Commerce Clearing House Labor Service lists 12 different types of such contract clauses, C. C. H. ¶ 65851-65852.
19Senator Ellender estimated that restrictions on the union security contracts now in effect would throw the burden of some twenty to thirty thousand new contracts on the NLRB 9 Cong. Rec. 4262 (1947).
20The opinion in the case of Berry v. Donovan, 188 Mass. 353, 74 N. E. 603 (1905), is a scathing indictment of the closed union shop's monopoly.
limited conditions as for example when the termination of union membership is for failure to pay dues.

**History of Union Security Clauses**

It would appear, oddly enough, that unions obtained their inspiration for inserting contractual limitations on the freedom of employment from their employers. In the early 1900s, as union activities became increasingly prominent, employers resorted to the so-called “yellow dog” contract to curb the increasing union strength. These contracts between individual employers and employees provided that the employee in consideration of his employment would not join a union or engage in union activities, upon pain of immediate discharge. Such contractual protections made it almost impossible for a union to break into a shop. The courts held in case after case that “yellow dog” contracts were perfectly legal as they fell within the right to contract freely. The theory of the courts was that two parties bargaining on equal terms could limit their rights as they saw fit.21 The early state statutes which sought to outlaw the “yellow dog” contract were held to be unconstitutional on the same basis.22 It was not until Congress passed the National Labor Relations Act of 1935 that the “yellow dog” contract was rendered illegal. This time the Supreme Court declared such a restriction on the freedom of contract to be within the plenary power of Congress over interstate commerce.23

Having been shown by bitter example the power of the “yellow dog” contract, it is not strange that labor sought to emulate the employers’ lead with contractual measures favorable to its own cause and the union security provision was born soon after the “yellow dog” contract. However, its progress was inhibited by both employers and a hostile judiciary. In many jurisdictions, a closed union shop agreement even in one shop was considered a monopoly and as such illegal.24 Other jurisdictions

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21In the case of *Hitchman Coal & Coke Co.* v. *Mitchell*, Mr. Justice Pitney said, “This court repeatedly has held that the employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken even by the legislature, unless through some proper exercise of the paramount police power.” 245 U. S. 229, 251 (1917).


were inclined to be more liberal in their views, but nevertheless tended to hold that when a union controlled labor in more than one shop or a large proportion of the employees in any community it became oppressive and contrary to public policy.25

In spite of the opposition to union security agreements, they continued to be used in increasing numbers. Thus, in 1935 at the time when the National Labor Relations Act was passed both the “yellow dog” and union security provisions were in use concurrently. Section 8 (3) of this Act slammed the door on future use of “yellow dog” contracts and at the same time laid down the welcome mat for union security provisions.26 The encouragement of favorable legislation hastened the trend that resulted in some 70% of all labor contracts containing union security provisions in 1946.

LEGISLATIVE CONSIDERATION OF UNION SECURITY

The inherent power of closed union shop provisions makes them particularly subject to abuse by those who hold the reins in the unions. It became common to associate all of labor’s shortcomings with monopolistic labor contracts. Even prior to the Congressional hearings on proposed labor legislation it was generally accepted that many of the sharpest blows would fall on union security provisions.

At the outset of the committee debate, there was a strong opinion in favor of outlawing all forms of union security provisions. The proponents of such drastic restrictions were loud in their denunciations of the union shop. They pointed to the maritime unions’ hiring halls as a classic example of the evils inherent in union shop contracts. These unions required that members seeking employment list their names with the union and await their turns before presenting themselves for employment. This practice had the effect of reducing all seamen to their lowest common denominator, and prevented the more skillful and popular employees from being accorded the preference which their skill and reputation ordinarily would have assured them. On the other hand,


(3) By discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization: Provided, that nothing in this Act, . . . , shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein, . . . "
the incompetent seaman who was discharged might be returned to the same employer by the hiring hall when his name reached the top of the list again. 27 Similar practices were prevalent in the building trades, 28 and there was a widespread practice of selling work permits to prospective employees before they were allowed to be interviewed for jobs. These permits were usually sold at excessive prices which served the dual purpose of bolstering the union’s treasury and of helping to preserve the union monopoly. Applicants who obtained positions were customarily taken into the union, but the money paid in by unsuccessful applicants was not returned. The records of the hearings are replete with examples of arbitrary union actions such as rules requiring that new members be blood relatives of old members, and discharges for political ideas contrary to those held by union leaders. 29 In the words of the Senate Labor Committee, “We have felt that on the record before us the abuses of the system have become too serious and numerous to justify permitting the present law to remain unchanged. It is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated.” 30 Other less spectacular, but equally persuasive objections to union security contracts were demonstrated by a comparison of the Railway Labor Act 31 with the Wagner Act. The Congress which passed the Railway Labor Act believed the provisions prohibiting employer discrimination against union membership and providing for the certification of exclusive bargaining representatives obviated the justification for union security contracts. Therefore, they were forbidden by this law. 32 Analogous to this reasoning was the argument presented by Senator Ball in support of his amendment which would have outlawed all contracts making union membership a condition of employment. He maintained that because the National Labor Relations Act precluded further “yellow dog” contracts the next step should be taken and union security contracts should be similarly prohibited in order to protect the freedom and rights of the individual. 33 The paternalistic character of the Wagner Act has been

30 See note 28 supra at 6.
33 See Senator Ball’s remarks in committee, 9 Cong. Rec. 5087 (1947).
justified by the assumptions that the disparity between the bargaining strength of the independent laborer and the employer cannot result in an equitable agreement, and that the laborer must be strengthened to enable him to meet the employer on equal terms. It has been argued that labor can now retain an adequately powerful bargaining position without the closed shop.  

Senator Ball's proposed amendment, however, was not the only attempt to eliminate union security provisions. The House Bill contained a provision that would have demanded the consent of the employer even before the union could petition the NLRB for a union shop election. This provision would have had the net effect of preventing strikes or other coercive measures with an object of securing union shops.

The minority which opposed restricting union security contracts contested the issue vigorously. They conceded the point on closed shops, but fought restrictions on the more limited union shop. Senator Malone introduced an amendment which would have forced an employer to accept a union shop contract if three-fourths of the employees voted favorably. This amendment was promptly defeated. The minority pointed to the industrial stability which was promoted by the closed shop, and its proven workability in many cases. Senator Malone went so far as to say that the employees would get a union shop anyway by resorting to strikes, picketing and rioting so they might as well be allowed to have it. The majority was willing to concede the existence of some limited virtues in the union shop such as stability and workability but believed that the majority draft retained these virtues while eliminating the abuses.

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It would appear that the situation has reversed itself since the Wagner Act was passed. An editorial in the Wall Street Journal of June 18, 1947, illustrates this change. "The real objection to the closed shop is that it was forced upon employers by the strength of great national unions supported openly or secretly by government. If the power of the unions were no greater than the power of the employers, that is if each employer were dealing only with a unit of his own employees, the closed shop could not be forced down his neck. It could only come by a contract freely and voluntarily made and it could be continued only by justifying itself." Page 44, Column 1.

*H. R. 3020 § 9 (g).*

*9 Cong. Rec. 5078 (1947).*

*"Id. at 5080.*

*It is interesting to note that during the course of the debate the labor advocates employed the argument that this Act constitutes a restriction on the right to contract freely. This is the same argument that was used by the opponents of the Wagner Act. At one
The extremists on both sides were outvoted, union security clauses were not completely eliminated nor was the employer forced to accept any such provision against his will. What emerged was an emasculated version of the union shop. The maximum a union can obtain is a contract which forces an employee to join the union thirty days after being employed. This protection can be secured only after complying with numerous conditions precedent; once obtained, it is hedged in with many limitations and restrictions.

**Conditions Precedent**

Specific provision for the union shop is set forth in Sections 8 (a) (3) and 8 (b) (2) of the Act:

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; *8*

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (a) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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*Section 7 of the Act contains the express right to refrain from participating in union activities except as this right may be limited by a union shop contract obtained under the provisions of § 8 (a) (3).*
(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership:

An examination of Section 8 (a) (3) discloses that two major conditions must be fulfilled before a labor organization may rightfully demand a union shop agreement. The union must become the certified bargaining agent for the employees, and the NLRB must have certified that a majority of the eligible employees have voted to authorize the union to make such an agreement. To understand the extensive nature of these conditions one must examine the further restrictions and conditions placed on the elections themselves.

Subsections 9 (f), (g), and (h) set forth the reporting requirements which must be fulfilled before the Board can entertain any union's petition for an election or investigate any question of employee representation which is raised by a labor organization. Thus, a union's first step in securing the right to bargain for a union shop is to file the reports required by these sections. Also required by these sections is the non-communist affidavit which must be filed by each officer of the local union in question as well as by each officer of any national or international labor organization with which the local is affiliated or of which it is a constituent unit.40

Detailed statements of the union's constitution, by-laws, and procedures showing the manner of electing officers, authorizing strikes, disbursing funds and expelling members (and the grounds therefore) must

40The filing party must state that he is not a member of the Communist Party and that he is not a member of, nor does he support any organization which teaches or believes in the overthrow of the U. S. Government by force or any other unconstitutional or illegal means. This requirement will not delay the union petition unduly as the truth of the assertions is investigated by the Department of Justice after they are filed with the NLRB. The petition is not delayed pending the results of the investigation. One of the NLRB's first important actions under the new law was to reverse upon appeal the opinion of its General Counsel who had held that the language of this section included the top members of the A.F. of L. and the C.I.O. The Board held that the intent of the Congress was not clear from the legislative history, and they concluded that the words "national or international labor organization" do not include parent federations such as the A.F. of L. and the C.I.O. 75 N.L.R.B. 2. (1947). See Adm. Law Note, 36 Geo L. J. 198, infra this Number (1948).
be filed with the Secretary of Labor and kept up to date by annual supplements.\textsuperscript{41} Further, each union must file, in a form prescribed by the Secretary of Labor, an annual financial statement showing assets and liabilities, receipts and disbursements. Copies of this same report also must be made available to every member of the union. Some observers believe that the administrative burden will prevent the unions from complying. This would appear to be an exaggeration of the difficulty. Another significant result is apparent, however. The required financial reports will reveal to employers the strength of the union's war chest. Heretofore, this has been a closely guarded secret.\textsuperscript{42}

After complying with these reporting requirements to secure the benefit of NLRB jurisdiction, the union which has not been previously certified by the Board then has the right to file a petition alleging that a substantial number of the employees in the bargaining unit desire representation and either that the employer refuses to recognize the union or that the currently certified union is no longer representative of the employees.\textsuperscript{43} The Board shall then investigate this petition and if it finds that there has not been a valid election held within the last twelve months and it has reasonable cause to believe that a question, affecting commerce, exists with regard to employee representation, a hearing shall be held. If the Board finds upon the record of this hearing that such question exists, it shall direct an election. This hearing may be dispensed with upon mutual agreement of the parties, and a consent election held following the petition.\textsuperscript{44} This representative election entails further complications in that the Board must determine in each case whether the union in question is the unit appropriate for purposes of collective bargaining.

\textsuperscript{41}See note 2 \textit{supra} at § 9 (f).

\textsuperscript{42}It is not known whether the documents filed with the Secretary of Labor will be available for public inspection but as a copy of the financial statement must be made available to every union member they should be easy to obtain.

\textsuperscript{43}It should be emphasized that there is nothing in the Act which prevents an employer from recognizing a union and making an agreement with it. However, a union has no standing before the Board to complain of an employer's refusal to bargain or of unfair labor practices to which the employer may resort before or after the conclusion of a collective labor agreement if it has not taken the indicated steps to secure recognition by the NLRB. Further, an employer has the right to force an election. Section 9 (c) (1) (B) specifies that an employer may petition for a representative election if he alleges that one or more persons or unions have claimed recognition.

\textsuperscript{44}See note 2 \textit{supra} at § 9 (c) (1). However, the Board must conduct the election by secret ballot and not by a mere check of membership cards as was often done in the past.
If a majority of the eligible employees in the unit vote in favor of the petitioning union then the results are certified to the union and to the employer. The employer is then obliged to bargain collectively, but there is a further requirement which must be satisfied before a union may demand a union shop clause as described below. However, having become the recognized bargaining agent, the union is protected for at least a year from hostile activities on the part of rival unions. Section 8 (b) (4) (C) makes it an unfair labor practice for an employer to require an employer to recognize one union if another union has been certified. Thus the agent union is relatively free to proceed at its leisure to petition for a union shop election.

**Union Shop Election**

Having complied with the requirements of Section 9 (c) and being certified by the Board as bargaining agent for the appropriate unit, the union is then in a position to petition for a union shop election under Section 9 (e). The petition must contain the allegation that at least 30% of the employees desire a union shop. The Board may then hold an investigation and a hearing, although the latter is not required, to determine whether the alleged 30% of the employees do in fact want a union shop and to make sure that no question of representation exists. If appropriate showings are not made on each of these questions, the Board may dismiss the petition. The caveat inserted in this Section to the effect that no election for a union shop may be held if any question of representation exists would appear to be more important in cases where some time has elapsed since the election which resulted in certification of the petitioning union, or where the employer has voluntarily recognized the union. There would be little probability of change in a union's representative status in cases where the union shop election followed soon after the bargaining agent election.

Again a secret ballot is taken and the results are certified to the union and the employer. If the union has gained majority affirmation, it is then able to bargain with the employer for a union shop. It is important to understand the extent of this right. There is a common misappre-

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45 The requirement of § 9 (a) that the majority of the employees in the unit vote favorably appears to apply to both representative and union shop elections. In the past, the NLRB held that the majority of those voting was sufficient. This alteration has been hotly attacked as undemocratic. 9 Cong. Rec. 4496 (1947). The clause "eligible to vote" contained in this section is important as employees in strike are not entitled to vote. § 9 (c) (3).
hension that once a union complies with the conditions precedent it is automatically given union shop rights. Such is not the case. At this point, the union has only the right to make union shop clauses one of its collective bargaining demands. It may then use all legitimate means of collective bargaining, including the strike, to persuade the employer to accept such provision. However, at least one partial alternative to this sequence of events is possible. Nothing in the Act prevents the employer from promising a priori to agree to a union shop after the election has been held. Many of the agreements which were consummated immediately prior to the effective date of the Taft-Hartley Act contained a clause whereby the employer agreed to recognize a union shop in the future upon union demand. In any case, the union shop cannot become effective unless the employer at sometime agrees to its insertion into the collective labor agreement.

**Enforcing the Precedent Conditions**

There are many restrictions throughout the Act which assure that the conditions precedent to securing a union shop will be met. If a union attempts to force a security clause on an employer before it has a right to do so, it is chargeable with an unfair labor practice under Section 8 (b) (2). Nor is it necessary for an employer to give in to the union's demands. This section makes it an unfair labor practice to cause or attempt to cause an employer to discriminate against an employee in violation of the conditions of Section 8 (b) (3). These prohibitions are supported by all of the Board's enforcement remedies as set forth in Section 10. In particular, the union may be required by Board Order to tender back pay to any employees which they succeed in having discharged in contravention of Section 8 (a) (3).

The employer who accedes to the union's unauthorized demands and discharges an employee who is not in violation of legitimate union shop requirements is guilty of discrimination under Section 8 (a) (3), and in some cases may also be guilty of lending unauthorized support to a union.

**Characteristics of the Union Shop**

Once having overcome the attendant difficulties and having obtained a union shop contract, just what power and advantages has the union gained? It is apparent that the dictatorial powers of the old closed

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46 See note 2 supra at § 10 (c).
47 Lending support to a union is forbidden to an employer by § 8 (a) (2).
union shop permitted by the Wagner Act are no longer available. This law clearly allows the unions to demand only that employees join the recognized union within thirty days after being employed. Union membership may not be made a condition of employment. Some members of the Senate Committee professed to see no difference between an agreement which demanded union membership as a condition of employment and one which forced him to join the union thirty days after being employed. In fact, there is a vast difference.\(^4^8\) The termination of the unions' power to control hiring is undoubtedly the most important qualification of the union shop.

A reading of Section 8 (a) (3) shows that under a union shop agreement a union can demand and the employer must discharge an employee who is not a member of the union thirty days after employment, but this is subject to certain exceptions. It is to be questioned whether these exceptions are not as broad as the basic right. Even in the face of a union shop an employer may refrain from discharging a nonunion employee if: (1) He has reasonable grounds for believing that union membership was not available to said employee on the same terms and conditions generally applicable to the other members, or (2) if he has reasonable grounds for believing that membership in the union was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining union membership.\(^4^9\) Examining the situation from the union's point of view it will be noted that its rights to urge the employer to discharge a non-member under a union shop contract is even more limited. Under the provisions of Section 8 (b) (2) a union may require the employer to discharge a non-member only if he has failed to pay the periodic dues and initiation fees uniformly required as a condition of membership.

Examples will serve to illustrate these restrictions in operation. Assume the case of a person employed in a union shop, who refused to pay his dues and join the union at the expiration of the period of

\(^{4^8}\)Senator Taft's explanation in reply to the committee members who failed to see any difference between the union shop allowed by the proposed law and the closed shop offers a concise summary of the differences. He said: "The great difference is that in the first instance [union shop] a man can get a job without joining the union or asking favors of the union, and once he has the job he can continue it for 30 days, and during that time the employer will have an opportunity to ascertain whether he is a capable employee."

\(^{4^9}\)9 Cong. Rec. 5088 (1947). See also Note 53 infra.

grace even though membership has been offered him on the same terms as those generally applicable to the present members. In this case, the union could rightfully demand a discharge. However, the employer could first satisfy himself that membership had been made available on a non-discriminatory basis. It is to be observed that this standard is largely subjective.\textsuperscript{60} Even an employer acting in good faith might consume considerable time in satisfying himself that membership truly had been made available to the non-member on the same terms and conditions as those generally applicable to other members of the union.

Alter the facts slightly and have the union refuse membership to the new man because he fails to meet the experience, skill, or other general admission requirements. This case illustrates the really limited nature of the union’s discharge right. This time the employer may discharge the man; he is not a member of the union and the two exceptions to 8 (a) (3) do not apply. Membership was available to him on the same terms as those applying to the union members, but he could not meet them. However, if he has tendered his dues and initiation fees the union could not discriminate against him by coercing the employer to discharge him.\textsuperscript{61}

Thus, harking back to the primary conclusion of this Section, it is manifest that the union shop no longer gives a labor organization any substantial control over hiring or tenure of employment. The union may demand only the payment of dues and reasonable initiation fees.\textsuperscript{52} This is true even though Section 8 (b) (1) provides that nothing in the Act shall be construed to impinge upon the right of a labor union to prescribe its own rules with respect to the acquisition or retention of membership. Reading this Section in the light of the other facts herein developed, it appears that a union may lay down any conditions or rules respecting membership that it desires, but it may not use these rules under a union shop agreement to limit the right to employment or to

\textsuperscript{60}The minority report from the Senate Committee says: “The effect of these provisions is virtually to make the employer the judge of the justifiability of firing or retaining a nonunion employee under a union-shop contract. The bill does not say that employees must in fact have been deprived or denied membership in the union for the reasons stated. It merely states that the employer must have reasonable grounds for so believing.” \textit{Sen. Rep. No. 105, 80th Cong., 1st Sess., Part 2, 9 (1947).}

\textsuperscript{61}See note 2 \textit{supra}, 2 at §§ 8 (b) (2) and 9, and 9 \textit{Cong. Rec. 5088 (1947).}

\textsuperscript{62}Section 8 (b) (5) of the Act makes it an unfair labor practice to require excessive or discriminatory initiation fees of employees covered by a union shop agreement as a condition precedent to joining such a union.
secure the discharge of nonunion members. This interpretation clearly
was accepted by both the majority and minority groups.53

What then does a union secure in a union shop contract? It obtains
no protection against dual unionism, or against any anti-union activities.
If a member pays his dues the union can only terminate his member-
ship for activities hostile to the union, not secure his discharge.54

It would appear that the Taft-Hartley Act has turned the labor picture
a good distance back toward a common law status, insofar as con-
tractual restrictions on employment are concerned. The Wagner Act
ban on "yellow dog" contracts is unaltered, but the closed shop is
abolished and the union shop which is permitted provides for little more
than a maintenance of union dues. Mr. Taft summed up the spirit of the
majority when he said: "The Committee did not feel that it should go
that far [as to abolish the union shop entirely], but the Committee felt
that if it permitted a union shop agreement which provided that every
man must be a member of the union, then the union must be reasonable,
must accept as members all who apply for membership, and must accept
them on the same terms as it applies to other members and must permit
them to remain in the union if they are willing to pay their dues. In
other words, the position of the Committee was this: either we must
have an open shop or we must have an open union."55 This attitude

53The Senate Committee's majority report speaks directly to this point. "The labor
organization may not persuade or attempt to persuade the employer to discriminate against
an employee except for two reasons: First, that the employee has lost his union mem-
bership by failing to tender the dues or initiation fees uniformly required as a condition
of membership; [the second reason, dual union activity, was deleted in conference]. . . .
It is to be observed that the unions are free to adopt whatever membership require-
ments they desire, but they may not rely upon action taken pursuant to those provisions
in effecting the discharge of, or other job discrimination against, an employee except in
In spite of the use of the words "discriminate against an employee", the above interpreta-
tion would appear to apply equally well to a prospective employee who is denied member-
ship in a union for reasons other than the failure to tender dues and initiation fees. Any
other interpretation would tend to vitiate many provisions of the Act, i.e., the words
"denied or terminated" as used in §§ 8 (a) (3) and 8 (b) (2); see also, the discussion in
the Senate Committee, 9 Cong. Rec. 5080, 5087-5088 (1947), wherein Senator Taft said,
"Incidently, it [the bill] abolishes the closed shop, insofar as that means that only mem-
bers of the union can be employed." The minority bloc appears to have agreed. See
and purpose was almost exactly that of many of our state courts when not confronted with the National Labor Relations Act or similar legislation. Witness the statement of one New Jersey chancellor: "Everyone must be left free to pursue his lawful calling; that is fundamental. It seems to me necessarily to follow that the union must either surrender its monopoly or else admit to membership all qualified persons. . . ."\(^6\)

**Duration of Contract**

Having examined the characteristics of the union shop, the question of the extent and conditions of terminating these contracts remains to be considered. In contrast to the practice under the National Labor Relations Act which made the closed shop almost self-perpetuating,\(^57\) the present union shop has a limited duration. In this connection, it is important to distinguish between the provision allowing revocation of a union's exclusive bargaining right and that applying to termination of union shop agreements. Section 9 (c) (1), which provides for holding elections to select a collective bargaining agent upon petition by an employee, a group of employees, a union, or an employer who alleges that one or more unions are pressing him for recognition, has the secondary effect of allowing elections which may unseat the existing union as the exclusive agent. This right, however, is subject to the limitations that no election shall be held in a bargaining unit in which a valid election has been held in the last twelve months.\(^58\) Thus it is seen that a union once certified has a minimum of one year in which its authority may not be questioned.

The further problem then arises as to what effect contracts made for longer than one year may have on a union's tenure. The NLRB's general policy under the Wagner Act was to protect a union's bargaining status if it had executed a valid contract which had not expired. The Senate Labor Committee report declared that the Board's policy need not be changed by this Act, and that it was still free to dismiss a petition for an election if a valid contract were still in effect.\(^59\) This being the

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\(^57\)In the past the NLRB generally refused to accept petitions from employers for elections. Fur Workers Union No. 21238 v. Fur Workers Union Local No. 72, 105 F. 2d 1 (App. D. C. 1939). This policy coupled with the union's power to employ the closed union shop to curb opposition made it practically impossible to dislodge a union from power once it had gained control.

\(^58\)See note 2 supra at § 9 (c) (3).

case, it would appear that a union can prolong its tenure by fixing the contract term.

Section 9 (e) (2) extends to employees the right to petition the Board for an election to rescind the union shop agreement made pursuant to Section 8 (a) (3) (ii). It provides that the Board shall hold an election and certify the results to the union and the employer. No reference is made to mandatory steps to rescind the union shop provisions. It was noted above that the union can probably retain its exclusive agency status for the duration of a contract period. Therefore, it would seem to follow that the union can retain its union shop rights for the same period. The language of Section 8 (a) (3) (ii) provides, as one of the conditions precedent to obtaining a union shop agreement, that "... the Board shall have certified that at least a majority of the employees ... have voted to authorize such labor organization to make such an agreement." Having once extended the authority to an agent to make a collective labor agreement, it would appear that the members would be bound by its terms for the duration of the contract. The legislative history and the Act itself are equally vague on this point, and the courts should have almost full latitude for construction.

Special Problems

One potentially explosive situation under the Act is the availability of membership to Negroes in unions covered by union shop contracts. The question is raised whether a union which excludes Negro members can insist that they be discharged from the shop. In view of the discussion in earlier sections of this article it would appear that the employer need not do so. The language "on the same terms and conditions generally applicable to other members" contained in 8 (a) (3) is broad enough to prevent an employer from discharging a Negro not accepted by the union, solely for racial reasons. The conference report expresses the view that the arrangements approved by the Board for separate unions for Negroes would not be disturbed. Mr. Taft's statements in the Senate Committee discussion bear out the above interpretation. It was

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*It is to be noted that the right of petition in this Section is limited to employees. This is contrasted to § 9 (c) which permits employer and union petitions.

*In the case of Larus & Brother Co., 62 N.L.R.B. 1075, 1083 (1945) the Board held that the establishment of a negro auxiliary after the union had been certified as the bargaining agent did not nullify the certification so long as bargaining was conducted by a joint committee.
his view that a union may refuse to admit a Negro but that it may not then go to the employer and demand his discharge.62

A further problem concerns the effect of this Act on the labor laws of the various states. This law like the Wagner Act is passed under the commerce power, and therefore, in the normal course of events the exercise of the plenary powers would nullify conflicting state laws. However, there is no reason why federal law may not by its own terms prevent this effect. Section 14 (b) of the Labor-Management Relations Act provides that nothing in the Act shall be construed to authorize the making of agreements which require membership in a labor organization as a condition of employment in any state or territory in which such contracts are prohibited by local law. This too is a strong blow at the already weakened union shop as some thirteen states now have such provisions in their law.63

Summary

From the foregoing discussion of the union shop under the Taft-Hartley Act a few summary conclusions can be drawn. The union shop no longer is the powerful force for maintaining union discipline and carrying out effective strikes that it was under the Wagner Act. Many observers hold that the name union shop is a misnomer, and that in truth the union shop agreement is nothing more than a maintenance of dues provision. Even under the strongest allowable union security agreement unions have little control over employment. The conditions precedent to acquiring union shop rights are complicated and burdensome. In the light of these conclusions it is to be questioned whether the union will consider the advantages commensurate with the attendant difficulties.64

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63 Arizona, 1946; Arkansas, 1944; Florida, 1944; Georgia, 1947; Iowa, 1947; Maine; Nebraska; North Carolina, 1947; North Dakota, 1947. However, petition for referendum has been filed and the law is suspended pending a vote in 1948 primary elections. South Dakota, 1946; Tennessee, 1947; Texas, 1947; Virginia, 1947.
64 Advance information would lead the observer to believe that the unions consider the end not worth the fight. A communication from the CIO headquarters to its locals maintained that the problem is not how the locals can get along without union security contracts, but what they have to gain by obtaining them. This same communication advised the locals not to try for union shop contracts. Wall Street Journal, August 18, 1947, p. 2, col. 2-3.
ENACTMENT OF PARTS OF THE UNITED STATES CODE INTO POSITIVE LAW

Five titles of the United States Code were enacted into positive law by the first session of the 80th Congress. This was done as part of an extensive program to transform the existing titles of the Code into a true code containing all general and permanent federal legislation.\(^1\) The remaining forty-five titles, which at present are merely prima facie evidence of the law, will likewise be made conclusive evidence of the law as this program is carried into effect. The five titles which Congress codified were treated in separate acts, as it is anticipated will be the case with the remaining titles of the Code. In passing each of these acts, Congress specifically repealed all previous statutes or parts of statutes whose provisions were incorporated in the particular title of the Code. The enacting and repealing clauses of each of these acts are similar and one will serve to illustrate all.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 1 of the United States Code, entitled 'GENERAL PROVISIONS', is codified and enacted into positive law and may be cited as '1 U.S.C. —', as follows:

"Sec. 2. The sections or parts thereof of the Statutes at Large or the Revised Statutes covering provisions codified in this Act are hereby repealed insofar as such provisions appeared in title 1, United States Code, 1940 edition, as shown by the appended table: Provided, That any rights or liabilities now existing under such repealed sections or parts thereof shall not be affected by such repeal."\(^2\)

Following the repealing clause is a table of the statutes repealed or repealed in part.

The titles which have been codified by Congress, together with the statute by which each was enacted into positive law, are shown in the table below.

<table>
<thead>
<tr>
<th>TITLE</th>
<th>ENACTED BY</th>
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<tbody>
<tr>
<td>1 &quot;GENERAL PROVISIONS&quot;</td>
<td>Pub. L. No. 278, 80th Cong., 1st Sess. (July 30, 1947)</td>
</tr>
<tr>
<td>6 &quot;OFFICIAL AND PENAL BONDS&quot;</td>
<td>Pub. L. No. 280, 80th Cong., 1st Sess. (July 30, 1947)</td>
</tr>
</tbody>
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93 Cong. Rec. 8550 (July 7, 1947).
Although few changes in the wording of the sections under the titles codified by Congress were made, the numbering of the sections has been modified from that which appeared in the 1940 edition of the code. This modification was made in order to permit future expansion in the codified titles. The five titles codified by Congress will appear in the first supplement to the 1946 edition of the United States Code, which is now in the process of publication and will appear in the early part of 1948. This edition will contain legislation enacted prior to January 2, 1947 and the first supplement to this edition will appear in April or May of 1948.

While the enacting clause of each of the acts makes the use of the code citation permissive rather than mandatory, it is more than likely that it will be used exclusively.

After the various titles are enacted into positive law, Congress may amend them by repealing or amending expressly mentioned sections. If this method of amendment becomes the rule, the troublesome problem of repeal by implication will be reduced greatly if not eliminated altogether.

In undertaking the creation of a true code, Congress has overcome an apparent reluctance, which arose after the enactment of the Revised Statutes of 1873, to make any official restatement more than *prima facie* evidence of the law. This reluctance arose from the fact that the edition of the Revised Statutes published in 1875 contained so many errors that a republication of the Revised Statutes in 1878 was made necessary.3 The present process of creating a true code over a period of time by enacting each title into positive law by a separate statute may enable Congress to scrutinize each title more closely than if the entire code were enacted at one time. While such a piecemeal process has the disadvantage over the interim period of having parts of the code conclusive, and other parts merely *prima facie* evidence of the law, the final results may better reflect the will of Congress than if the entire project were undertaken at once.

Though long reluctant to create a true code, Congress has been aware of the necessity of arranging existing statutes in a form which would

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enable those interested to readily determine what statutory enactments were currently in existence. Obviously the bound volumes of the Statutes at Large did not meet this requirement. As a compromise between its unwillingness to create a true code, and its awareness that a systematic arrangement of existing law was required, Congress authorized the publication of the United States Code in its various editions, but prescribed that it was to be *prima facie* evidence of the law only.\(^4\) This meant that the Statutes at Large or the Revised Statutes governed in case of a discrepancy between them and the Code. Such a situation was bound to give rise to some degree of uncertainty and confusion. The various provisions of a statute may be found under several different sections of the Code, while a particular section of the Code may be derived from several different statutes. Although the language of the statutes is used in the Code wherever possible, minor changes in wording are sometimes necessary for the sake of clarity or grammatical construction. Where such a change is made by the Code editors, it is possible that a discrepancy between the original statute and the wording of the code may be created. In order to protect himself from such a discrepancy, the user of the code must check the statutes from which the Code section was derived.

In placing the provisions of a newly enacted statute under the various Code sections, the editors of the Code are sometimes faced with the question whether a provision of a later statute is so clearly in conflict with a provision of an earlier law as to repeal it by implication. If it is decided that the earlier provision is so repealed, the wording of the earlier law may be dropped from the Code section. It is possible, however, that a court may subsequently decide that there was no such repeal by implication. Such a judicial decision would point out the discrepancy between the Code section and the statutes from which it was derived. Such a discrepancy arises not from any clerical error, but from a difficult problem of interpretation concerning a matter of repeal by implication. Prior to a judicial decision, however, even though the Code sections be carefully checked against the statutes from which they were derived, the discrepancy may be neither readily apparent nor easily ascertainable. With the enactment of the titles of the Code into positive law, such difficulty is largely eliminated, and the lawyer is relieved of the tedious and time-consuming task of checking the Code against the Revised Statutes and Statutes at Large.

NOTES

MUTUALITY OF REMEDY IN THE FEDERAL COURTS

The word "mutuality" has been used by courts of law and courts of equity in innumerable cases. It stands for several totally different concepts, but the courts do not always specify the particular one to which they have reference. It is the purpose of this article to show how a phase of one of the doctrines has been treated in the federal courts. The negative aspect of the doctrine of mutuality of remedy will be reviewed. However, some reference must be made to the other meanings of the term because of the tendency of the courts to confuse the various doctrines which masquerade under the same name.

When the word "mutuality" is used by courts of law with reference

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2 Are the federal courts because of the decisions in Erie R. Co. v. Tompkins, 304 U. S. 64 (1938), and in Ruklin v. New York Life Insurance Co., 304 U. S. 860 (1938), bound to apply the state rule in diversity suits where lack of mutuality of remedy is a defense? Since one aspect of the doctrine, affirmative mutuality, is covered by federal statute (note 8 infra), does it follow that the courts are not bound to use the state law when negative mutuality is an issue? These questions have not been answered by the courts at this writing, and in view of the confusing and apparently contradictory statements in Guaranty Trust Co. v. York, 326 U. S. 99 (1945), [44 Col. L. Rev. 915 (1944); Comment, 55 Yale L. J. 401 (1946)], it appears to be an impossible task to predict what the answer to this problem will be: "This does not mean that whatever equitable remedy is available in a State Court must be available in a diversity suit in a federal court, or conversely, that a federal court may not afford an equitable remedy not available in a state court." Guaranty Trust Co. v. York, supra, at 105.

The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of a State Court a block away should not lead to a substantially different result." Id. at 109.

It is obvious that if a federal court uses the first sentence quoted as authority, it may disregard the state rule of negative mutuality of remedy. It is equally apparent that if it does follow this procedure, the result will often be "substantially different" than it would have been if the state rule had been applied.

This issue was not raised in Texas Co. v. Z. & M. Independent Oil Co., 66 F. Supp. 957 (N. D. N. Y. 1945), but it is interesting to note that the court restricted the holding of Epstein v. Gluckin, 233 N. Y. 490, 135 N. E. 861 (1922), to subsequent mutuality, thus failing to follow the state rule. The New York rule is stated in Walter v. Hoffman, 267 N. Y. 365, 196 N. E. 291 (1935), in which the court cited Epstein v. Gluckin and said: "... the rule of mutuality of remedy is satisfied if the decree of specific performance operates effectively against both parties and gives to each the benefit of a mutual obligation." In Cummings v. Ziterer, 63 N. Y. S. 2d 347 (Sup. Ct. 1946), this court stated:
to the validity of a contract mutuality of obligation is generally meant. It is frequently said that if there is no mutuality of obligation there is no consideration, and consequently no binding contract. This is not entirely true, for other types of consideration may support the contract and yet there may be no mutuality of obligation. "Consideration is essential; mutuality of obligation is not, unless the want of mutuality would leave one party without a valid or available consideration for his promise."

Courts of equity customarily use the term mutuality when they have reference to the doctrine of mutuality of remedy, but they sometimes mean mutuality of obligation because they have found there is no consideration, and therefore no contract. In a suit for specific performance once the court has determined that a valid contract exists it must decide whether it will apply the doctrine of mutuality of remedy. This doctrine has two aspects, an affirmative and a negative.

When the court uses the affirmative doctrine it grants specific performance although the complainant has an adequate remedy at law. It grants relief because the other party could have had a decree of specific performance against the complainant. It is readily apparent that in so doing the court is disregarding one of the time-honored doctrines of equity, *vis.*, that specific performance will be granted only if the remedy at law is inadequate. A simple example of the application can be had in the case of a suit for specific performance by the vendor on a contract for the sale of land in a jurisdiction where his remedy at law is deemed adequate. The court grants specific performance because if the vendee were suing he could have it.

"For mutuality of equitable relief there is no need. . . . At any rate, the parties are now before the court, and a decree may be fashioned to afford the relief in equity, to which each may be entitled." 3

3Big Cola Corp. v. World Bottling Co., 134 F.2d 718 (C. C. A. 6th 1943); Miami Coca Cola Bottling Co. v. Orange Crush Co., 296 Fed. 693 (C. C. A. 5th 1924); Recent Decision, 36 Georgetown L. J. 268, *post.* in which mutuality of obligation is discussed.


8In view of the following it would appear that this doctrine now cannot be applied in the federal courts: "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law." 36 Stat. 1163 (1911), 28 U. S. C. § 384 (1940).
Courts which follow the negative aspect of the doctrine refuse to grant specific performance even though the complainant's remedy at law is inadequate if in the converse situation the defendant could not have it. Under the broad principles of equity complainant is entitled to relief, but is deprived of it by a court which seeks to make the remedies mutual. Using the same example as above, if the vendee in a contract for the sale of land sues for specific performance he would be refused because the vendor could not have specific performance were he suing.

It is obvious that both aspects of the doctrine cannot be applied in the same jurisdiction if the courts are to be consistent. It may be well to emphasize also at this point that courts applying the doctrine of mutuality of remedy are concerned only with what the situation would be if the defendant were suing for specific performance. Thus they do not need to take into consideration the possibility of granting relief on condition, nor the fact that the plaintiff has already performed. Under their test they must only inquire if the other party could, or could not, have gained specific performance.

The fairness and the logic of the doctrine of mutuality of remedy have been criticized, but it is interesting to note that in spite of the abuse which has been put upon it, it remains to perplex the bench and bar.

The negative doctrine was first adopted by a court as a reason for refusing specific performance in the famous case of Flight v. Bolland. In 1858 Lord Justice Fry stated the negative aspect of the doctrine in his work, Specific Performance of Contracts. In spite of the many criticisms of his exposition, his words are most important. They are invariably cited by courts which adhere to it, and form the starting point for most of the attacks upon it. Many of the courts that follow this doctrine content themselves with citing Fry as their only authority.

26 Ky. L. J. 129 (1938).
12 Fry, Specific Performance of Contracts § 286 (1st ed. 1858): "... A contract, to be specifically enforced by the Court must be mutual—that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. Whenever, therefore, whether from personal incapacity, the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."
A good starting point in any discussion of the doctrine in the federal courts is the leading case of Norris v. Fox, because it expressly adopted the rule of negative mutuality of remedy as enunciated by Fry, and used it as the basis of its decision. In this case the complainant by a contract in writing agreed to convey land by a warranty deed with an abstract showing good title. The title to this land at the time of the execution of the contract was in a third party. Complainant subsequently obtained a deed to the land he had bound himself to convey, and tendered it to the defendant who refused to accept it and to perform his obligation. Complainant brought a bill for specific performance but the court refused relief, because of the lack of mutuality of remedy. It reasoned that since the defendant at the time of the execution of the contract could not have gained specific performance, there was no mutuality of remedy. The fact that the complainant had, since the making of the contract, gained title to the land was deemed of no consequence. This decision cannot be defended on the ground that the court was attempting to assure the defendant of complainant’s performance, because the complainant, at the time of the action was ready and able to perform. This case has never been expressly overruled, but it has been distinguished and few courts have adopted it completely.

Eleven years after Norris v. Fox the courts began to carve further exceptions from the rule. In Blanton v. Kentucky Distilleries & Warehouse Co. the court decided that it was immaterial that the contract could not be enforced against the plaintiff at the time it was made. This court focused its attention on the ability of the plaintiff to perform at the time of the suit, and concluded that if he could be compelled to do so by the decree there was no reason why specific performance should not be granted. This is called the rule of subsequent mutuality. This decision is not as valuable in reducing the importance of Norris v. Fox as it might have been, because this court distinguished the latter case.

15The U. S. Supreme Court has not treated the problem of negative mutuality in recent years. The few cases in which the Court has been confronted with this defense are not of much assistance because almost all of them were decided on other grounds. In Marble Co. v. Ripley, 10 Wall. 339 (U. S. 1870), a case often cited by courts which follow the doctrine, the Court based its decision refusing specific performance partly on lack of mutuality of remedy, and it cited Fry. Holmes, J., did little to clarify the issue, when in Javiere v. Central Altagracia, 217 U. S. 502 (1910), he said: "There is too a want of mutuality in the remedy whatever that objection may amount to."
by saying that in the instant case, that which could not have been specifically enforced against the plaintiff at the making of the contract was collateral to the main subject of the contract. This opinion quoted many adverse comments on the doctrine of negative mutuality, showed that the cases relied on in Norris v. Fox were not in point, and concluded that the ruling in that case had only Fry's words as authority.

In Mississippi Glass Co. v. Franzen the court announced another exception to the strict doctrine of negative mutuality of remedy. It declared that if the plaintiff had already performed that which could not have been specifically enforced against him when the contract was made, he could gain specific performance. In effect this court said that the defense of lack of mutuality of remedy had no application to an executed contract. The rule seems only logical, but is directly opposed to Fry's doctrine of negative mutuality.

A series of cases followed in which the courts developed a rule based on equitable principles, and ignored the rule of negative mutuality as such, although some of them called their doctrine by the same name. This rule, first enunciated in Montgomery Traction Co. v. Montgomery Light & Water Power Co., was not predicated upon an inquiry as to the result if the defendant were suing for specific performance. Relief was granted, but the decree was contingent upon continued performance by the plaintiff. The plaintiff had contracted to supply power to the defendant which had bound itself to use it to operate its street cars. The contract's termination date was seven years away when the defendant breached. Plaintiff filed a bill for specific performance, and the defendant answered that it could not be granted because the plaintiff's services were of such a nature that the court would not order it to perform if the defendant were suing. The decree of the court required the defendant to perform only as long as the plaintiff carried out its obligation. Clearly this opinion shows the court was striving to reach a truly equitable result and was not confining itself to an arbitrary rule, the reason for which had never been proved.

The following year Great Lakes & St. Lawrence Transportation Co. v. Scranton Coal Co. was decided, the opinion and result following closely the Montgomery Traction Co. case. This court in granting specific performance said that equity was no longer deterred from granting its aid because of the "so called lack of mutuality in the

229 Fed. 672 (C. C. A. 5th 1916).
239 Fed. 603 (C. C. A. 7th 1917).
remedy". It declared that it sufficed that defendant’s compulsory performance was conditioned upon the plaintiff’s continued readiness to carry out its obligation. In this case the plaintiff had contracted with defendant ship owner to employ defendant’s vessels to transport its coal. The defendant sold its ships and notified the plaintiff it could no longer perform. The plaintiff proved his remedy at law was inadequate because ships could not be obtained elsewhere.

Several like decisions followed in other cases and it seemed that a federal rule had come into existence which did not use the standard of negative mutuality, but which, by applying accepted equitable principles, gave the innocent party all relief possible while assuring the defendant that he would suffer no unreasonable hardship.

The hope that Fry’s doctrine was no longer of importance in the federal courts, and that it had been succeeded by the rule enunciated in the Montgomery Traction case was short-lived. In Roller v. Weigle the court declared “the familiar principle applies that a court of equity will never decree specific performance where the remedy is not mutual.” In its opinion the court shows with what ease a case such as this may be disposed of if the rule of negative mutuality is used. It merely stated that defendant could not have had specific performance if he were suing because plaintiff was bound to perform personal services, therefore it could not be granted in favor of the plaintiff.

At a time when the federal courts were split on the status of the rule, Justice Cardozo, speaking for the Court of Appeals of New York, in Epstein v. Gluckin, uttered the most important words on the doctrine of negative mutuality that have appeared since Fry’s work on specific performance. This court refused to follow the rule of negative mutuality, but substituted therefor a rule developed according to true equitable principles. In this case the assignee of the vendee in a contract for the sale of land sued for specific performance. The vendor contended that since she could not specifically enforce the contract against the plaintiff the remedies were not mutual. The court granted relief and pointed out that no hardship resulted because by the very act of bringing suit, the plaintiff had bound himself to perform. The opinion showed that there was no injustice to either party because the plaintiff received that to which he was entitled under the contract while the defendant was assured

21233 N. Y. 490, 135 N. E. 861 (1922).
of the plaintiff’s performance. This rule is identical to the one applied six years before in the Montgomery Traction Co. case.

Two cases decided in the District of Columbia in 1926 showed conclusively that negative mutuality was still a very confused, yet very important doctrine, and that the federal courts were not ready to follow the New York court in abandoning negative mutuality. In Crowley v. Crowley the plaintiffs were vendors of land, who at the time of the sale to the defendant, did not have good title to the property, as the vendee well knew. Two years after the date of the sale, the vendee having previously consented to an extension, the vendors perfected title and on defendant’s refusal to perform, sued for specific performance. The court denied the plaintiffs relief because of their delay in perfecting title. The court stated however that there was another reason on which it could base its decision. It said, “it is elementary that the right to enforce specific performance depends upon mutuality of obligation”. It then quoted Fry and cited two cases in which the decisions were grounded on mutuality of remedy. The opinion further stated that where a contract when made could not be specifically enforced against one of the parties, he could not put himself in a position to gain specific performance by performance of those conditions that could not have been specifically enforced. This case applied the rule of negative mutuality in its strictest sense, and misnamed it by calling it mutuality of obligation.

The second case, Robb v. Crawford, involved a contract to exchange two parcels of land. There was an incumbrance on the plaintiff’s property at the time the contract was made. In his bill he alleged that he was at all times, after the making of the contract, ready and able to perform. The court in granting specific performance said that even if there was a lack of mutuality of remedy when the contract was entered into, this element was supplied on the part of the plaintiff during the life of the contract and prior to the filing of the suit. It stated that the “better opinion” was that mutuality of remedy need not exist at the inception of the contract. The defendant had quite naturally predicated his defense on the Crowley and Weigle cases. The court refused to disagree with the rulings in either of these cases, but said that the Weigle case was for personal services and therefore “clearly distinguishable”, and the dicta in the Crowley case was not applicable. It is

difficult to arrive at any conclusion except that the rule of subsequent mutuality used in this case was directly opposed to that followed in the *Crowley* case.

An examination of two interesting cases decided by the Court of Appeals for the Eighth Circuit shows how this court restricted the rule announced in *Epstein v. Gluckin*, and in so doing minimized the effect of that case in the federal courts. In *Electric Management and Engineering Corp. v. United Power & Light Corp.*, the defendant had agreed to sell stock to the plaintiff, the latter paying $10 for the option to purchase. Under the terms of the contract the plaintiff, in his sole discretion, was free to withdraw if an examination of the books proved unsatisfactory to him. Defendant denied plaintiff access to the books and the latter brought his bill for specific performance, still reserving the right to withdraw, however. The court denied relief because the plaintiff had failed to submit itself unconditionally to the decree of the court, the court reasoning that there was no mutuality of remedy at the time suit was filed. The opinion expressly adopted *Epstein v. Gluckin*, stating it was the federal rule, but it then declared that the extent of the holding of that case was that mutuality of remedy must still exist, but only at the time suit was filed. If this court were correct Justice Cardozo merely substituted one rule of negative mutuality for another.

In *Engemoen v. Rea*, plaintiff and defendant entered into a contract of joint venture, under which the former was to perform personal services and furnish the money needed to operate a hog-feeding farm, while the latter was to provide the land. Defendant breached, refused to allow the plaintiff to use the land, and commenced using it for his own business. Plaintiff asked for injunctive relief equal to a request for specific performance. The court in denying him relief based its decision on the lack of mutuality of remedy, applying the doctrine in accordance with the rule laid down by Fry. The court stated that since plaintiff was to perform personal services the defendant could not have gained this relief if the situation were reversed. Thus this court did not consider the possible unfairness to either party but confined itself to the old "rule of thumb".

Great progress away from the rule of mutuality of remedy was made by the decisions of two different circuit courts when they were confronted with cases involving contracts, under which either one or both

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26 F.2d 576 (C. C. A. 8th 1928).
of the parties were free to terminate on the giving of a short notice. Previous to this time relief had usually been denied because of the lack of mutuality of remedy. In Oklahoma Natural Gas Corp. v. Municipal Gas Co., the court, in a well reasoned opinion, treated the problem of a request for specific performance when both parties had the right to terminate the contract upon the giving of a ninety day notice. The defendant city had leased to the plaintiff certain pipes, partly in consideration of the plaintiff's undertaking to supply gas to its residents. The defendant gave no notice but leased the pipes to a third party, and plaintiff brought his bill for specific performance. The court, after determining that the remedy at law was inadequate, granted relief, stating that when equitable conditions existed the claim for specific performance was as much a matter of right as legal relief. It significantly failed to mention mutuality of remedy, evidently being of the opinion that that doctrine was incompatible with its position as to the right to equitable relief. The decision seems just and not at all futile, for it gave to the plaintiff the period for readjustment to which it was entitled under the contract. It caused no hardship for both parties still retained the right to terminate the contract upon the giving of proper notice.

The first federal case to adopt the rule of Epstein v. Gluckin expressly and interpret it in the sense that mutuality of remedy is not necessary, was Daniels v. Brown Shoe Co. In this case defendant filed a bill of equitable counterclaim seeking specific performance of a contract under which the plaintiff was bound for the life of a patent while the defendant could terminate upon the giving of a six months' notice. Plaintiff contended there was no mutuality of remedy, since it could not gain specific performance, because such a contract would not be enforced against a party who could nullify a court's decree by terminating the contract. This court granted relief stating there was no injustice, as the plaintiff was being compelled to do only that to which he had bound himself when he made the contract, and if the defendant failed to perform his obligation, the decree would no longer bind the plaintiff. This ruling seems exactly in accord with that announced in Epstein v. Gluckin.

Once again when it seemed that the arbitrary rule of negative mutuality had been discredited in the federal courts a decision was handed

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27 38 F.2d 444 (C. C. A. 10th 1930), 9 Tex. L. Rev. 94 (1930).
28 77 F.2d 899 (C. C. A. 1st 1935), 20 Minn. L. Rev. 225 (1935).
down affirming it. In *Madison Square Garden Corp. v. Braddock*, the defendant was under contract to the plaintiff to box under the auspices of the latter before fighting anywhere else. Several amendatory contracts had been drawn when the defendant announced his intention to refuse to carry out his obligation and to box in another place. Plaintiff sought a preliminary injunction to restrain him from performing at any time until he fulfilled his contract. The district court refused to grant the injunction because it was of the opinion that the negative covenant was unreasonable. The circuit court of appeals affirmed, but on the ground that there was no negative covenant. It then went on to say that even if there had been such a covenant and even if it were reasonable, it could not grant relief because of the lack of mutuality of remedy. The opinion on this point is startling indeed for it states that the doctrine of mutuality of remedy is "settled law", and that the doctrine itself is a "very simple one." The court's only authority for its declaration that this simple doctrine was the law was the broad language in *Marble Co. v. Ripley*. It stated that "no further authority need be cited". Opinions such as this one, involving a controversial issue of law in which the court blandly states that the law is well settled and that the test which it uses is a simple one, are hard to defend. It seems logical that the court would welcome an opportunity to explain its reasons. It is because of these tactics that one writer commented that lack of mutuality of remedy was used to cover a multitude of situations and explain none of them.

Further proof that the federal courts were not yet ready to abandon mutuality of remedy was also given by the courts of the Second Judicial Circuit. In *Bethlehem Engineering Co. v. Christie*, in denying plaintiff's request for specific performance, the court relied partly on the lack of mutuality of remedy. The plaintiff had paid for the exclusive agency to promote the sale of defendant's tank. The latter was to make a tank available to the plaintiff and to give it access to all necessary drawings. Certain terms and conditions were left open to be decided later by mutual agreement. The opinion showed that if positions were reversed and defendants were suing he could not be given specific relief because the plaintiff was obliged to perform personal services. The

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26 F.2d 924 (C. C. A. 3d 1937), 22 Minn. L. Rev. 273 (1938).
10 Wall. 339 (U. S. 1870).
Note, 26 Ky. L. J. 129 (1938).
court said that under certain circumstances lack of mutuality of remedy standing alone would not bar relief, but that it was an important consideration in personal service contracts. The decision in the instant case is not open to criticism, for even under the rule of Epstein v. Gluckin, it is doubtful if specific performance would have been granted because of the obscurity of the contract. It is unfortunate, however, that the court used the standard of negative mutuality.

In Texas Co. v. Z. & M. Independent Oil Co. the plaintiff attempted to exercise the option it had obtained under a contract with the defendant to purchase the latter's business. Defendant had just sold out to one of the plaintiff's competitors who had notice of the other contract, when plaintiff brought a suit for specific performance of the contract which it alleged resulted when the option was exercised. Among the defenses interposed by the defendant was that there was lack of mutuality of remedy and obligation. The court dismissed this contention stating that the requirement of mutuality of remedy was satisfied if it existed at the time suit was brought. In so deciding, this court cited and followed the Electric Management & Engineering Corp. case which had interpreted the rule of Epstein v. Gluckin to mean only that subsequent mutuality was required.

Conclusion

The federal courts have not been consistent in applying, or refusing to apply, the rule of negative mutuality. Most of them have limited it to the extent that specific performance will be granted if mutuality of remedy exists at the time suit is filed. The majority of the courts refuse if either one, or both of the parties are required to perform personal services. Some of them have disregarded the rule completely and use in its place the doctrine first announced in the Montgomery Traction Co. case and made famous by Justice Cardozo, whereby contingent decrees are issued. A small minority use the term in a very broad sense, and then cite what they evidently consider are the "magic words" of Fry. Whether this latter group still adheres to the strict doctrine of negative mutuality is difficult to determine, for their opinions are usually very general and invariably their principal authority is Fry.

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See note 24 supra.
INADVERTENCE, ACCIDENT OR MISTAKE IN REISSUE PATENTS

The right to reissuance of a patent for the remainder of its original term is granted by statute to a patentee whose patent is "... wholly or partly inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention. ..." On surrender of the original patent, the patentee may secure a reissue patent correcting the deficiency.

Although this statute provides expressly for reissues where the patentee has claimed more than he had a right to claim as new, many subsequent decisions of the Supreme Court and the various circuit courts of appeal construing it have established as the incontrovertible rule that, under certain circumstances, a reissue patent may be granted for the sole purpose of enlarging the scope of the patent by broadening the claims.

If a court holds that there was no inadvertence, accident or mistake, the reissue is void as one issued by the Commissioner of Patents in excess of his power, irrespective of lapse of time.

The question of what constitutes sufficient inadvertence, accident or mistake for a reissue of the patent is a very practical matter that often confronts patent attorneys. To determine what specific examples of inadvertence, accident or mistake have recently been accepted by the Patent Examiners as sufficient, the writer has examined a large number of recent chemical reissue patent files. The following paragraphs summarize the reasons which were advanced and held sufficient by the Examiners.

GROUNDs HELD SUFFICIENT BASIS FOR REISSUE

Failure to Appreciate the True Scope of the Invention

In the files examined, this reason was offered most frequently. A great number of the oaths specify that the attorneys inadvertently failed to perceive clearly the invention and failed to present claims of adequate

3Coon v. Wilson, 113 U. S. 268 (1885).
A great number of oaths specify that the patentees are not versed in the interpretation of claims and were not aware that a substantial part of their invention was not covered by the claims or that the claims were too broad or inaccurate. Some of the files disclose that the inadvertence, accident or mistake arose because of patentee’s inability to speak English, or unfamiliarity with the United States patent laws which resulted in failure to claim the true scope of the invention.

Self-Evident Errors Discovered After the Issue of the Patent

A large number of reissue patents were allowed because of self-evident errors for which a certificate of correction in accordance with Rule 1707 would not be permitted. Examples of this type of error include:

1. “Low” ratio of heat-radiant surface to volume of gases should have been “high” ratio.8
2. “Degrees Fahrenheit” should have read “degrees Centigrade” and vice versa.
3. Error in misplacement of the decimal point in a critical acidity range; should read “.02 to .06%” instead of “0.2 to 0.6%”.10
4. Proportions of components of a catalyst used in the process were expressed as “per-cent by weight” whereas, in fact, these proportions were meant to be referred to as “parts by weight”.
5. Compounds incorrectly named, as “tetakisazo” should be “trisazo”;12 “2,2,4,6,6-pentachloro-3-cyclohexene-dione-1,3” should be “2,2,4,6,6-pentachloro-4-cyclohexene-dione-1,3”;13 “terpadiene” should have been “unsaturated carbocyclic terpene hydrocarbons”.14

It is within the jurisdiction of the Commissioner of Patents to order a patent to be reissued to correct an obvious error in one of the drawings.15

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4Re. 22,886; Re. 22,849; Re. 22,786; Re. 22,784; Re. 22,648; Re. 22,487.
5Re. 22,865; Re. 22,860; Re. 22,858; Re. 22,808; Re. 22,748; Re. 22,722; Re. 22,652.
6Re. 20,370; Re. 22,814.
8Re. 22,886.
9Re. 22,816; Re. 22,566.
10Re. 22,811.
11Re. 22,800.
12Re. 22,705.
13Re. 22,597.
14Re. 22,438.
15Re. 22,886.
To Set Up an Interference

A number of applications for reissue patents are filed for the purpose of copying claims from a later issued patent and requesting the Patent Office to set up an interference in order to determine the prior inventor. In these cases, the applications resulting in the patents were co-pending and an interference should have been declared between them by the Patent Office prior to their issue. If the applicant for the reissue patent has sufficient disclosure in his original specification to permit copying of the claims, an interference between the issued patent and the reissue application is declared and, if the applicant is found to be the prior inventor, the copied claims are included in the reissue patent.16

Newly Discovered Prior Art

When, after issuance of the original patent, applicant discovers prior art or court decisions of which he was previously unaware and which make his patent invalid, he may obtain a reissue with claims of limited scope if so doing will avoid the art or decision.17

Research Discloses Errors in the Patent

Probably the most interesting facts of inadvertence, accident or mistake are found in this category. The following are examples:

1. A very well known patent which has been reissued twice, the second time in September 1947, is Muller patent 2,329,074, Re. 22,700 and Re. 22,922, relating to the use of DDT as an insecticide. As this case is not only interesting in its facts but also involves several important principles, it will be set out in some detail.

After the original patent issued, the assignees, J. R. Geigy A.G., were involved in an opposition proceeding in Holland. In the course of this opposition, the applicant discovered that some of the compounds disclosed in the original patent were not insecticides. When the original tests were conducted to determine the insecticidal properties of the various compounds claimed, DDT, the chemical name of which is alpha, alpha-bis parachlorophenyl-beta, beta, beta-trichlorethane, was tested first. A large glass chamber was used for the tests with 100 flies in each experiment. After the test on DDT, which was effective as a contact insecticide, the chamber was cleaned with two solvents before each subsequent test. Results of these tests showed that all the com-

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16 Re. 22,854; Re. 22,775; Re. 22,687; Re. 22,612; Re. 22,605.
17 Re. 22,751; Re. 22,579; Re. 22,524.
pounds were effective against flies. These later compounds turned out not to be insecticides at all. It appears that the glass chamber had remained contaminated by the DDT in spite of the cleaning between tests due to the tremendous residual effect of the compound. The applicant, a resident of Switzerland, applied for a reissue as soon as mail service free of censorship by the Germans was established between Switzerland and the United States. The first reissue was granted with claims more restricted than those in the original patent. Because of the tremendous quantity of DDT which has gone into use in insecticides and the corresponding importance of the patent, assignees made a very careful search for prior disclosures of the compound and, after issue of the first reissue patent, found two articles which described the synthesis of the compound and its solubilities in various solvents. The value of DDT as an insecticide was not described. Because of these articles, applicant believed that the composition claims of the reissue were too broad, and filed an application for a second reissue where, for the first time, he presented claims to the method of killing insects. The method claims were rejected by the Examiner on the ground that no accident, inadvertence or mistake had been shown to explain the failure to present the method claims in the original application. The Examiner's position was that the need for method claims should have been apparent from an inspection of the original application. The Board of Appeals reversed the Examiner, holding that the claims of the original and the first reissue patent seemed to give adequate protection; however, the later finding of the prior art made it necessary to obtain the method claims. Such failure to ask for method claims was held to constitute such inadvertence, accident or mistake as is contemplated by the reissue statute and, hence, applicant was granted the method claims.

2. Original claims relating to a lubricant were based on bench tests, such as Timken and SAE tests, whereas actual field test conducted later gave different results. The bench tests were of a limited nature and resulted in a failure to appreciate the true scope of the invention. ¹⁸

3. The compounds which exhibited an oxidation inhibiting property in lubricants were described as ethers. Further investigations of the compounds showed that they were probably phenols, and the reissue application was filed to describe the compound in terms of its empirical composition. ¹⁹

¹⁸Re. 22,911.
¹⁹Re. 22,909; Re. 22,910.
4. The invention was found inoperative when a compound in a compounded hydrocarbon oil contained less than 24 carbon atoms. The application was filed to restrict the invention to compounds containing over 24 carbon atoms.20

5. An ingredient in an insulating material was "Vinsol", which was mistakenly defined as "consisting chiefly of highly oxidized abietic acid". Later, it was determined that the properties of the material were due not to the presence of abietic acid, but to an unidentified substance, and since an accurate analysis was not possible the material was defined in the reissue application by its method of preparation.21

When Amendment under Rule 78 Is Refused

In some cases in which the error was discovered after the notice of allowance but before issue, and correction by amendment under Rule 7822 was refused since an additional search would have been required, reissue patents were granted.23

To Remove Ambiguity from the Claims

In cases in which errors arose in amending the claims so as to leave them ambiguous, or in which courts have found the claims bad for indefiniteness or the like, reissues have been granted to correct the deficiencies.24

Later Changes in Circumstances

Patentees are permitted to change the scope of their inventions because of changes in circumstances that arise after issue of the patent; such as, for example, (1) recent court decisions interpreting the claims in such a way as to require their revision;25 (2) original claims being found invalid by the courts thereby requiring patentees to file for reissues restricting the claims.26 A particularly interesting example of this is found in the double reissue of the Lefort patent 1,998,878, Re. 20,370 and Re. 22,241 relating to the preparation of ethylene oxide. The first reissue application was filed to add claims of enlarged scope, stating that the inadvertence, accident or mistake arose because the

20Re. 22,829; Re. 22,830.
21Re. 22,532.
23Re. 22,828; Re. 22,510.
24Re. 22,454; Re. 22,464; Re. 22,489; Re. 22,736.
25Re. 22,750; Re. 22,524.
26Re. 22,772; Re. 22,454.
applicant was a resident of France and was not familiar with the United States laws relating to the grant of patents. The added claims were subsequently allowed. Several years later, this reissue patent was involved in litigation and the Supreme Court found the added claims to be void as not being the same invention as disclosed in the original patent. The second reissue application was filed to revert to the language employed in the claims of the original patent. It might be added that later all of the claims of the reissue patent 22,241 were held invalid for insufficiency of the specification.

**Grounds Which Bar Obtaining a Reissue**

The reasons cited previously have all been held sufficient grounds to supply the necessary inadvertence, accident or mistake to support the issuance of a reissue patent. There are, however, a number of reasons which have been held to be a bar to obtaining a reissue patent. Among these are the following.

**New Matter**

New matter may not be introduced into the reissue application.

Anything that would have been "new matter" if introduced in the original application would obviously be "new matter" in the reissue application.

An interesting example is a case in which the patentee claimed in the original patent the process of making a carotene concentrate, including the step of elutriating with a minimum amount of water. Later, he filed for reissue to add claims to cover the process applied to juice alone without added water. Originally, it had been considered uneconomical to use juice alone, and hence it was not claimed; but later, due to a surplus of carrots, the carrot pulp was being used as a cattle feed and a large amount of remaining juice was available for making the carotene concentrate. The added claims were not allowed in the reissue patent.

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30Ives v. Sargent, 119 U. S. 652 (1887); Application of McCoy, 148 F.2d 347 (C. C. P. A. 1945); In re Geisler, 121 F.2d 537 (C. C. P. A. 1941); In re Stresau, 110 F.2d 106 (C. C. P. A. 1940).
since there was insufficient disclosure in the original specification to warrant them.\textsuperscript{31}

\textit{Claims Cancelled During Prosecution of the Original Patent}

The cancellation of a claim in the original application is not inadvertence, accident or mistake, and therefore bars the grant of similar claims in the reissue.\textsuperscript{32} The rule applies not only to identical claims, but also to claims of substantially the same scope.\textsuperscript{33} However, the patentee may obtain claims in the reissue application broader than the claims of the original patent, so long as they are narrower than the claims cancelled from the original application.\textsuperscript{34}

\textit{Unreasonable Delay in Applying for the Reissue Patent}

A reissue patent with broadened claims can be validly granted only on an application filed within a reasonable time after the grant of the original patent.\textsuperscript{35} The maximum period that might be considered a reasonable time for broadening claims after the grant of the original patent was formerly two years, although several cases have held a shorter time as being unreasonable.\textsuperscript{36}

This was analogous to the then existing statutory limit of two years for filing an application after publication, public use or sale, or prior patenting, had occurred. The statutory limit has since been changed to one year,\textsuperscript{37} and the Patent Office has correspondingly shortened the reasonable time for filing a broadened reissue application based on a patent issued after August 5, 1940.\textsuperscript{38}

A delay in applying for a narrowed reissue application is usually harmless.\textsuperscript{39}

\textsuperscript{31}Re. 22,629.

\textsuperscript{32}Dobson v. Lees, 137 U. S. 258 (1890); Leggett v. Avery, 101 U. S. 256 (1879); \textit{Ex parte} Bowman, 1894 Com. Dec. 25 (Com'r Pat. 1893).

\textsuperscript{33}G-H Rim Co. v. Firestone Steel Products Co., 29 F.2d 825 (C. C. A. 6th 1928); \textit{Ex parte} White, 1928 Com. Dec. 6 (Com'r Pat. 1926).

\textsuperscript{34}Ex parte Lillienfield, 11 U. S. P. Q. 216 (Pat. Off. Bd. App. 1931); Re. 22,557.

\textsuperscript{35}Topliff v. Topliff, 145 U. S. 156 (1892).

\textsuperscript{36}Vandenburgh v. Truscon Co., 261 U. S. 6 (1923); Miller v. Brass Co., 104 U. S. 350 (1881); \textit{In re} Lees, 269 Fed. 679 (App. D. C. 1920); \textit{In re} Kaser, 64 F.2d 687 (C. C. P. A. 1933).


\textsuperscript{38}Ryder v. Coe, 64 U. S. P. Q. 365 (D. C. 1945).

Error Can Be Corrected by a Certificate of Correction

A reissue patent will not be granted to correct an error on the part of the Patent Office if the error is of such nature that it can be corrected by a certificate of correction in accordance with Rule 170 of the Rules of Practice, United States Patent Office.40

Specific Facts Not Alleged

The reissue oath should point out the particular defects and how and in what manner the patent was thereby rendered inoperative or invalid, stating facts rather than conclusions or opinions.41 In most cases, a supplemental oath may be filed to correct any defects in this respect.42

Conclusions

From a study of these files, it is the opinion of the writer that the Patent Office is rather lenient in its holdings as to what errors have arisen through inadvertence, accident or mistake and, hence, can be corrected by a reissue. In the absence of circumstances that would indicate a fraudulent or deceptive intention, and where there has been no unreasonable delay in applying for the reissue patent, the Examiners in most cases appear to hold the reasons cited as sufficient. This attitude seems to be fair and just, permitting the patentee to obtain the full protection of his invention disclosed in the original patent.

ALVIN BROWDY

THE PRIVATE AGENT'S LIABILITY AFTER A SUIT BY THE THIRD PARTY HAS BEEN BROUGHT TO A JUDGMENT FOR OR AGAINST THE PRINCIPAL

In seeking satisfaction from the principal for injuries suffered in dealing with an agent, one is apt to overlook the fact that the agent is sometimes solely liable or liable in the alternative for the damages caused. This note is concerned with the liability of the agent after a suit by the third party has been brought to a judgment for or against the principal. We present the discussion in three steps: First, Thomas sues Peters and Peters prevails; may Thomas then hold Adams? Second, Thomas sues Peters and recovers; can Thomas then hold Adams

40 Ex parte Fish, 1905 Com. Dec. 64 (Com'r Pat. 1905).
41 Ex parte Pfaudler, 1883 Com. Dec. 1 (Com'r Pat. 1882).
42 Re. 22,615.
also? Third, Thomas has recovered from Peters; can Peters then hold Adams? For the sake of brevity we will often use the names Thomas, for the third party; Peters, for the principal; and Adams, for the agent.¹

In discussing the liability of the agent, it is assumed that the agent is of normal legal capacity and competent to assume contractual obligations. When we say that the agent is liable, we mean to answer the question at the head of that section in the affirmative, subject to any qualifying statements which may follow.

I. Thomas Sues Peters and Peters Prevails; May Thomas Then Hold Adams?

Joint Torts

The definition of a joint tort, applied to cases of vicarious liability for concerted action,² places the joint tort outside the scope of a note on agency.³ Where the master is liable only under the rule of respondeat superior, the master and servant are not joint-tortfeasors.⁴ Such cases of joint torts arising out of the principal's statutory liability for the torts of his agent will be discussed under the heading of Torts. Where the principal has personally participated in the tort committed by his agent and is in pari delicto with him, he is liable because he is a wrong-doer and not because he is a principal.⁵ Each joint-tortfeasor may be sued separately.⁶ There is no contribution between joint-tortfeasors who are in pari delicto.⁷ The fact that Thomas has failed in his suit against

¹This nomenclature has been used for over fifteen years at Georgetown Law School by Dean Hugh J. Fegan, B.A., M.A., Ph.D., LL.B., LL.D., in his courses in Agency.

²The Ross Coddington, 6 F.2d 191 (C. C. A. 2d 1925); Smithson v. Garth, 3 Lev. 324, 83 Eng. Rep. 711 (1691); Prosser on Torts § 109 (1941).

³"In tort the relation of principal and agent does not exist; they are all wrong-doers and may be used jointly or separately; and the liability of each and all does not cease until payment has been made or satisfaction rendered, or something equivalent thereto." Berghoff v. McDonald, 87 Ind. 549, 559 (1882). See Mechem on Agency § 1452 (2d ed. 1914) for comment.


⁵Stapler v. Parler, 212 Ala. 644, 103 So. 573 (1925); Millio, Limitations on the Enforceability of Criminal Sanctions, 28 Georgetown L. J. 767, 773 (1940).

⁶Tower v. Camp, 103 Conn. 41, 130 Atl. 86 (1925).

⁷Southwestern Bell Telephone Co. v. East Texas Public Service Co., 48 F.2d 23, 26 (C. C. A. 5th 1931). Inasmuch as punitive damages are awarded against the principal only when he participates in the tortious act, the principal cannot expect indemnification or contribution from the agent for such added damages which he pays since in such cases the two are in pari delicto.
Peters is no defense to Adams where Peters and Adams were in pari delicto.

Torts

An agent who violates a duty which he owes to a third person is answerable to such person for the consequences, whether it be an act of malfeasance, misfeasance, or nonfeasance. The agent is personally liable for his wrongful acts. The fact that he commits the act under the direction of his principal, who may also be liable, does not relieve him. It is immaterial that the agent acted in the bona fide belief that the principal had a right to tell him to do the act.

The agent must owe a duty to the third party in order to be liable to him in damages for tort. If the third party is injured solely as a result of the agent's failure to perform his duties to the principal, then the agent is not liable to the third party. But if the agent in performing his duty to his principal infringes upon the rights of third parties, then he becomes liable for misfeasance to the third party.  

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13"For the warrant of no man, not even of the king himself, can excuse the doing of an illegal act, for, although the commanders are trespassers, so also are the persons who did the act." Sands v. Child, 3 Lev. 351, 352, 83 Eng. Rep. 725, 726 (1693); 3 Holdsworth, A History of English Law 308.
14Tiffany on Agency 356 (2d ed. 1924); Mechem op. cit. supra, §§ 1455, 1456.
16"... the rule of the servant's immunity as to acts of nonfeasance is limited to acts which are merely breaches of duty owed to the master, as distinguished from that owed to the complaining party. For the former he is not liable to a stranger to his contract, but for the latter he is." Knight v. Atlantic Coast Line R. Co., 73 F.2d 76 (C. C. A. 5th 1934). McNamara v. Chapman, 81 N. H. 169, 170, 123 Atl. 229, 230 (1923); Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co., 71 N. H. 522, 534, 53 Atl. 807 (1902). See Note, 28 A. L. R. 438 (1924).
17"But if the agent actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequences of his acts: and he cannot by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance or doing nothing, but it is misfeasance, doing improperly." Osborne v. Morgan, 130 Mass. 102, 103, 39 Am. Rep. 437, 439 (1881).
If the principal's liability to the third party in these cases is dependent upon the principle of *respondeat superior*, and the third party has failed in his suit against the principal on the merits of the case, *i.e.*, on whether or not the agent was negligent, then the agent may plead the prior judgment as a bar to any subsequent suit brought against him by the same plaintiff for the same negligent act of the agent. The prior judgment in favor of the principal is *res judicata*.

**Contract**

The agent is not personally liable upon authorized contracts made in the principal's name. Neither the insolvency of the principal nor his inability or refusal to perform the contract affects this result. In order to simplify matters we have divided this part of the discussion into two subsections because Adams may be acting either with or without the authorization of Peters.

First, what liability arises where the quasi-agent acts without authority assuming to act for a disclosed principal?

"... a person professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, to be liable for the acts of the principal in the same capacity as that in which the person is said to act for him."

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20King v. Stuart Motor Co., 52 F. Supp. 727 (N. D. Ga. 1943); Jones v. Valisi, 111 Vt. 481, 18 A.2d 179 (1941). "To permit a person to commence an action against the principal and to prove the acts alleged to be trespasses, to have been committed by his servant by his order, and to fail upon the merits to recover, and subsequently to commence an action against that servant, and to prove and rely upon the same acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony. In such cases the technical rule, that a judgment can only be admitted between the parties to the record or their privies, expands so far as to admit it, when the same question has been decided and judgment rendered between parties responsible for the acts of others." Emery v. Fowler, 39 Me. 326, 329, 63 Am. Dec. 627, 629 (1855).


22As far as the liability of the agent is deemed to rest upon any theory of contracts, it will in general extend only to the party to the contract or to those who stand in a situation to enforce contracts made with him. As far as it is based upon theories of misrepresentation it will extend only to those to whom the representation was made and who were entitled to rely on it.


24MECHEM, *op. cit. supra*, § 1357. If the agent warrants the capacity of the principal or has reason to know of the principal's lack of capacity, he may be held. RESTATEMENT, AGENCY § 332 (1933).

25The organization of the section on Contracts under Topic I is taken from MECHEM, *op. cit. supra* (Book IV, Chapter III).
upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for a promise."^{24}

If the quasi-agent honestly misrepresents his lack of authority, he may still be liable for breach of implied warranty of authority.^{25} If he deliberately or fraudulently misrepresents his authority so as to mislead the other to his detriment, the quasi-agent may be liable in an action of deceit.^{26} In neither of these cases is the action on the contract the quasi-agent undertook to make.^{27} It cannot be held as a general rule that wherever the quasi-agent, because of his lack of authority, fails to create a right of action against his principal upon the contract, he makes himself liable thereon.^{28} A quasi-agent is not liable on a contract executed by him, without authority, unless it contains appropriate words binding him personally.^{29}

The liability of the agent is terminated if the principal ratifies the contract in such form and under such conditions as to make the contract

^{24}Collen v. Wright, 8 E. & B. 647, 657 (Q. B. 1857). "As a separate and independent rule of law, the doctrine of Collen v. Wright is not confined to the bare case where the transaction is simply one of contract, but it extends to every transaction of business into which a third party is induced to enter by a representation that the person with whom he is doing business, has the authority of some other person." Starkey v. Bank of England, [1903] App. Cas. 114, 118.

^{25}Collen v. Wright, supra; Moore v. Maddock, 251 N. Y. 420, 167 N. E. 572 (1929); Baltzen v. Nicolay, 53 N. Y. 467 (1873); Halbot v. Lens, [1901] 1 Ch. 344.

^{26}A. Lorenzo Co. v. Wilbert, 165 La. 247, 115 So. 475 (1928); Noyes v. Loring, 55 Me. 408 (1867); Christensen v. Nielson, 73 Utah 603, 276 Pac. 645 (1929); Smout v. Ilbery, 10 M. & W. 1 (1842). Agent is not bound personally if the other party was not misled by his misrepresentations of authority. A. Lorenzo Co. v. Wilbert, supra; Christensen v. Nielson, supra; Bryce v. Bull, 106 Fla. 336, 143 So. 409 (1932).


^{28}We are aware that it is not infrequently laid down as a rule of law that if an agent does not bind his principal he binds himself; but this rule needs qualification and cannot be said to be universally true or correct. . . . If the form of the contract is such that the agent personally covenants and then adds his representative character, which he does not in truth sustain, his covenant remains personal and in force, and binds him as an individual; but if the form of the contract is otherwise, and the language when fairly interpreted, does not contain a personal undertaking or promise, he is not personally liable, for it is not his contract, and the law will not force it upon him." Ogden v. Raymond, 22 Conn. 379, 385 (1853).

^{29}Johnson v. Smith, 21 Conn. 627 (1852); Hermann v. Clark, 108 Ore. 457, 219 Pac. 608 (1923).
binding upon himself.\footnote{Mechem, op. cit. supra, § 1402. Valid ratification is equivalent to prior authority, and relieves the agent from any liability to third persons for acting without authority providing ratification does not place the third party in a worse position than he would have occupied had the agent acted under prior authority. Robinson v. Otis, 298 Fed. 638 (S. D. N. Y. 1924).} Damages to be recovered against the quasi-agent for acting without authority must, in general, be compensation for the loss which the other party has naturally and proximately sustained by reason of the false assertion of authority.\footnote{Mechem, op. cit. supra, § 1400; Harris v. Tams, 258 N. Y. 229, 179 N. E. 476 (1932); Christensen v. Nielsen, supra note 26.}

To apply these rules to some classes of cases: (1) Where authority was never conferred upon him, the quasi-agent is liable to whomever he misleads, either in deceit or for breach of warranty.\footnote{Seney v. Swift & Co., 270 Fed. 141 (C. C. A. 6th 1921); Willingham, Wright & Covington v. Glover, 28 Ga. App. 394, 111 S. E. 206 (1922); Kroeger v. Pitcairn, 101 Pa. 311 (1882); Collen v. Wright, supra note 24.} (2) Where authority which once existed is terminated prior to the agent’s act and the agent is informed of the termination, he is liable to a third party for damages suffered as a result of his misrepresentation.\footnote{Termination by death of principal: “Where an authority given to an agent has, without his knowledge, been determined by the death or lunacy of the principal, and, subsequently, the agent has, in the belief that he was acting in pursuance thereof, made a contract or transacted some business, with another person, representing that, in so doing, he was acting on behalf of the principal, the agent is liable, as having impliedly warranted the existence of the authority which he assumed to exercise, to that other person, in respect of damage occasioned to him by reason of the non-existence of that authority.” Taken from the headnote to Yonge v. Toynbee, [1910] 1 K. B. 215. Insanity of the principal: Yonge v. Toynbee, supra; Drew v. Nunn, 4 Q. B. D. 661 (1879); Mechem, op. cit. supra, §§ 1379, 1380. War, bankruptcy: Agent probably wouldn’t be liable since both parties would be deemed equally conversant with the facts. Mechem, op. cit. supra, § 1381.} (3) Where no principal is in existence, as in the case of inchoate corporations, the agent will be liable to third persons whom he has misled into believing the corporation did exist.\footnote{seeberger v. McCormick, 178 Ill. 404, 53 N. E. 340 (1899); Farmers Trust v. Floyd, 47 Ohio St. 525, 26 N. E. 110 (1890).} (4) Where the principal, a corporation, is in existence but does not have the power which it attempts to confer upon the quasi-agent, and the quasi-agent acts upon it, the latter may be liable if the existence of the power is a question of fact of which the other party cannot be charged with knowledge.\footnote{Lagione v. Timmerman, 46 S. C. 372, 24 S. E. 290 (1896); 1 Fletcher, Private Corporations §§ 190, 192 (1931); 38 Harv. L. Rev. 889, 895.} He is usually not
liable where it is a question of law.\textsuperscript{36}

An agent who exceeds his authority is personally liable\textsuperscript{37} to the third person whom he has misled\textsuperscript{38} for any damages suffered by that party\textsuperscript{39} under the same principles which govern the acts of an agent done without authority\textsuperscript{40} unless his act has been properly ratified by the principal.\textsuperscript{41}

Under Section 20 of the Negotiable Instruments Law, which provides that the agent or representative shall not be liable on the instrument "if duly authorized" to sign, it is generally held that the agent will be personally liable if he signed in a representative capacity without proper authorization.\textsuperscript{42}

In the second classification, the agent, though authorized to bind his principal, may bind himself.\textsuperscript{43}

The agent, intending to bind his principal may inadvertently bind no one on the contract and yet not be liable for deceit or misrepresentation.\textsuperscript{44} He may execute the contract so defectively as to bind himself even though he intended to bind his principal, in which case the words of


\textsuperscript{37}Dimock & Fink v. Westerhoff, 117 Conn. 659, 166 Atl. 756 (1933); Weiss v. Baum, 217 N. Y. Supp. 820 (1926).

\textsuperscript{38}A. Lorenze v. Wilbert, supra note 26; Mott v. Kaldes, 288 Pa. 264 (1927).

\textsuperscript{39}Dimock & Fink v. Westerhoff, supra note 37; Jester v. Gray, 188 Iowa 1249, 177 N. W. 475 (1920).

\textsuperscript{40}Weiss v. Baum, supra note 37.

\textsuperscript{41}Burden v. Robertson, 7 F.2d 266 (C. C. A. 2d 1925); National Builders Bureau v. Lumber Co., 130 Okla. 30, 264 Pac. 907 (1928).


\textsuperscript{43}"That an agent may bind himself personally even when acting really or professedly as agent, is not denied; and in the execution of a simple contract as well as a specialty; and this will be so, in all cases, where, by language already expressive of such intent, he has substituted his own responsibility for that of his principal." Johnson v. Smith, supra note 29.

"The result is to disclose three possible situations in which a known and authorized agent may place himself: (1) contracting only in the name of his principal, he may altogether escape personal liability; (2) he may make the contract in such form that either the principal or the agent may be responsible; (3) he may make the contract in such form that he only is liable on it." This second situation is true, "according to the weight of authority (negotiable instruments and sealed instruments excepted), even though the agency was known and the contract was in writing and made in the agent's name without disclosing the name of the principal." Mechem, op. cit. supra note 3, § 1420.

\textsuperscript{44}Beattie v. Lord Ebury, L. R. 7 Ch. App. 777 (1872).
representative capacity are treated as mere *descriptio personae.* 45 However, in an informal contract the intention of the parties governs, and if it were never intended that the agent be personally liable, he will not be accountable to the third party. 46 A more stringent adherence to the proper form of execution is discovered in the case of instruments such as deeds than is found in less formal instruments. 47 This has been modified in many states by statutes impairing the validity of the seal. 48 The authorized agent is personally liable under the Negotiable Instruments Law when he signs an instrument in a representative capacity without thereon properly designating the principal. 49

An agent who conceals the fact of his agency and contracts as the ostensible principal is liable in the same manner and to the same extent as though he were the real principal in interest. 50 An agent who acts for an undisclosed principal makes himself personally liable on the contract. 51 Where the third party cannot hold the principal in such cases, he may be able to hold the agent on the same contract.

Where the agent has made himself and the principal liable on a contract, the problem of alternative liability will not arise where Thomas has failed in his suit against Peters, the undisclosed principal on the contract, for in such cases both parties are obviously not liable. 52

47Fullam v. West Brookfield, 9 Allen 1 (Mass. 1864); City of Providence v. Miller, 11 R. I. 272 (1876).
48Maine, Mississippi, Ohio, Pennsylvania, Rhode Island, Tennessee, Virginia and West Virginia are a few.
50Alexander Eccles & Co. v. Shipping Co., 21 F.2d 653 (S. D. Ga. 1924): "... the principle that the agent of an undisclosed principal is equally liable with the principal. This is a salutary principle of law enforced against an agent acting for an undisclosed principal in cases where his action is such as to induce the other party to extend credit on his account; or where one enters into a contract with the agent without knowing him to be such, upon discovery of the principal he may elect between them which to sue; and in contracts the rule is the same where he states himself to be an agent without disclosing the name of his principal." American Alkali Co. v. Kurtz, 134 Fed. 663, 665, 666 (C. C. E. D. Pa. 1905).
52See Topic II: THOMAS SUES PETERS AND RECOVERS; CAN THOMAS THEN HOLD ADAMS ALSO?
II. THOMAS SUES PETERS AND RECOVERS; CAN THOMAS THEN HOLD ADAMS ALSO?

Tort 68

When an agent commits a tort, there is a single wrongful act—there is only one injury. The principal is charged by law with responsibility for the agent's acts. The third party may elect to hold either the agent or the principal, but he is entitled to only one satisfaction. If he recovers against the principal for the tort of the agent, he is precluded from recovering against the agent. To hold otherwise would be to require the agent to pay full satisfaction to the plaintiff in the present suit and also to pay the principal the amount which the plaintiff recovered against the principal in the prior suit. This would impose upon the servant a greater degree of responsibility than has been put upon any other wrongdoer.

Contract

As we have said before, the agent is not personally liable to third parties upon authorized contracts made for a disclosed principal and in the principal's name. In this section we will assume that the contract in question is a valid one, inasmuch as the third party has already recovered from the principal upon it.

Where the agent has made both himself and the principal liable on the contract and where the agent does not have a personal interest in the contract, the liability of the principal and agent is in the alternative, not joint or double. The third party is entitled to only one satisfaction for the damages caused him. A suit against the principal, brought

68 For discussion of joint torts see Topic I.
70 Bartonshill Coal Co. v. Reid, 3 Macq. 283 (1858); Hern v. Nichols, 1 Salk. 289, 91 Eng. Rep. 256 (K. B. 1709).
72 Emery v. Fowler, supra note 18; Myhra v. Park, 193 Minn. 290, 258 N. W. 515 (1935).
73 See Topic III, post.
75 See note 21 supra.
76 MECHEN, op. cit. supra, § 1426.
77 Id. at § 1415.
to a judgment which is satisfied, constitutes per se an election by the third party and releases the agent.\textsuperscript{64}

If the agent has become jointly bound on the contract by virtue of a personal interest in it, the separate judgment against the principal on the contract, in the absence of statute, is a bar to a subsequent action by the third party against him.\textsuperscript{65}

III. THOMAS HAS RECOVERED FROM PETERS; CAN PETERS THEN HOLD ADAMS?

Tort

In the discussion of joint torts under the first question, we eliminated from this note those cases of joint torts in which both the principal and agent actively participated in the commission of the tort. Now we will consider the liability of the agent to his principal in those cases of joint torts in which the principal is by law made a tort-feasor under the doctrine of respondeat superior.\textsuperscript{66} In the former cases the parties are in pari delicto and there can be no contribution among them. In the latter they are not in pari delicto\textsuperscript{67} and indemnity can be obtained from the wrongdoer.\textsuperscript{68}

"The right to indemnity stands upon the principle that every one is responsible for the consequences of his own negligence, and, if another person has been compelled (by the judgment of a court having jurisdiction) to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him."\textsuperscript{69}

\textsuperscript{64}Murphy v. Hutchinson, 93 Miss. 643, 48 So. 178 (1908). See Note, 21 L. R. A. (N. S.) 786 (1909). \textsc{Restatement, Agency} § 337 (1933), "Granting that each was liable, both were not, for both could not be at one and the same time, since the contract could not be the personal contract of the agents, and yet not their contract, but that of the principal. The vendor had a choice and was put to his election." Tuthill v. Wilson, 90 N. Y. 423, 428 (1882).

\textsuperscript{65}See Note, 1 A. L. R. 1601.

\textsuperscript{66}18 Can. B. Rev. 205, 217; \textsc{Leflar, Contribution and Indemnity between Tortfeasors,} 81 U. of Pa. L. Rev. 130.

\textsuperscript{67}Churchill v. Holt, 127 Mass. 165 (1879); Mayberry v. Northern Pacific R. Co., 100 Minn. 79, 110 N. W. 356 (1907).

\textsuperscript{68}Aetna Life Ins. Co. v. Roper, 243 Ky. 811, 50 S. W. 2d 8 (1932). "We must look for personal participation, personal culpability, personal knowledge. If we do not find these circumstances, but perceive only a liability in the eyes of the law, growing out of a mere relation to the perpetrator of the wrong, the maxim of law that there is no contribution among wrongdoers is not to be applied. Indeed we think this maxim too broken in upon this day to be called with propriety a rule of law, so many are the exceptions to it, as in the case of master and servant, principal and agent, partners, joint operators, carriers and the like." Bailey v. Bussing, 28 Conn. 455, 459 (1859).

\textsuperscript{69}Oceanic Steam Nav. Co. v. Compania T. T. E., 134 N. Y. 461, 31 N. E. 987 (1892).
The amount which the principal can obtain from the agent in the form of indemnity cannot be greater than the smaller of two amounts: the actual damage suffered by the principal, or the amount paid in satisfaction by the principal to the third party.\textsuperscript{70}

\textbf{Contracts}

It is the agent's duty to adhere faithfully to all instructions given him by his principal, and if he violates or fails to act upon such instructions, he will be liable to the principal, in an action for breach of contract, for any damages or loss arising therefrom.\textsuperscript{71} The agent in such cases will be required to make full indemnity to the principal.\textsuperscript{72}

In those cases in which the agent has a personal interest in the contract and is jointly bound upon it with his principal, the principal, who has paid full satisfaction for the joint obligation, may obtain contribution from the agent for his share in the transaction.\textsuperscript{73}

\textbf{Conclusion}

Whenever a person, acting as an agent, causes loss or damages arising out of a contract or tort, he makes his principal liable under the doctrine of \textit{respondeat superior}. Salutary as this doctrine may be, it fails to make the agent any less the wrongdoer or any less responsible for the injuries and damages which he causes. To those he has injured while acting as an agent he must pay damages. This may be done by the payment of damages directly to the third party or indirectly, by reimbursing the principal for the damages he has had to pay for his agent's acts. In any case the injured party is entitled to only one recovery for the damages which he has suffered as a result of the agent's breach of duty. The agent should not be placed in such a position by a judgment that he will have to pay twice for the injury he has caused.

\textbf{JOHN T. MILLER, JR.}


\textsuperscript{71}"In such cases, it is wholly immaterial whether the loss or damage be direct to the property of the principal, or whether it arise from the compensation or reparation, which he has been obliged to make to third persons in discharge of his liability to them, for the acts or omissions of his agent." Story, Agency § 217c (9th ed. 1882).

\textsuperscript{72}Labatt, Master and Servant 8011 (2d ed.). \textit{"... In the relation of principal and agent strict compliance by the latter with the instructions of the former is an unvarying condition of exemption from liability. Loss from disregard thereof must be borne by the agent, unless he establishes that the disregard had no connection with the loss, and that it would certainly have followed whether instructions were obeyed or disregarded."} Bank of British North America v. Cooper, 137 U. S. 473 (1890).

\textsuperscript{73}See Note, 64 A. L. R. 213 (1929).
RECENT DECISIONS

CIVIL PROCEDURE—Petition by Some of the Heirs for the Use and Benefit of All the Heirs, Alleging It Was Impractical to Bring Them All into Court as Parties, Was Held Sufficient to Support a Class Action for Mental Pain and Suffering Caused by the Partial Destruction of Their Grandparents' Graves.

Appellants contracted to reconstruct part of Highway No. 23. The plans called for the relocation of the highway, requiring a cut approximately seventy-five feet deep. Adjacent to the right of way was a graveyard containing graves among which were the graves of Robert and Susanne Miller. In negligently blasting a boulder out of the cut, the appellants caused a landslide which extended into the adjacent property and partially destroyed some of the graves. This action was instituted by some of the heirs for the use and benefit of all the heirs of Robert and Susanne Miller, alleging damages for mental pain and anguish. "Held, that the right of action for the destruction of graves is a family right and damages for mental pain and anguish may be maintained by a class action. Codell Construction Co. v. Miller, 304 Ky. 708, 202 S. W.2d 394 (1947).

As an exception to the rule that all persons having an interest in the subject matter of an equity suit must be made parties thereto, the doctrine of virtual representation originated at an early date. City of London v. Richmond, 2 Vern. 421, 23 Eng. Rep. 870 (1701). The doctrine was applied where the members of a class were so numerous that it was impractical to join them all, and a few were permitted to sue, or be sued, on behalf of the whole class. This rule is to be distinguished from the equity rule permitting parties, who would otherwise be deemed necessary, to be dispensed with when it was impractical to join them; for under the doctrine of class or virtual representation, the persons who are not parties are in a sense before the court. Kaufmann v. Annuity Realty Co., 301 Mo. 638, 256 S. W. 792 (1923).

The doctrine is generally said to be based upon considerations of justice, convenience and necessity. The application of this rule is justified by the consideration that the persons joined have a common interest, that the former may be depended upon to bring forward the entire merits of the controversy in their own self interest, and that the persons not joined are thus sufficiently represented and protected by the nominal parties. Smith v. Swormstedt, 16 How. 288 (U. S. 1853).

With the advent of reformed procedure, the equity doctrine found expression in the codes. Note, 22 MINN. L. Rev. 34 (1937). Thus the statute in the instant case reads, "If the question involves a common or general interest of many persons, or if the parties be numerous and it is impractical to bring all of them before the court within a reasonable time, one or more may sue or
defend for the benefit of all.” Ky. Code § 25 (Carroll, 1938). This rule merely states formally what was the established equity practice. Such class actions are only allowed when the interest of all the parties are fairly represented and protected by those bringing the suit. Hansberry v. Lee, 311 U. S. 32 (1940). Among the types of cases in which a party is allowed to represent a class are suits by one of many subscribers to a fund to collect all unpaid subscriptions, Hodges v. Nalty, 104 Wis. 464, 80 N. W. 726 (1899); by one of a large number of creditors to enforce stockholders’ liability, Holmberg v. Armbrecht, 327 U. S. 392 (1946); by one of many cestuis to recover trust money, Conroy v. Cover, 80 Colo. 434, 252 Pac. 883 (1926); and by one of several heirs to set aside a fraudulent conveyance, Thomas v. Jones, 97 N. C. 121, 1 S. E. 692 (1887); Hendrix v. Money, 64 Ky. 306 (1866).

Generally, aside from statutory extension of the rule, it has no application to actions at law. Baskins v. United Mine Workers, 150 Ark. 398, 234 S. W. 464 (1921). But with the adoption of the doctrine into the codes, it has been extended to include actions at law as well as equity. Here the problem arises in deciding whether there is a question of common or general interest in many persons. As a rule the courts will refuse to allow a class action for individual damages. The fact that all of such persons might have joined as plaintiffs in the action and there asserted their several rights to relief, does not authorize a representative suit by a few on behalf of all. Brenner v. Title Guarantee and Trust Co., 276 N. Y. 230, 11 N. E. 2d 890 (1937). For the recovery of damages, each member of the class must intervene to assert and prove such damages to himself. Brenner v. Title Guarantee and Trust Co., supra; Certia v. University of Notre Dame, 82 Ind. App. 542, 141 N. E. 318 (1923); Garfein v. Stiglitz, 260 Ky. 430, 86 S. W. 2d 155 (1935).

While a dead body is not considered as property in the technical sense of the word, yet the law recognizes a right somewhat akin to property, arising out of the duty of the nearest relations to bury their dead, which authorizes and requires them to take possession of the dead body for the purpose of burial. Sheenan v. Commercial Travelers’ Mut. Acc. Ass’n, 283 Mass. 543, 186 N. E. 627 (1933); Gostkowski v. Roman Catholic Church, 262 N. Y. 320, 186 N. E. 798 (1933); Nichols v. Central Vt. Ry., 94 Vt. 24, 109 Atl. 905 (1919). The right is a personal and exclusive right to the custody and possession of the remains, and, in the absence of testamentary disposition, belongs to the surviving husband or wife, if any, or, if there be none, then to the next of kin. North East Coal Co. v. Pickelsimer, 253 Ky. 11, 68 S. W. 2d 760 (1934); Pettigrew v. Pettigrew, 207 Pa. 313, 56 Atl. 878 (1904); Nichols v. Central Vt. Ry., supra. The next of kin are those who inherit from the deceased the fee, interest or easement in the soil containing the dead body under the statute of descent. It may be stated as a general rule that the person who has a qualified property right in the dead body, for the purpose of securing its burial, is entitled to recover for mental anguish caused by the wilful and
wanton mutilation of the body by another. Mensinger v. O'Hara, 189 III. App. 48 (1914); Meagher v. Driscoll, 99 Mass. 281 (1868); Larson v. Chase, 47 Minn. 307, 50 N. W. 238 (1891). If all the parties deriving their rights under this rule are before the court, damages for mental pain and anguish can be recovered, since injury to the body is sufficient injury for such damages. North East Coal Co. v. Pickelsimer, supra. But according to the rule of damages for class actions, it would be impossible to assess individual damages for each of a class unless each proved such damages to himself individually. Brenner v. Title Guarantee and Trust Co., supra; Certia v. University of Notre Dame, supra.

The decision in the instant case does not apply the majority rule. It has allowed a few in a class action to recover damages for mental pain and anguish for the whole class, without each in the class coming before the court to prove such damages individually. While it is true that a class action may be maintained for damages to the whole class, since the rights of the whole class are represented by those few, it does not follow that a class action should be allowed for damages which each of the class must prove for himself. Since all of the parties are not before the court, damages for each individual’s mental pain and anguish cannot be assessed.

HARRY ST. A. O’NEILL

CIVIL PROCEDURE—Congress Cannot Give Federal District Courts Outside District of Columbia Jurisdiction, Based on Diversity of Citizenship, of Action By or Against Resident of District of Columbia.

Two suits were brought in the United States District Court in Maryland by residents of the District of Columbia against a Maryland Corporation. The plaintiffs’ claim of jurisdiction was based upon the amendment of 1940 of the Judicial Code, 54 Stat. 143 (1940), 28 U. S. C. § 41 (1) (b) (1940), which extended the jurisdiction of United States district courts founded upon diversity of citizenship to suits between “citizens” of the District of Columbia and those of a state or territory. The defendant moved to dismiss, thereby attacking the constitutionality of this legislative extension. Held, that the amending legislation is unconstitutional because it enlarges the federal judicial power beyond the limitations of Article III of the Constitution. Feely v. Sidney S. Schupper Interstate Hauling System, Inc., 72 F. Supp. 663 (Md. 1947).

In 1805 the Supreme Court first decided that a resident of the District of Columbia could not bring suit in the federal courts on the ground of diversity of citizenship because the District of Columbia was not a “state” nor were its residents citizens of a “state” within the meaning of Article III § 2 of the Constitution. Hepburn and Dundas v. Ellzey, 2 Cranch 445 (U. S. 1805). An unbroken line of decisions upholding this construction followed. Barney v.
Baltimore City, 6 Wall. 280 (U. S. 1867); Hooe v. Jamieson, 166 U. S. 395 (1897); Mutual Life Ins. Co. of N. Y. v. Lott, 275 Fed. 365 (S. D. Cal. 1921); Pannill v. Roanoke Times Co., 252 Fed. 910, 914 (W. D. Va. 1918); Duchay v. Acacia Mut. Life Ins. Co., 105 F.2d 768 (App. D. C. 1939). In 1940, Congress amended the Judicial Code to give the residents of the District of Columbia access to the federal courts of the several states in suits predicated upon diversity of citizenship. Since the enactment of this amendment its constitutionality has been passed on by the district courts in six reported cases. Winkler v. Daniels, 43 F. Supp. 265 (E. D. Va. 1942); McGarry v. City of Bethlehem, 45 F. Supp. 385 (E. D. Pa. 1942); Glaeser v. Acacia Mutual Life Ass'n, 55 F. Supp. 925 (N. D. Cal. 1944); Behlert v. James Foundation of New York, 60 F. Supp. 706 (S. D. N. Y. 1945); Ostrow v. Samuel Brilliant Co., 66 F. Supp. 593 (Mass. 1946); Feely v. Schupper Interstate Hauling System, Inc., supra. Of the six decisions, four have declared the amendment unconstitutional. In the instant and most recent case, the court, with the benefit of the five prior opinions, considers and meets the chief arguments of the proponents of the constitutionality of the amendment.

The two courts which upheld the legislation conceded the point to be well-settled that a resident of the District of Columbia is not a citizen of a "state" for the purpose of diversity of citizenship, but relied upon the plenary power given Congress by Article I, § 8 of the Constitution to legislate for the District of Columbia. Winkler v. Daniels, supra; Glaeser v. Acacia Mutual Life Ass'n, supra. The proponents of the amendment in Congress also relied on the power given by Article I § 8 of the Constitution. H. R. REP. No. 1756, 76th Cong., 3rd Sess. (1940); 29 GEORGETOWN L. J. 193 (1941). But, while legislative discussion is an important aid to the courts in determining the legislative intention such statements are by no means determinative of constitutional power to enact the legislation. Brimmer v. Rebman, 138 U. S. 78, 84 (1891); Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1, 10 (1928) The sweeping character of the authority given Congress to legislate for the District of Columbia has been stated to be exercised "within the District for every proper purpose of government." Neild v. District of Columbia, 110 F.2d 246, 249 (App. D. C. 1940). That this power extended to the enlarging of the jurisdiction of the federal courts set up within the District of Columbia was declared in O'Donoghue v. United States, 289 U. S. 516 (1933). But as to the federal courts outside the District which were created under Article III of the Constitution, Mr. Justice Van Devanter in Ex parte Bakelite Corp., 279 U. S. 438, 449 (1929), said, "They [constitutional courts] share in the exercise of the jurisdictional power defined in that section and can be invested with no other jurisdiction. . . ."

In upholding the amendment, the court in the Glaeser case directed attention to the language of Mr. Chief Justice Marshall in the Hepburn case which, after characterizing as "extraordinary" the situation of a resident of the seat
of the government being unable to sue in the federal courts of the states, went on to state, "But this is a subject for legislative not for judicial consideration." Hepburn and Dundas v. Ellzey, supra at 453. The court in the Glaeser case apparently interpreted "legislative . . . consideration" to mean Congress acting alone. However, in view of the Court's opinion in the Hepburn case it seems more probable that it meant "legislative . . . consideration" in the broader sense of action by the legislatures of the several states to amend the Constitution.

It has been stated that the purpose of the diversity of citizenship provision of the Constitution was to secure the citizen of a state against possible local prejudice if he were compelled to sue in the courts of his adversary's state. Polk's Lessee v. Wendell, 5 Wheat 293, 302 (U. S. 1820); Bank of the United States v. Deveaux, 5 Cranch 61, 87 (U. S. 1809); The Federalist, No. 80 (Hamilton). That the citizens of the District of Columbia should also have this security may be a persuasive argument but does not appear to meet the constitutional point. Feely v. Schupper Interstate Hauling System, Inc., supra at 668. In this connection it should be noted that while a resident of the District of Columbia may not sue in the federal courts of the several states, neither may he be sued in them, that he has access to those courts when a federal question is presented, that he may sue in the courts of the District of Columbia and of the several states and that, since Erie R.R. v. Tompkins, 304 U. S. 64 (1938), a federal court in hearing cases based upon diversity of citizenship must apply the substantive law of the state. Feely v. Schupper Interstate Hauling System, Inc., supra at 668.

The importance of the instant case lies in its demonstration of the strong constitutional case against the amendment. Professor Chafee, in discussing the Interpleader Act of 1936, has said of the diversity of citizenship problem, "This obstacle is not only statutory; it is constitutional, and therefore nothing could be done in the new statute to take care of it." Chafee, The Interpleader Act of 1936, 45 Yale L. J. 963, 977 (1936). That residents of the District of Columbia can sue on the ground of diversity of citizenship in the federal courts of Virginia and California but not in the federal courts of New York, Pennsylvania, Massachusetts and Maryland is an unfortunate situation. It is to be hoped that the Supreme Court will soon resolve the question because until it does the validity of judgments in the district courts between residents of the District of Columbia and residents of the states will be open to collateral attack.*

RICHARD L. WALSH

*Since this note was written the United States Court of Appeals, Fourth Circuit, has affirmed the decision in the principal case.
CONFLICT OF LAWS—Jurisdiction over Foreign Corporation Assumed by New Jersey Court of Chancery in an Action Involving the Management of Corporate Internal Affairs.

This action arose out of a dispute between the Rogosin and Worne interests in the Worne Plastics Corporation. Defendant corporation, incorporated under the laws of the State of Delaware, was licensed to do business in the State of New Jersey; had all of its assets located in the State of New Jersey; and all of the individual defendants, who were directors of the defendant corporation, as well as the corporation itself, were before the Court of Chancery of New Jersey, and are amenable to its process. Defendant corporation was founded for the purpose of producing and vending acrylic resin according to a formula developed by Howard E. Worne, the president of said corporation. Rogosin, president of the Beaunit Mills, Inc., caused his firm to purchase 167,900 shares of stock in defendant corporation. At no time before the filing of this bill was there any large scale production of acrylic resin. Worne contended that this failure was due to the interference of Rogosin, and Rogosin contended that it was due to the fact that the formula had not advanced beyond the experimental stage. Complainant Appleton prayed for an injunction against a prospective dissolution of the corporation and the appointment of a custodial receiver, on the grounds that a dissolution of the corporation would be a fraud upon the stockholders representing the Worne interests. Complainant cited, in substantiation of Rogosin’s fraudulent intent, a visit by one Novick, a chemist in the employ of Rogosin, to ascertain whether the plant owned by defendant corporation could be used for the purpose of manufacturing textile finishes, a business in which Rogosin is engaged. Defendant corporation moved to strike the bill on the grounds that said corporation was a foreign corporation, and the Court of Chancery of the State of New Jersey had no power to regulate the internal affairs of a foreign corporation. Heid, complainant’s application for a custodial receiver and preliminary restraint denied, on the grounds that it was prematurely requested, and defendant’s motion to strike denied, on the grounds that there were sufficient allegations of fraud or bad faith. Appleton et al. v. Worne Plastics Corporation et al., 54 A.2d 612 (N. J. 1947).

It is well settled that state courts will decline jurisdiction of action against foreign corporations where such jurisdiction involves interference in the foreign corporation’s internal affairs. Weiss v. Routh, 149 F.2d 193 (C. C. A. 2d 1945); Kelley v. American Sugar Refining Co., 139 F.2d 76 (C. C. A. 1st 1943); Pratt v. Mutual Life Insurance Co., 157 Kan. 710, 145 P.2d 113 (1944); Gregory v. New York, Lake Erie and Western R.R., 40 N. J. Eq. 38 (1885); Alfred Kohlberg, Inc. v. American Council of Pacific Relations, Inc., 185 Misc. 633, 56 N. Y. S.2d 788 (Sup. Ct. 1945); Meade v. Pacific Gamble Robinson Co., 21 Wash.2d 866, 153 P.2d 686 (1944). However, a distinction must be made between interference in a foreign corporation’s internal affairs which does not involve the exercise of visitorial powers, and interference
which does; and a further distinction between truly foreign corporations, and those only nominally foreign. Where a corporation is a true foreign corporation, and a suit is brought against it requesting relief which does not involve the exercise of visitorial powers over its internal affairs, the courts will generally decline jurisdiction, on the grounds that the remedy thus obtained would be ineffective. In Hallenberg v. Greene, 66 App. Div. 590, 73 N. Y. Supp. 403, 408 (1st Dep't 1901), the court said: "The orders and decrees of a court have no extraterritorial effect or force. They can only be enforced directly against property within the state, or in personam against individuals or officers of corporations found within the jurisdiction of the court, and thereby affect property without the state. When a judgment against a foreign corporation would not be effectual without the aid of the courts of a foreign country or of a sister state, and it may contravene the public policy of the foreign jurisdiction, or rest upon the construction of a foreign statute, the interpretation of which is not free from doubt,—as where the subject-matter of the litigation and the judgment would relate strictly to the internal affairs and management of the foreign corporation,—the court should decline jurisdiction, because such questions are of local administration, and should be relegated to the courts of the state or country under the laws of which the corporation was organized."

Where, on the other hand, a corporation is foreign in name only, that is, chartered in a foreign state for the purpose of conducting business outside that state, and a suit is brought against it requesting relief which does not involve the exercise of visitorial powers over its internal affairs, relief has been granted. In Scholl v. Allen, 237 Ky. 716, 726, 36 S. W.2d 353, 358 (1931), the court, speaking of a corporation created under the laws of the State of Delaware, with its only office, place of business, and all its assets, records, books, etc., in the State of Kentucky, said: "The vague principle that courts will not interfere with the internal affairs of a corporation whose foreignness is at best a metaphysical concept must fall before the practical necessities of the modern business world." Under no circumstances, however, have courts assumed jurisdiction of suits involving the internal affairs of true or nominally foreign corporations, where the exercise of visitorial power is required. In Williamson v. Missouri-Kansas Pipe Line Co., 56 F.2d 503 (C. C. A. 7th 1932), the court, again speaking of a Delaware corporation said: "Except in cases involving the exercise of visitorial powers, the question is not strictly one of jurisdiction, but rather of discretion in the exercise of jurisdiction." The Supreme Court of the United States approved of the rule of non-interference in the internal affairs of a foreign corporation, applying the doctrine of forum non conveniens, in the case of Rogers v. Guaranty Trust Co. of N. Y., 288 U. S. 123 (1933). In a dissenting opinion, however, Justice Cardozo said: "The doctrine of forum non conveniens is an instrument of justice. Courts must be slow to apply it at the instance of directors charged as personal wrongdoers, when justice will be delayed, even though not thwarted altogether, if jurisdiction is refused."
This dissenting opinion prepared the ground for the decision in Williams v. Green Bay and Western R.R. Co., 326 U. S. 549 (1946) wherein the Supreme Court refused to dismiss the bill on grounds of forum non conveniens, and although not expressly overruling Rogers v. Title Guaranty Trust Co. of N. Y., supra, disapproved of the rule therein stated, adding the safety clause that each case should turn on its own facts. For discussion of jurisdictional problem involved see, Koster v. (American) Lumbermen's Mutual Casualty Co., 67 Sup. Ct. 828 (1947), 36 Georgetown L. J. 94 (1947).

It is interesting to note, that whereas the courts have assigned as their reason for not assuming jurisdiction of a suit against a foreign corporation involving its internal affairs, the difficulty of enforcing a decree, that the ease of enforcing a decree has been assigned as a sound one for assuming jurisdiction over a nominally foreign corporation. In Mayer v. Oxidation Products Co., 110 N. J. Eq. 141, 156, 159 A. 377, 383 (1932), a case quoted with favor in the instant case, the court said: "On the other hand, it appears that all the officers and directors of the defendant company are amenable to process in New Jersey, and have been made parties to this suit, and that all the corporate assets are here. It is more convenient for defendants as well as complainants to litigate in New Jersey rather than to be sent to Delaware to settle their disputes. In New Jersey alone could a decree for complainant be made effective."

There has been an increasing tendency in the state courts to take jurisdiction of suits involving Delaware corporations which are, for the most part, nominally foreign corporations; cf. School v. Allen, supra; Williamson v. Missouri-Kansas Pipe Line Corporation, supra. The net result of this decision is to carry the tendency a bit farther. The court intimates, by its refusal to strike the bill on the grounds that there is a sufficient factual allegation of fraud or bad faith, that it considers itself competent to take jurisdiction of a suit against a foreign corporation, even though it would control the internal affairs of a foreign corporation, through the exercise of visitorial powers, where necessary to correct the abuses by members of a corporation resulting from fraud or bad faith.

R. J. GUNNING


Five FBI agents obtained warrants for the arrest of George Harris on charges of using the mails to defraud and causing a $25,000 forged check to be transported in interstate commerce. Armed with the arrest warrants they arrested
Harris in the living room of his four room apartment, handcuffed him and then meticulously searched his apartment looking for the checks and other means of perpetrating the crimes mentioned in the arrest warrants. After five hours the agents discovered, among Harris' sealed private papers, some official draft registration cards which Harris was holding in violation of the Selective Service Act. These draft cards were then used in evidence to convict Harris on Selective Service violation and other charges. Harris moved in the Oklahoma District Court to suppress the evidence as obtained by an illegal search and seizure under the Fourth Amendment. Held, the search was constitutional as incident to a lawful arrest, and the cards were the means of committing a crime; the cards were United States property and, as such, subject to seizure by the FBI; possession of the cards constituted a continuing offense in the presence of officers. *Harris v. United States*, 67 S. Ct. 1098 (1947).

The Fourth Amendment secures the citizen against *unreasonable* searches and seizures. There is no formula for determining what is reasonable; each case is to be decided on its own facts and circumstances. *Go-Bart Co. v. United States*, 282 U. S. 344 (1931). Searches under search warrant are closely circumscribed; no search warrants are authorized except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the thing to be seized. *U. S. Const. Amend. IV*. No mention is made in the amendment of searches without search warrants, but the Supreme Court has held searches to be reasonable if undertaken *incident* to a lawful arrest. *United States v. Lee*, 274 U. S. 559 (1927); *Agnello v. United States*, 269 U. S. 20 (1925); *Gouled v. United States*, 255 U. S. 298 (1921); *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1919); *Weeks v. United States*, 232 U. S. 383 (1913); *Boyd v. United States*, 116 U. S. 616 (1885). The Court in the instant case was called upon to explore the scope and extent of the exception to the rule requiring search warrants and determine what may properly be considered *incidental*.

Various reasons have invoked the exception in the cases. It is often impractical to get a search warrant. *Carroll v. United States*, 267 U. S. 132 (1924). It may be necessary to foil the escape of the criminal. *Closson v. Morrison*, 47 N. H. 482 (1867); or to prevent the prisoner from destroying evidence. *Reijsnyder v. Lee*, 44 Iowa 101 (1876).

The premises under the control of the person arrested may be searched, and this has not been limited to the room in which arrest takes place. *Davis v. United States*, 328 U. S. 582 (1946); *Marron v. United States*, 275 U. S. 192 (1927); *Agnello v. United States*, supra; *Matthews v. Correa*, 135 F.2d 534 (C. C. A. 2d 1943); *Sayers v. United States*, 2 F.2d 146 (C. C. A. 9th 1924). Some of the cases suggest that the spatial extent of the search permitted varies with the circumstances of the arrest. *Sayers v. United States*, supra; *United States v. Charles*, 8 F.2d 302 (N. D. Cal. 1925). In *United States v.*
Boyd, 1 F.2d 1019 (W. D. Wash. 1924), the whole house was permitted to be searched where the arrest was for a crime actually being committed in the presence of the officer.

During a proper search incident to a lawful arrest, evidence related to the crime for which the arrest is being made is subject to seizure. Weeks v. United States, supra. At least two federal cases hold that evidence of unrelated, separate crimes may also be seized; in United States v. Charles, supra, liquor found during a lawful search for drugs was seized; and in Milam v. United States, 296 Fed. 629 (C. C. A. 4th 1924), prohibition agents stopped an automobile suspected of transporting liquor and seized evidence therein found of smuggling Chinamen in violation of the immigration laws. Provided the search be legal, there is no reason for excluding evidence found during the search. Paper v. United States, 53 F.2d 184 (C. C. A. 4th 1931).

Where an officer is not trespassing but has a right to be where he is and while there sees a criminal offense being committed, he can and must make the necessary searches and seizures. Lawson v. United States, 9 F.2d 746 (C. C. A. 7th 1925); Ludwig v. United States, 3 F.2d 231 (C. C. A. 7th 1924); In re Lobosco, 11 F.2d 892 (E. D. Penna. 1926); Fusaro v. McKennell, 120 Misc. 434, 198 N. Y. Supp. 719 (Sup. Ct. 1923); State v. Hoffman, 245 Wis. 367, 14 N. W.2d 146 (1944).

The Harris decision is not in conflict with the existing law. There is ample precedent for searches beyond the room of arrest, and the thing seized here was clearly an instrumentality of crime. The decision does mark the first instance in which the Supreme Court has approved of such a seizure of evidence of a crime wholly unrelated to the crime for which the arrest was being made; but precedents are not wanting for this in the lower courts.

Although the Harris decision clearly follows the law as it stands, suggested limitations upon the permissibility of searches and seizures incident to arrest have appeared in the lower federal courts. In United States v. DiCorvo, 37 F.2d 124 (Conn. 1927), the requirement is made that the search be part of the "res gestae" of the arrest. (It must be noted, however, that the arrest in that case was one for a misdemeanor.) Lawson v. United States, supra, requires a measure of contemporaneousness of the search with the arrest. Parker, J., in Henderson v. United States, 12 F.2d 528 (C. C. A. 4th 1926), rejected evidence on the ground that the arrest which authorized the search in which it was found was really incidental to the search instead of vice versa as called for by the spirit of the law. And the Supreme Court itself has cautioned in United States v. Lefkowitz, 285 U. S. 452 (1932), that the arrest must not be used as a mere adjectival device to open the doors to the police.

FRANCIS E. JONES, JR.
CONSTITUTIONAL LAW—Freedom of the Press Precludes Punishment for Contempt for Newspaper Comments on a Pending Action Unless Such Comments Constitute a Clear and Present Danger to the Administration of Justice.

Petition brought to the United States Supreme Court, for a writ of habeas corpus. Petitioners—publisher, editorial writer and reporter of a Corpus Christi, Texas, newspaper—were sentenced for constructive criminal contempt for commenting on a county judge’s action in directing a verdict for the plaintiff in a forcible detainer case wherein the jury returned three times with a verdict for defendant before reluctantly submitting to the court’s direction. The news articles referred to “arbitrary action”, “travesty on justice”, and deplored the fact that the judge was an elected layman whose action had brought down “the wrath of public opinion upon his head”. They further reported that groups of citizens were petitioning him to grant the motion which had been made for a new trial; that people were aroused because a serviceman “seems to be getting a raw deal”; and that there was no way of knowing whether justice was being done. Held, that such statements concerning a pending action do not constitute a real and imminent threat to the administration of justice. Craig v. Harney, 67 Sup. Ct. 1249 (1947).

At common law the courts had broad power to punish for constructive contempt, i.e. for an act reflecting on the court but committed outside the court. Hollingsworth v. Duane, 12 Fed. Cas. 359, No. 6,616 (C. C. D. Pa. 1801).

By the Act of March 3, 1911, 36 Stat. 1163, 28 U. S. C. § 385 (1940), the scope of the power to punish for constructive contempt was considerably restricted. No longer could a mere libel, such as remarks reflecting on the court’s integrity, be dealt with summarily, unless it was such as to interfere with the court’s function in dealing with the pending case. Ex parte McLeod, 120 Fed. 130 (N. D. Ala 1903). Nor can a judge hold a party in contempt for remarks which belittle him personally. Craig v. Hecht, 263 U. S. 255 (1923).

In addition the statute was worded so as to restrict the court’s power to punish to those cases where misbehavior of the party is in its presence “or so near thereto” as to obstruct the administration of justice. The phrase “or so near thereto” has been the cause of some dispute as to whether “near” is meant logically or geographically. In Nye v. United States, 313 U. S. 33 (1941), in which a letter was mailed to a justice from a distant city, it was held to be no contempt by a literal interpretation of the word “near”, though Justice Stone’s dissenting opinion maintained that logical proximity to the cause of the action rather than a matter of miles or city blocks was the intended criterion.

A separate and more essential problem is involved when the Supreme Court comes to apply its limited federal statute to a case brought up from a state court whose local statute is in broad terms. In Patterson v. Colorado, 205
U. S. 454 (1907), the Supreme Court recognized the right of a state to enforce its own policy on contempt. But since that decision, the phrase "clear and present danger" first coined by Mr. Justice Holmes in *Schenk v. United States*, 249 U. S. 47 (1919), by way of a favorable reference to the *Patterson* case, has been seized upon to give a defendant the maximum leeway of free speech and to nullify strict holdings on contempt by state courts.

The "clear and present danger" doctrine was firmly established in *Bridges v. California*, 314 U. S. 252 (1941) and *Pennekamp v. Florida*, 328 U. S. 331 (1946). In the former case the Supreme Court superimposed the doctrine on California's "reasonable tendency" rule, in effect using the Fourteenth Amendment to bring state courts in line with its interpretation of the First Amendment.

The intermediate step between the two extremes of the *Patterson* case and the *Bridges* case was *Nye v. United States*, supra, which came up from a lower federal court and was decided on the notion of the proximity of the contempt to the court, the significant letter in that case having been written and mailed in a city one hundred miles distant. The *Nye* case, the first to set the new liberal doctrine which was followed in the *Bridges* case, overruled *Toledo Newspaper Co. v. United States*, 247 U. S. 402 (1918) (which spoke of a "reasonable tendency" in upholding a contempt judgment) and set forth a three- ply norm of estimating when the administration of justice has been hindered as: (a) whether court's integrity will be questioned if it does not take the desired action; (2) whether it will avoid further criticism by so acting; (c) and whether if it does not so act the public will be prone to ignore its decrees.

The instant case aligns itself directly with the *Bridges* and *Pennekamp* cases. The Texas court applied a yardstick similar to the one used in the *Toledo* case, but the Supreme Court applied its own norm of "clear and present danger" and concluded that no such danger existed to the impartial administration of justice. It is the latest link in the chain of recent high court decisions which give a broader scope to the freedom of the press doctrine when it conflicts with the equally priceless principle of a judiciary maintained free from outside pressures while weighing the merits of a cause.

The instant case extends the doctrine one step beyond the *Bridges* case in that the latter dealt with contempt arising from a matter of public interest involving a criminal case, whereas this decision concerned newspaper comments on civil litigation, of no importance to the public. With this further strengthening of the stand taken in the *Bridges* case, plus the step forward into the field of comments on small personal suits, the present case is indicative of the concern of the Supreme Court for our heritage of freedom of speech.

J. P. MORGAN
CONTRACTS—One Who Conceives and Develops a Specific Method Has Literary Ownership in His Idea, and May Contract with Regard to It, Notwithstanding That He Did Not Originate It, or It Was Not New or Novel.

During the war years, when the use of leather was curtailed by the government, the shoe industry cast about for substitutes to replace leather soles. Plaintiff experimented with available substitutes, and developed in the workshop of his home a laminated cotton duck sole. Defendant, an upholstery manufacturer, became interested in plaintiff's results. Negotiations between them ended with defendant experimenting with the process in an attempt to develop it to the point where it could be produced under factory conditions. After about six weeks, factory production was attained. It was decided that plaintiff would sell for defendant on a basis of earning a ten per cent commission. The sales agency was to be exclusive. No written contract ever existed between the parties. Plaintiff obtained substantial orders but defendant, notwithstanding the agreement, sold to another distributor. Subsequently plaintiff's commission was reduced to five per cent, and eventually he was refused the right to contract for any further orders. He then sued for breach of contract. The manufacturer defended on the ground that since plaintiff did not originate the idea and process he could not contract in relation to them. Held: Although the abstract idea was not new plaintiff could recover because he had conceived and developed a specific method even though he did not originate it in the sense that no one else ever had a similar idea. Schonwald v. F. Burkart Mfg. Co., 202 S. W. 2d 7 (Mo. 1947).

It is a fundamental tenet of contract law that not everything can be the subject of a contract. The instant case is concerned with one of the subjects which may or may not have merchantable characteristics; viz., ideas. Fundamentally an abstract idea belongs to the world and the possessor of it has no property interest therein. Bowen v. Yankee Network, 46 F. Supp. 62 (D. Mass. 1942); Liggett & Meyer v. Meyer, 101 Ind. App. 420, 194 N. E. 206 (1935); Fendler v. Morosco, 253 N. Y. 281, 171 N. E. 56 (1930). However, the early common law and succeeding codes have recognized the fact that the originator of an idea has a property interest in his brainchild. 2 Lewis' Blackstone 407; Werckmeister v. American Litho. Co., 134 Fed. 321 (C. C. A. 2d 1904); cf. Wheaton v. Peters, 8 Pet. 591 (U. S. 1834). This property interest exists separate and apart from any copyright statute and it may be protected by contract. The author of an idea has the right to the first publication. It is his exclusive property until published. But once published it belongs to the public, or, as some courts have expressed it, "in a pool"; unless protected by contract. Cf. Haskins v. Ryan, 75 N. J. Eq. 330, 78 Atl. 566 (1908); Bristol v. Equitable Life Ass'n Soc. of N. Y., 132 N. Y. 264, 30 N. E. 506 (1892); Palmer v. Dewitt, 47 N. Y. 532 (1872). However, if the abstract idea, when molded into form by its creator still does not add anything new to the "pool",
then the offeree would be receiving nothing which he did not already possess as a partaker of the common knowledge. For this reason, courts of law and equity have required that an idea to be the subject of a contract must be new or novel. *Stone v. Marcus*, 63 N. Y. S.2d 220 (1946); *Yadkoe v. Fields*, 66 C. A.2d 150, 151 P.2d 906 (D. C. A. 1944); *Thomas v. Reynolds*, 350 Pa. 262, 38 A.2d 61 (1944); *Plus v. R. C. A.*, 49 F. Supp. 116 (S. D. N. Y. 1943); *Liggett & Meyer v. Meyer*, supra; *Comm'r Int. Rev. v. Aff. Enterprises*, 123 F.2d 665 (C. C. A. 10th 1941). Simultaneously with the conception of novelty there arose the question of whether something as intangible as a mere idea, could be made the subject of a contract. Almost universally the courts have adapted the principle that an idea must be expressed in a "concrete" form in order to make it merchantable. *O'Brien v. R. K. O.*, 68 F. Supp. 13 (S. D. N. Y. 1946); *Stone v. Marcus*, supra; *Plus v. R. C. A.*, supra; *Bowen v. Yankee Network*, supra. These two tests have been repeatedly applied by the courts, and where either was lacking the court often would refuse to even inquire into the existence of the other. *Anderson v. Distler*, 17 N. Y. S.2d 674 (1940); *Stein v. Morris*, 120 Va. 390, 91 S. E. 177 (1917).

As is usually the case it is the application of these tests to a particular case which gives rise to difficulty. Just what novelty is, has never been defined. See Englehardt, *Confusion, Unlimited*, 34 *Georgetown L. J.* 302 (1946). The trend of the courts seems to have been to allow the matter to rest with general connotations. It has at best been declared that the distinction between what is abstract, and what is concrete and novel is one of degree. *Thomas v. Reynolds*, supra. The present industrial age and, perhaps, the gradual decline of new inventions in favor of the increasingly new combinations of old ideas, has practically thrust upon the courts the necessity of deciding just how novel an idea must be to make it the subject of a contract.

The present case has definitely stated that an idea need not be new in the sense that no one had ever thought of the same idea before. There was uncontroverted evidence at the trial that the process of laminating cloth soles had been previously experimented with; and that one firm had even laminated duck cloth with pyroxyln, although the method was never patented. This strengthens the view that the plaintiff's idea was far from novel.

The instant case may be contrasted with a somewhat similar situation which was the object of judicial interpretation in a Detroit court. *Lueddecke v. Chevrolet Motor Co. et al.*, 70 F.2d 345 (C. C. A. 8th 1934). In that instance the plaintiff had written to the defendant offering to give him a plan whereby the automobile manufactured by defendant would prove more marketable. After an exchange of correspondence in which defendant seemed agreeable to the offer plaintiff showed it how to better distribute the internal weight of the car. In a suit in contract for damages on appropriation of his idea, the court declared that "the mere idea of experimenting with the disposal of the weights was not novel and useful and plaintiff had no property rights therein".
The instant case reflects in one aspect the case of Stein v. Morris, supra, wherein it was declared as dictum that to furnish consideration for a contract plaintiff must upon his proposition either offer a new idea, or if the idea is common, a specific method of his own for the use and application by defendant of the common idea. This view, aside from the present case, is little exemplified in the law but appears to be growing in favor. Cf. Bristol v. Equitable Life Ass'n Soc., supra.

Vernon v. Waggoner, 49 Tex. App. 144, 107 S. W. 919 (1908) reflects a view which is somewhat similar to the rationale of the instant case. In speaking of the marketability of a manuscript the court declared “the contents of the manuscript need not be the product of the author's own brain. If he has merely gathered from sources accessible to all alike the material forming its contents, and arrayed same in a concrete form, it is his property”. Contra: Fendler v. Morosco, supra.

Courts of equity have long recognized the principle that “a secret art is a legal subject of property”. See, Peabody v. Norfolk, 98 Mass. 452 (1868); Salomon v. Hertz, 40 N. J. Eq. 400, 2 Atl. 379 (1885). Perhaps the instant case if viewed from this latter aspect, would not seem too divergent. The court has, however, sought to treat it from the viewpoint of literary property rather than as a trade secret. As such the Supreme Court of Missouri has minimized more than any other court the test of novelty in declaring that an idea need not be novel, but that a specific process, though undeveloped, will supplant the element of newness.

While it is true that industrial ideas are generally protected by either patent law or by a master-servant agreement, there shall at times arise cases where such ideas can be protected only by a contract between the parties. Where such is to be the case, a doctrine as promulgated in the instant decision may very well aid recovery on the part of deserving plaintiffs who otherwise may have been defeated by the barrier of novelty.

JOHN J. O'TOOLE


Colleen Schwindt was indicted for forgery by the Grand Jury for the District of South Dakota. The indictment was returned to the district court sitting in the Northern Division and subsequently was transferred to the Southern Division, where the forgery had been committed, for trial. The defendant was arrested in Oregon. There she signed a written document stating she wished to plead guilty in the district court in Oregon. With the consent of the United States Attorneys of both districts, the indictment was transferred from South Dakota to Oregon, under the provisions of Rule 20, Federal Rules of Criminal
Procedure. The district court in Oregon was asked by the United States Attorney there to receive the plea of defendant, and if guilty, as indicated, to enter judgment of conviction and pass sentence. Held, that the provisions of Rule 20, Federal Rules of Criminal Procedure, sanctioning the transfer of an indictment, returned in the district where the offense was committed, to another district with the consent of defendant and the United States Attorneys, are invalid. \textit{United States v. Bink, — F. Supp. —} (Ore. 1947).

The trial of an accused in the vicinage of the crime is fundamental in our law. A declared grievance in the Declaration of Independence was “For transporting us beyond Seas to be tried for pretended offenses; . . .” The Constitution provides: “The trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; . . .” \textit{U. S. Const., Art. III, § 2.} It further states: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, . . .” \textit{U. S. Const. Amend. VI.} Subsequently, it is provided by statute that: “The district courts shall have original jurisdiction as follows: . . . (2) Crimes and offenses. Of all crimes and offenses cognizable under the authority of the United States.” \textit{36 Stat. 1091} (1911), \textit{28 U. S. C. § 41} (1940). But this power was conferred on the district courts “subject to the controlling provisions of the Constitution.” \textit{Patton v. United States, 281 U. S. 276} (1930). The controlling provisions in this instance are set out above.

It follows that the settled law prior to the adoption of Rule 20 was that indictment, trial, and judgment could be returned only in the district where the crime was committed in whole or in part. \textit{Burton v. United States, 202 U. S. 344} (1906); \textit{Horner v. United States, 143 U. S. 207} (1892); \textit{Pratt v. United States, 279 Fed. 263} (C. C. A. 5th 1922).

The Federal Rules of Criminal Procedure became effective March 21, 1946. Rule 20 allows the defendant to waive trial in the district where the offense was committed, and to consent to the disposition of the case in the district where he was arrested. Two conditions must be fulfilled: (1) The consent of the United States Attorneys of the two districts, and (2) a statement in writing by the accused, after receiving a copy of the indictment or information, that he desires to plead guilty or nolo contendere.

The Advisory Committee’s Notes on these rules explain that Rule 20 was adopted in the interests of defendants and was meant to relieve them of the hardships of being removed from the district of arrest to the district of indictment. Committee’s Note to Rule 20, Federal Rules of Criminal Procedure.

The permissibility of such a transfer of an indictment from one district to a second district as allowed by the rules has not before been questioned. The rule is a radical departure from the established law relating to venue of criminal cases in the district courts. The actual effect of this rule is to leave the
choice of court to the defendant and prosecutors, since only their consent is required for transferring the indictment.

In the past, the selection of a district court was very limited. The controlling limitation was the district of the offense. *Burton v. United States, supra; Horner v. United States, supra; Pratt v. United States, supra.* Within this district, indictments could be transferred. 34 STAT. 207 (1906), 36 STAT. 233 (1910), 28 U. S. C. § 114 (1940). But a judge of a district having no subsections or divisions is without power to transfer a cause to another district. *United States v. Beadon,* 49 F.2d 164 (C. C. A. 2d 1931).

A matter that may be misleading here is the fact that a defendant has the right to waive: trial by jury, *Patton v. United States, supra;* venue of criminal cases in state courts, *People v. Nathan,* 139 Misc. Rep. 345, 249 N. Y. Supp. 395 (Sup. Ct. 1931); *People v. Richards,* 247 Mich. 608, 226 N. W. 651 (1929); and representation by counsel, *Johnson v. Zerbst,* 304 U. S. 458 (1938). But these rights are not to be confused with the instant question which involves jurisdictional issues. In the use of the rights above, the accused is exercising or waiving personal rights, but the jurisdiction of a court over an offense is not a personal right in any sense.

It is well settled that jurisdiction of an offense cannot be conferred on a court by the consent of the accused. *Railway Co. v. Ransey,* 22 Wall. 322 (U. S. 1874); *Wick v. United States,* 290 Fed. 191 (C. C. A. 8th 1923). Yet Rule 20 would allow the consent of the accused and the prosecutor to place jurisdiction in a district court. The effect this might have in altering criminal procedure is speculative.

Undesirable practices might be fostered by Rule 20. A defendant might be arrested in a district where the average sentence imposed for a particular crime was lighter than in the district of its commission, and for various reasons the United States Attorney in the latter district might consent to the defendant's being tried where arrested. The effect would be that a defendant guilty of a crime meriting severe punishment in the community where he committed the offense would be treated with comparative leniency by the standards of the community where he was tried.

A further criticism which might be made is that the rule increases the possibility of delay, one of the very things it is trying to avoid. A defendant could have the indictment transferred to the second district, then plead not guilty and have all the records returned to the first district. Another motive for pleading not guilty would be a belief that the trial in the second district is to be before a more severe judge. Then the case would be returned as above to the first district. In either case, defendant's former indication that he was prepared to plead guilty in the second district could not be used against him in the first district, unless he was represented by counsel at the time of the indication.

But apart from speculative abuses that might arise under Rule 20 it seems
certain that this rule cannot be accepted under our present system of district courts because it is opposed to their basic principles of venue and jurisdiction. The Advisory Committee in drafting the rule apparently did not believe that transferring the venue would involve basic jurisdictional elements. The contrary position of the court seems more in accord with the constitutional requirements.

Under Rule 20, the selection of one of two courts is allowed, and it must follow that the jurisdiction of the district courts has been expanded to embrace crimes committed wholly in other districts. This change could not be sanctioned by a United States constitutional court in view of the explicit clauses in the Constitution, statutes, and past decisions cited above.

The question as to how the Supreme Court might treat this matter is at present moot. It should be mentioned that the Supreme Court appointed the Advisory Committee to assist the court in the preparation of the Federal Rules of Criminal Procedures, which it was empowered to write. 54 Stat. 688 (1940), 18 U. S. C. § 687 (1940). These rules were approved by the Supreme Court. But if it were seriously contended that the constitutionality of the rules were then passed upon, "the result would only point to the inadvisability of rendering advisory opinions." United States v. Bink, supra at —.

The decision of the court in holding Rule 20 invalid is in accord with existing law. It reinforces the line of past decisions in not allowing the expansion of the district courts' jurisdiction beyond that conferred by the Constitution in the light of later statutes.

FRANK W. FORD, JR.

DEFAMATION—The Utterance of Defamatory Remarks, Read from a Script, into a Radio Microphone and Broadcast, Was Libel and Not Slander.

Plaintiff filed an action for libel and slander against a radio news commentator. The complaint did not sufficiently allege special damage, nor did it contain any averments of injury to the plaintiff's professional reputation. The defamatory remarks, made by the defendant, were read from a script and broadcast. On a motion to dismiss, held, that the reading of written defamatory matter on a radio broadcast was libel and not slander, so that the complaint sufficiently stated a cause of action. Hartmann v. Winchell, 73 N. E.2d 30 (N. Y. 1947).

This case represents the latest and most authoritative ruling on the problem of radio defamation. Libel, traditionally, has been the publication of defamatory remarks in a written or permanent form, while slander has been confined to the oral or spoken. Thorley v. Lord Kerry, 4 Taunt. 355, 128 Eng. Rep. 367 (1812); Pollock, Torts, 242 (13th ed. 1929). Libel has been regarded by the law as the more mischievous of the two because of the permanence of the

But the problem of radio defamation has been the subject of wide debate. Is it libel or slander? One solution has urged that the law of libel should be extended to radio defamation because the number of listeners is so large. *Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 20 P.2d 847 (1933); *Vold, The Basis for Liability for Defamation by Radio*, 19 MINN. L. REV. 611 (1935) passim.

Secondly, it is urged that it should be treated as slander, *Meldrum v. Australian Broadcasting Co.*, (1932) Vict. L. R. 425; *Notes, 26 Georgetown L. J. 475 (1938)*; 46 HARV. L. REV. 133 (1932), so as to conform to the distinctions already drawn between the written and the spoken forms of communication.

A third viewpoint would combine the two into one tort, holding that the distinction between libel and slander has outlived its usefulness. *Veeder, History and Theory of the Law of Defamation*, 4 COL. L. REV. 33 (1904); 70 SOL. J. 613 (1926).

The courts have not completely accepted any of these theories, but, adhering to the traditional distinctions, have worked out a rule that is nearly uniform.

Where the defamation is read from a script, *i.e.*, a program continuity, so that there is in existence, a written, permanent record, the defamation is held to be libel. *Sorenson v. Wood*, 123 Neb. 348, 243 N. W. 82 (1932); *Hryhorijiv (Grigorieff) v. Winchell*, 180 Misc. 575, 45 N. Y. S.2d 31 (Sup. Ct. 1943); *Polakoff v. Hill*, 261 App. Div. 777, 27 N. Y. S.2d 142 (1st Dep't 1941). But when the defamation is extemporaneous, the result of an “ad lib”, without having been part of the script, the relatively few cases hold this to be slander. *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A.2d 302 (1939); *Locke v. Gibbons*, 164 Misc. 877, 299 N. Y. S. 188 (Sup. Ct. 1937). In the latter case, Pecora, J. said at 193, “The extemporaneous interpolations by the defendant in this case, if actionable as defamation at all, must be considered as slander.”

The use of the script or continuity to fix the libelous character of radio defamation is not necessarily specious. It was held very early, *John Lamb's Case*, 9 Co. Rep. 59b (1610), and *De Libellis Famosis*, 5 Co. Rep. 125a (1605), that the reading of a defamatory writing to a third person constituted the

*Meldrum v. Australian Broadcasting Co.*, *supra*, however, refused to accept this reasoning in its application to radio, since the written form, the continuity, was not capable of being seen by the listener.

The court in the instant case rejected this position, saying, "What gives sting to the writing is its permanence of form." (Citing *Ostrowe v. Lee, supra.*) "This is true whether or not the writing is seen. Visibility of the writing is without significance and we hold that the defendant's defamatory utterance was libel and not slander."

This decision, although it has avoided the issue of the entire debate, indicates the present law. However, the peculiar nature of radio, capable of reaching a national audience, having, as it does, an authoritative character and possessing a capacity for harm infinitely greater than a majority of newspapers, has been overlooked. *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889, 890 (Mo. 1934); *Vold, Defamation by Radio, supra* at 642, 643; Note, 26 *Georgetown L. J.*, *supra*, at 481.

"... Radio advertising is one of the most powerful agencies in promoting the principles of religion and of politics. It competes with newspapers, magazines and publications of all kinds. The fundamental principles of the law involved in publication by a newspaper and by a radio station seem to be alike. There is no legal reason why one should be favored over the other. ..." *Sorenson v. Wood, supra*, at 357.

The court in the present case said it could not do in the case of radio broadcasting what Lord Mansfield declared he could not do in *Thorley v. Lord Kerry, supra*, namely, abolish the distinction between oral and written defamation. This distinction in the final analysis is based on the form in which a defamatory imputation is conveyed, not upon the damage it does.

**PAUL R. CONNOLLY**

**EQUITY—Covenant to Refrain from Soliciting Business from Employer's Customers for One Year After Termination of Employment Contract Is Not Enforceable by Injunction in Absence of Minimum Guarantee of Employment.**

In an action by plaintiff-employer to restrain defendant-employee from breach of a restrictive covenant contained in a written employment contract, a motion was made for a temporary injunction. Plaintiff, engaged in the business

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*This case is also noted in 47 Col. L. Rev. 1071 (1947).*
of maintaining coin operated machines, employed defendant in 1940 as collector on a commission basis. He exacted an agreement that defendant would not solicit patronage from the employer's customers for one year after termination of the employment relationship, but provided no guarantee of employment for any minimum period. Held, while the covenant in question may be valid at law, enforcement through injunction rests in the sound discretion of the equity court and will be denied when determined to be unreasonable as lacking in mutuality of obligation in not providing a guarantee of employment for a definite period. Byram v. Vaughn, 68 Fed. Supp. 981 (D. C. 1946).

As a general rule, both under the common law and modern statutes, contracts in unreasonable restraint of trade or restricting the property right of gainful economic endeavor, if there be nothing more, are contrary to public policy and void. But exceptions have long been recognized when justified by particular circumstances and when the contract is reasonable in affording adequate protection to the party in whose favor it is drawn and in no way injurious to the public. Nordenfeldt v. Maxim Nordenfeldt Guns and Ammunition Co. [1894] A. C. 535, 565. In contrast to this general rule and adding weight to its exceptions, is the further public policy offering protection against unfair trade practices, many aspects of which were exhaustively reviewed in Schechter Poultry Co. v. United States, 295 U. S. 495 (1935). A number of American courts have made it clear that breach of restrictive employment covenants will be enjoined when failure to grant such relief would permit unfair solicitation of business by the former employee from among the clients whose acquaintance he had made through his contract with the plaintiff. Colonial Laundries v. Henry, 48 R. I. 332, 138 Atl. 47 (1927) and Empire Steam Laundry v. Losier, 165 Colo. 95, 130 Pac. 1180 (1914). This is especially true where the employee's duties involved periodic and recurring contact with the employer's customers, thus putting him in a position to use the good will so created to his own advantage in establishing a new competing business or in bargaining with another employer. Cali v. National Linen Service Corp., 38 F.2d 35 (C. C. A. 5th 1930); Carpenter v. Southern Properties, 299 S. W. 440 (Tex. Civ. App. 1927); Jennings v. Shepherd Laundries Co., 276 S. W. 726 (Tex. Civ. App. 1925). Nor will the plaintiff always be denied a remedy because the negative covenant or some aspect of it is found to be unreasonable or broader than is necessary to protect his proper interests; while the terms of the covenant may not be enforced literally in such cases, the employee may be enjoined from using or disclosing knowledge gained from the employment, Tolman v. Mulcahy, 119 App. Div. 42, 103 N. Y. Supp. 936 (1907), or from acting as a salesman or solicitor whereby he could injure the former employer, Sherman v. Pfefferkorn, 241 Mass. 468, 135 N. E. 568 (1922). Contracts not to compete have been held divisible so that covenants which are not geographically limited or which cover an unreasonably large area may be enforced within limits fixed by the court. John T. Stanley Co. v. Lagomarsino, 53 F.2d 112

It is equally well-settled that equity will not issue its writ of injunction in such cases unless the whole matter appears equitable, "that is, unless it rests upon a contract that is fair in its terms, involves no imposition nor injustice, and the private interests of the employer in the subject-matter of the contract to which the restrictive covenant is incidental, requires in good faith for its protection the enforcement of the covenant". Super Maid Cook-Ware Corp. v. Hamil, 50 F.2d 830, 831 (C. C. A. 5th 1931) and cases cited therein; Sternberg v. O'Brien, 48 N. J. Eq. 370, 22 Atl. 348 (1891).

The so-called "doctrine of mutuality" has been used broadly to express a variety of inexact ideas and even when refined to "mutuality of obligation" no precise rule of law is immediately brought to focus. Page, Contracts § 565 (2d ed. 1920). Most frequently the latter term is used as a test to determine whether one or both of the parties can by fair implication be regarded as having made any obligatory promise, Williston, Contracts § 141 (rev. ed. 1938). As a test, therefore, it fails to do more than show the presence or absence of consideration sufficient to support a valid contract. Its extension to matters of equity has been criticized sharply by learned authorities on the grounds that it has induced confusion and is better covered by other concepts, Williston, op. cit. supra, §§ 141, 1433; that its usefulness has been impaired by the number and extent of exceptions, Pomeroy, Equity Jurisprudence § 1405 (5th ed. 1920); and that it is an artificial extension of legal consideration, Stone, The "Mutuality" Rule in New York, 16 Col. L. Rev. 443 (1916). Yet some courts continue to require that mutuality of obligation be shown as a prerequisite to enforcement of negative covenants. There is little doubt that the reported case uses the term in the sense described above since the court describes the contract as containing "no undertaking on the part of the employer to continue the employee's services for any specified term", Byram v. Vaughn, supra at 982, and states that "One who seeks to restrict another's freedom of action should be willing to surrender his own independence to a corresponding degree". Ibid. at 984.

Except as it may have a bearing on the reasonableness or fairness of the agreement, mutuality of obligation has not been so strictly required that each promise by one party must be counterbalanced by a precisely parallel consideration running from the other, Page, op. cit. supra, § 525; the better view has tended to consider the total obligations on each side as constituting inducement for the other to accept the agreement. Philadelphia Ball Club, Ltd. v. Lajoie, 202 Pa. 210, 51 Atl. 973 (1902). Nor has equity refused its aid because there was reserved to one party the power to terminate the relationship at the end of any year while the other remained bound. Franklin Telegraph Co. v. Harrison, 145 U. S. 459 (1892). Following this line, contracts containing restrictive post-employment covenants have generally been upheld unless the
gross inequality of the contract makes it oppressive or contrary to public policy. *Sherman v. Pfefferkorn*, supra, is recognized as the leading expression of this view.

The contract in the reported case, being one for employment at will, is determined by the court to be unilateral. By its very nature, there can be no mutuality of obligation in such an agreement, *Meurer Steel Barrel Co. v. Martin*, 1 F.2d 687 (C. C. A. 3d 1924), yet there is no universal rule which denies to parties to such agreements the remedy of specific performance. *Williston*, op. cit. supra, § 1439. Wherever the issue has been raised and decided there is almost complete accord that partial execution of a contract for employment at will or on a month to month basis through rendition of services and payment of compensation therefore will cure any lack of mutuality. *Bettinger v. North Fort Worth Ice Co.*, 278 S. W. 466 (Tex. Civ. App. 1925); *Freudenthal v. Espey*, 45 Colo. 488, 102 Pac. 280 (1909); *Granger v. Craven*, 159 Minn. 296, 199 N. W. 10 (1924); *Red Star Yeast & Products Co. v. Hague*, 25 Ohio App. 100, 157 N. E. 393 (1927); *National Gum & Mica Co. v. Braendly*, 27 App. Div. 219, 51 N. Y. Supp. 93 (1898); *Philadelphia Ball Club, Ltd. v. Lajoie*, supra. It is significant, therefore, that there had been performance under the contract in the reported case over a period of almost six years, that is from September 21, 1940 to July 20, 1946.

Cases holding contrary to the above authorities generally sustain a conclusion that mutuality of obligation is a "make weight" consideration to be evaluated along with other facts in determining whether equity should intervene. Thus, absence of mutuality of obligation has been cited where the covenant was held to be generally inequitable, *Dockstader v. Reed*, 121 App. Div. 846, 106 N. Y. Supp. 795 (1907); where the plaintiff had discharged the employee before the end of a definite contract period, *Carpenter v. Southern Properties*, supra; where the employment was not specialized (window washer) and further employment offered no possibility of damage to plaintiff, *Gilbert v. Wilmer*, 102 Misc. Rep. 388, 168 N. Y. Supp. 1043 (1918); where the plaintiff did not allege or show irreparable injury, *May v. Lee*, 28 S. W.2d 202 (Tex. Civ. App. 1930); where there was conflict as to ownership of the process which plaintiff sought to protect, *Victor Chemical Works v. Iliiff*, 299 Ill. 532, 132 N. E. 806 (1921); or where the public interest in preventing unemployment was considered paramount to the employer's protection, *Love v. Miami Laundry Co.*, 118 Fla. 137, 160 So. 32 (1934).

In general, it is not the mere taking of new employment, but unfair competition which equity enjoins. *Williston*, op. cit. supra, § 1450 and cases cited. Among the cases cited in support of the reported case, all but one involved enforcement of a covenant not to accept employment or to engage in competing business. Instances of refusal to enforce covenants limited to solicitation of the employer's customers constitute a distinct minority. The reported case decides the question of mutuality for the first time in the District of Columbia,
although the validity of reasonable ancillary covenants at law was settled. Godfrey v. Roessle, 5 App. D. C. 299 (1895); Erikson v. Hawley, 12 F.2d 491 (App. D. C. 1926). Such covenants are “invalid” in the jurisdiction when determined to be unreasonable, but that determination “requires a discretionary judgment that can only be made in the light of such factors as the nature of the business, the character of the service performed by, and the station of the employee, in relation to area in which the former employer seeks to be protected”. Chemical Fireproofing Corp. v. Krouse, 155 F.2d 422, 423 (App. D. C. 1946). It appears that in deciding the issue on the narrow technical ground that it does, the court establishes the jurisdiction as a minority of one in the view that the mutuality of obligation issue alone will bar enforcement or other remedy to the plaintiff. The opinion contains no discussion of the character or extent of the respective parties' contentions as to those matters which a court of equity might properly consider in such a case. No mention is made of competitive conditions in the particular business involved, the type and frequency of the employee’s contacts with plaintiff’s customers, the effect of changes in labor market conditions, the precise nature of defendant's new association, or the degree of injury to be suffered by the plaintiff in the event of breach. Complete reliance is placed on a line of cases (especially Super Maid Cook-Ware Corp. v. Hamil, supra) decided during a period of economic distress so severe that the public interest aspects of unemployment and its consequences became a matter of judicial notice. West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937). The result is a precedent which forces dissection into two separate agreements of a contract apparently regarded by the parties as a single expression of their respective undertakings.

ROBERT M. MANGAN

PATENTS—Provision in Anti-Trust Decree Requiring Compulsory Non-exclusive Licenses of Patents at Uniform Reasonable Royalties Is Proper Exercise of Sound Judicial Discretion.

The United States instituted a proceeding in equity in the United States District Court for the Southern District of New York to prevent and restrain alleged violations of §§ 1 and 2 of the Sherman Act, 26 STAT. 209 (1890), as amended, 50 Stat. 693 (1937), 15 U. S. C. §§ 1, 2, by the National Lead Co., Titan Inc., a subsidiary of National Lead, and the Du Pont Co. From detailed findings of fact, the court found that National Lead and Titan Inc. had participated in an “international cartel” dating from 1920 which was based on exclusive cross-licensing agreements relating to patents and technical know-how in the titanium pigment field. The court also found that Du Pont joined this cartel in 1933 by virtue of a patent cross-licensing agreement with National Lead and certain implied assurances made by Du Pont to a foreign
member of the cartel that Du Pont would respect the original territorial limitations of the cartel, although the court recognized that Du Pont's status, rights and obligations were different from those of the other members of the cartel. The court further found that the 1933 agreement between National Lead and Du Pont was in restraint of interstate trade and commerce in this country as these two dominated the titanium industry and the agreement increased the power of each to exclude newcomers from the field. In its decree the court adjudged the specified agreements to be unlawful, enjoined the defendants from further contracting in a similar manner, ordered defendants to grant to any applicant non-exclusive licenses under the specified patents at a uniform reasonable royalty and authorized reciprocal licenses under specified terms, ordered liquidations of certain stock holdings, provided for supervision and retained jurisdiction to carry out the decree. *United States v. National Lead Co.*, 63 F. Supp. 513 (S. D. N. Y. 1945).

The Government filed an appeal to the Supreme Court in which it requested several modifications of the district court decree, most important of which was the request for either royalty-free compulsory licensing of the specified patents until the effects of the illegal combination had been fully dissipated, or a perpetual injunction against their enforcement. *Held*, that the provisions of the lower court decree requiring the granting of compulsory non-exclusive licenses at uniform reasonable royalties on a reciprocal basis should be affirmed. *United States v. National Lead Co.*, 67 Sup. Ct. 1634 (1947).

The Court, speaking through Mr. Justice Burton, felt that "without reaching the question whether royalty-free licensing or a perpetual injunction against the enforcement of a patent is permissible as a matter of law in any case, the present decree represents an exercise of sound judicial discretion. . . . We do not in this case face the issue of the constitutionality of such an order. That issue would arise only in a case where the order would be more necessary and appropriate to the enforcement of the Antitrust Act than here." *United States v. National Lead Co.*, *supra* at 1643, 1648.

The Court then pointed out that the existence of competitors in the titanium field who had been growing in stature despite having to pay royalties on the specified patents demonstrated that royalty-free licenses were not necessary to put the industry back on a competitive basis. It also pointed out that if the licenses were not on a reciprocal basis the smaller competitors would be able to become the dominant factor in the industry by being able to take everything for themselves and keeping everything they have. As to the difficulty of determining a uniform, reasonable royalty the Court said that a ready-made yardstick was available in the royalties already being paid by the smaller competitors, and also pointed out that reasonable royalties have long been determined as damages in suits for patent infringement, even though the patent had not previously been licensed. *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, 235 U. S. 641 (1915); *Suffolk Co. v. Hayden*, 3 Wall. 315 (U. S. 1948]
Mr. Justice Douglas, Mr. Justice Murphy, and Mr. Justice Rutledge dissented from so much of the majority opinion as upheld the district court decree of reasonable royalties on the specified patents, saying that the action of the district court judge was in deference to the rule of Hartford-Empire Co. v. United States, 323 U. S. 386 (1945), wherein the remedy of royalty-free compulsory licensing of patents was expressly denied, rather than an expression of his own judgment, and that as the question was not there considered by the full Court it should remain an open one except as applied to the Hartford case. They felt that the Court, under its broad equity powers could decree royalty-free licensing of patents, if such remedy were necessary to enforce effectively the anti-trust laws, and that divestiture and dissolution may be ordered even though property rights are impaired thereby. United States v. Crescent Amusement Co., 323 U. S. 173 (1944); United States v. Union Pacific R.R., 226 U. S. 470 (1913). They further felt that such action was necessary in the present case to insure the restoration of competition to the titanium industry.

The principal interest of the instant decision lies in its effect on the question of the legal status of royalty-free licensing in antitrust decrees. In antitrust suits wherein patents have been misused, the courts are faced with the problem of giving effect simultaneously to the patent laws and the antitrust laws, bearing in mind that the purpose of their decree is fair and effective enforcement, not punishment. Whether or not the Antitrust Acts circumscribe or limit the monopoly which a patentee possesses by virtue of the ownership of a patent appears to have first been answered in the case of United States v. Standard Sanitary Mfg. Co., 226 U. S. 20 (1912), wherein it was held that rights secured by a patent do not protect the making of contracts in restraint of trade, or those which tend to monopolize trade or commerce in violation of the Sherman Act. In United Shoe Machinery Corp. v. United States, 258 U. S. 451 (1922), the contention was made that the Antitrust Acts take away from the patentee without due process of law property secured to him by the grant of the patent. This contention the Court met by saying:

"Undoubtedly the patentee has the right to grant the use of the rights or privileges conferred by his patent to others by making licenses and other agreements with them which are not in themselves unlawful, but the right to make regulation in the public interest . . . is controlled by general principles of law, and the patent right confers no privilege to make contracts in themselves illegal, and certainly not to make those directly violative of valid statutes of the United States." United Shoe Mach. Co. v. United States, supra at 463.

In the case of Standard Oil Co. (Indiana) v. United States, 283 U. S. 163 (1931), it was held that the lawful individual monopolies granted by the patent statutes cannot be unitedly exercised to restrain competition, and that the
limited monopolies granted to patent owners do not exempt them from the prohibitions of the Sherman Act. The restriction of the patent to its express terms is illustrated in cases where the patentee is denied the right to require of a licensee that only certain unpatented materials be used with the patented materials. *Leitch Mfg. Co. v. Barber*, 302 U. S. 458 (1938); *Carbice Corp. v. American Patents Development Corp.*, 283 U. S. 27 (1931); *Motion Picture Patents Co. v. Universal Film Co.*, 243 U. S. 502 (1917). In the case of *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U. S. 488 (1942), the patentee was denied the right to sue for direct infringement of his patent while he was using his patent to extend the patent monopoly to include unapatented materials. From the decision of *United States v. Univis Lens Co.*, 316 U. S. 241 (1942), it appears that any attempt to enlarge the statutory grant loses for the patentee all right to enforce his patent until the consequences of the illegal attempt are fully dissipated.

As to how far the courts may go in taking away the property rights of the patentee, it may be generally stated that a party to a previous illegal contract, agreement or combination with others restraining competition in that business is not deprived of legal protection of his property in that business, RESTATEMENT, CONTRACTS § 519 (1932); *Small Co. v. Lamborn & Co.*, 267 U. S. 248 (1925); *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540 (1902); *Standard Oil Co. v. Markham*, 61 F. Supp. 813 (S. D. N. Y. 1945). Accordingly, courts in enjoining violations of the Sherman Act arising from the misuse of patents have reained from action which amounted to a permanent forfeiture of the patents. *United States v. Univis Lens Co.*, supra; *United Shoe Mach. Corp. v. United States*, supra; *Standard Sanitary Mfg. Co. v. United States*, supra; *Sylvania Industrial Corp. v. Visking Corp.*, 132 F. 2d 947 (C. C. A. 4th 1943); *Novadel-Agene Corp. v. Penn*, 119 F. 2d 764 (C. C. A. 5th 1941); *American Lecithin Co. v. Warfield Co.*, 105 F. 2d 207 (C. C. A. 7th 1939).

While the above cases illustrate that the patentee is denied the right to sue for infringement of his patent until he can show that the effects of the monopoly which has been created through the misuse of the patents have been dissipated, they did not take any affirmative action against the patentee for using his patent in violation of the Antitrust Act. The affirmative action of requiring the patentee to license all applicants under patents which had been misused in violation of the Sherman Act was first taken in the celebrated case of *Hartford-Empire Co. v. United States*, supra. However, in taking this step the Court modified the district court decree of royalty-free compulsory licensing to a compulsory licensing of the patents at uniform reasonable royalties. The language there used by the Court would indicate that the remedy of royalty-free licensing is unavailable as a matter of law:

“That a patent is property, protected against appropriation both by individuals and by government, has long been settled. In recognition of this quality of a patent the courts, in enjoining violations of the Sherman Act arising from
the use of patent licenses, agreements, and leases have abstained from action which amounted to a forfeiture of the patents.” Hartford-Empire Co. v. United States, supra at 415.

That the Hartford-Empire decision has been interpreted by district court judges as meaning that the remedy of royalty-free licensing is unavailable as a matter of law is aptly shown in the case of United States v. Vehicular Parking, 61 F. Supp. 656 (Del. 1945) wherein Judge Leahy said:

“I am unable to agree with the government's reading of Hartford-Empire Co. v. United States, that the court has power to mandate a royalty-free license where the patent has been used as an instrument in violation of the anti-trust laws. If a court could permit such a provision it would obviously be tantamount to a cancellation of a patent . . . . I am thus compelled to read Hartford-Empire Co. v. United States for the proposition that a patent is not to be cancelled by making it royalty-free because it was once utilized as a device to violate the anti-trust laws.” United States v. Vehicular Parking, supra at 657.

Of what effect is the instant decision on the question of remedies available for enforcement of the antitrust laws? It would appear that it has weakened the doctrine of the Hartford-Empire decision as regards the unavailability of royalty-free licensing as a matter of law. In the Hartford-Empire case the requirement of royalty-free licensing was expressly denied in a four to two decision. Here, the availability of this requirement is not passed on by the majority of four, but is vigorously affirmed by the three dissenting Justices. It is submitted that in leaving open the question whether royalty-free licensing is available as a matter of law in any case, the Court has left the district court judge in a quandary as to what relief he can grant. Undoubtedly this question will again be presented to the Court for further clarification.

REGINALD K. BAILEY, JR.

TORTS—The Use of “Line of Duty” as a Definition of “Scope of the Employment” in the Federal Tort Claims Act.

Plaintiff Rutherford was involved in an automobile accident with Wininger, a Chief Boatswain’s Mate, United States Navy. He sued the United States under the Federal Tort Claims Act, 60 STAT. 844, 28 U. S. C. A. § 931 (Supp. 1946). His suit was the first to invoke Section 402c of the Act which defines “acting within the scope of his office or employment”, in the case of a member of the military or naval forces of the United States, as meaning, “acting in line of duty”. Although Wininger was on active duty, it was held that at the time of this accident, he was acting for his own private purposes, since he was driving home in his own car instead of the government vehicle provided for him, after having completed all his duties that day, and therefore, was not acting in line of duty, and of course, by the Act, was not within the
scope of his employment. *Rutherford v. United States*, Civil No. 955 (E. D. Tenn. June 19, 1947). The conclusion in this case—that Wininger was not acting in the scope of his office or employment—is obviously correct. Yet by all the precedents Wininger *was*, from the few facts stated in the opinion, in line of duty that day, *Moore v. United States*, 48 Ct. Cl. 110 (1913); *32 Ops. Att'y Gen.* 12 (1919), and therefore by the statute, acting "within the scope of his employment".

This paradox arises from the fact that "line of duty" is, and always has been, a status, used to determine, as between the United States and those in its military service, eligibility for pay and benefits, i.e., liability of the United States for such pay and benefits, *32 Ops. Att'y Gen.*, *supra*. Not until the Federal Tort Claims Act was line of duty declared to be synonymous with scope of the employment, in the sense that this phrase is used to fix liability upon the United States to third parties for torts of those in its military service. "Line of duty" has been construed to be much broader than "scope of his employment", for one is in line of duty when on furlough, pass, or leave, though performing no duties whatever within his employment by the United States, *Moore v. United States*, *supra*, at 113; *32 Ops. Att'y Gen.*, *supra*, at 20; *O'Hagan v. United States*, 103 Ct. Cl. 408 (1945).

Further, line of duty comprises not only a status but an act. An act negligently or wilfully done by one (otherwise in line of duty) acting for his own purposes at the time, is not in line of duty. *32 Ops. Att'y Gen.*, *supra*, at 19. To illustrate, had Wininger been struck by lightning, or been killed or injured by any cause outside his control or fault, it would be compensable as in line of duty, regardless of whether he was doing an act for himself or for the United States; had Wininger caused the accident sued on, by his own wilful or negligent conduct, it would not be in line of duty—the conduct intervening "as the producing cause between his public service or performance of his duty, and the injury or disease", *32 Ops. Att'y Gen.*, *supra*, at 23.

The opinion in *Rutherford v. United States* further seemed to merge, without differentiation, the concepts of general and special duties with "line of duty". One in the military service is always on general duty from date of enlistment to date of separation, *Moore v. United States*, *supra*, at 113; line of duty is determined by examining the act done while on general duty, without regard to whether special duties were being engaged in or not. Therefore Wininger's completion of his recruiting activities for the day was not pertinent to a determination of his line of duty status, at least, for purposes of compensable injuries sustained by him, *32 Ops. Att'y Gen.*, *supra*, at 20.

Although in determination of both line of duty and scope of employment the act done by the person alleged to be at fault must be examined, this similarity does not make "line of duty" a good definition for "scope of the employment". Such determinations of "line of duty" in the past have only served to allow or disallow compensation to the military personnel and have
not concerned Government liability to persons outside the service. They have frequently been extended to award compensation to needy or meritorious personnel in circumstances where no private individual or corporation would have been held responsible, Moore v. United States, 48 Ct. Cl. 110 (1913)—death while on leave, from disease contracted before passage of law authorizing benefits, held in line of duty; Doke v. United Pacific Insurance Company, 15 Wash. 2d 536, 131 P.2d 436 (1942)—National Guardsman held in line of duty while waiting for a bus on his way to a drill. It is as if the liability of a corporation for the facts of its employees were to be determined by their eligibility for the corporation's pension plan.

Another question arises from the use of "line of duty" as a definition for "scope of the employment". Heretofore, line of duty, being a pay status, was determined exclusively by the War and Navy Departments, so complete is their power to determine the status of those in the military service that the constitutional courts have consistently refused to review any decision by them upon such status, Nordmann v. Woodring, 28 F. Supp. 573 (W. D. Okla. 1939); In re Traina, 248 Fed. 1004 (E. D. N. Y. 1918). How then can a District Court now inquire into line of duty? Does this mean that the United States, having found that a soldier was not in line of duty for pay purposes in a particular accident, can offer its own determination to show that as a result by the Federal Tort Claims Act, he was not in the scope of his employment? In view of the fact that this statute is in derogation of sovereignty, and is to be construed strictly, in favor of the United States, State of Maryland to Use of Burkhardt v. United States, 70 F. Supp. 982 (D. C. Md. 1947), it is possible that the United States might thus determine its own liability.

In conclusion, "line of duty" is not a good definition for "scope of the employment" because this would change its function so completely that it would become a phrase with two meanings: one to denote the close internal relationship between the United States and its military personnel and the other to determine tort liability to third parties—the requirements, precedents, and functions of the one being totally different from the other.

CHARLES J. MURPHY

WORKMAN'S COMPENSATION—CONFLICT OF LAWS—Initial Award Made Under the Statute of the State of Employment Held Not a Bar to Additional Recovery Where an Award in State of First Recovery Is Not Intended to Be Final.

An employer and an employee, both residents of Illinois, entered into an employment contract in that state. Pursuant to it, the employee agreed to work in Wisconsin, and while working there, suffered an injury. The employee sought workmen's compensation in both states. A settlement contract, con-
aining the provision that "This settlement does not affect any rights that applicant may have under the Workmen's Compensation Act of the State of Wisconsin", was approved by the Illinois Commission, and later a formal lump sum settlement order was made. The workman sought a second award in Wisconsin, with credit to be allowed the employer for the amount awarded in Illinois. Held, since the Illinois statute did not preclude recovery in another state, and recovery in Wisconsin was reserved in the award, Wisconsin should allow recovery for the difference between the amount recovered in Illinois and the amount that could be recovered in Wisconsin. Industrial Commission of Wisconsin v. McCartin, 330 U. S. 622 (1947).

It is fundamental that either the state of employment or the state of injury could have made a separate award. Alaska Packers Assn. v. Industrial Accident Commission, 294 U. S. 532 (1935); Pacific Employers Ins. Co. v. Industrial Accident Commission, 306 U. S. 493 (1939). But the problem raised here is whether full faith and credit must be given by a state to a workmen's compensation award of a sister state, and thereby preclude a second recovery under its own statutes. In interpretation of the full faith and credit clause, U. S. Const. Art. IV, § 1, and the amended statute implementing it, Rev. Stat. § 905 (1875), 28 U. S. C. 687 (1940), a judgment has been placed on a different footing than a statute. Kenney v. Supreme Lodge, 252 U. S. 411 (1919). Even though recovery could not be had in the forum in which the judgment is sought to be enforced, the provisions of the Constitution and the Act of Congress as interpreted, have forced a state to enforce the judgment of a sister state for taxes, Milwaukee County v. White Co., 296 U. S. 268 (1935); or for a gambling debt, Fauntleroy v. Lum, 210 U. S. 230 (1907); and damages for wrongful death, Kenney v. Supreme Lodge, 252 U. S. 411 (1919).

It has been held that an award of workmen's compensation in the state in which the injury was sustained, the effect of which in that state is to bar further recovery, bars such recovery for the same injury under the workmen's compensation law in the state of employment even where credit was allowed for the first recovery, Magnolia Petroleum Co. v. Hunt, 320 U. S. 430 (1943). Workmen compensation awards, therefore, have followed the established rule of full faith and credit, although many legal writers express the opinion that in this field, one of the "few and far between exceptions" should have been made. Cheatham, Res Judicata and the Full Faith and Credit Clause, 44 Col. L. Rev. 330 (1944); Samuel B. Horovitz, Injury and Death Under Workmen's Compensation Laws.

The question immediately asked then is why wasn't the Magnolia case controlling; and, if not controlling, was it overruled? In Texas, the situs of the injury in the Magnolia case, a compensation award was the exclusive remedy. Tex. Civ. Stat. Ann., art. 830b, § 5 (Vernon, 1938). When the award was made final it was res judicata there and "entitled to the same faith and credit
as a judgment of a court”. Ocean Accident & Guarantee Corp. v. Pruitt, 58 S. W.2d 41, 45 (1933).

In addition it is provided by Section 19 of the same article: “... that no recovery can be had by the injured employee hereunder in the event he has elected to pursue his remedy and recovers in the State where such injury occurred.” This has been held to refuse a second recovery in Texas, even though the workman could have recovered initially in Texas. Travelers Ins. v. Cason, 132 Tex. 393, 396, 124 S. W.2d 321 (1939).

In Illinois there was not such an unmistakable intent either by the legislature or by the judiciary to exclude a second recovery once an award had been made outside the state. The statute has nothing comparable to the Texas statute, quoted above, and it has never been decided that recovery outside the state would preclude recovery for the difference in amounts allowed in Illinois. Moreover, the reservation in the Illinois award lends credence to the holding that the Illinois Act does not foreclose an additional award under the laws of another state. The court, however, made it plain that “it takes no reservation in the original judgment or decree to give him that right”. McCartin case, supra, at 630.

The test that must be applied by a sister state desiring to give effect to its own statutes allowing second recovery with a credit for the first award, and to escape the impact of the Magnolia case, is clear. Does the state allowing the first recovery consider a compensation award, both within and without the state, final? If so, full faith and credit will not allow the second award by a sister state, and the Magnolia rule is applied. If this intent is not clearly demonstrated, the McCartin rule can be applied, subject to a final determination by the Supreme Court as to the true intent. The way is cleared to allow interplay in the variant policy among the states and to provide a more liberal interpretation to full faith and credit in Workmen’s Compensation cases.

JAMES G. BUTLER
BOOK REVIEWS


In this volume are collected the views of noted tax authorities and representatives of both labor and industry with reference to the federal taxation of corporations, as expressed at the symposium conducted by the Tax Institute in New York on December 6 and 7, 1946. While practically all the participants* are agreed that the tax policy of the Federal Government should be such as to encourage private enterprise, promote production, and maintain a high level of employment, their views are widely divergent upon the question how these purposes may best be accomplished. They range from the complete abolition of tax on corporations to the restoration of some such additional tax as the wartime excess profits tax, and from the use of the taxing power solely as a means of raising revenue to its use as a regulator of the national economy.

Perhaps the basic question with which the symposium is concerned is whether corporations should be taxed as such, or whether only the stockholders should be taxed. Part One of the volume is devoted to specific proposals for reforming corporate income taxes. One of these is the abandonment of all present corporate taxes, on the theory that they are, at least in part, passed on to consumers and thus become undesirable indirect taxes. In substitution therefor a small franchise tax on corporations for the privilege of doing business is proposed, together with a tax on undistributed earnings equivalent to the normal rate on individuals and a very high surtax on undistributed profits above a certain minimal percentage to allow for business expansion. In many respects this suggested alternative is all too reminiscent of the ill-favored and relatively short-lived undistributed profits surtax imposed by the Revenue Act of 1936.

Another proposal is the adoption of the British system of treating the corporation as a withholding agent and allowing the stockholder a credit for the tax withheld by the corporation from his dividend. It is recognized, however, that the British system would entail administrative diffi-

culriages in this country because of our graduated individual surtax rates. A third suggestion is that the present corporation tax structure be retained but that the corporations be allowed credit for dividends paid. A fourth is the counterpart of this, i.e., that instead of allowing corporations a dividends paid credit, dividend income in the hands of the stockholder be exempt from tax at the basic rate for combined normal and surtax in the lowest bracket.

The so-called double taxation of corporate income—once to the corporation and again as a dividend to the stockholder—is the one feature of our present tax system to which the majority of the participants unite in voicing strenuous objection. But even here it should be pointed out that a minority—in particular the labor representatives—take issue with the others. The minority view is that the tax on corporation is either passed on to consumers in the price of the corporate products or used to hold down wages of labor; and so the conclusion is that there is no real double taxation. Nevertheless most of the proposals advanced for modification of the corporate tax system are directed toward the elimination, either in whole or in part, of twice taxing dividend income.

Part Two of the volume is concerned with tax relief to small corporations, though there is no precise consensus as to what is a small corporation. There appears to be rather general agreement on the desirability of some tax advantages for small business. The proposal receiving the greatest attention here is an optional partnership treatment, that is, allowing the stockholders of a corporation an election to pay tax on their pro rata shares of the corporation's income (with no tax on the corporation as such), just as partners are now taxed on their distributive shares of partnership income, whether or not distributed. While this method might be satisfactory in the case of small, closely held corporations, it is recognized that it would present almost insurmountable difficulties in the case of large, widely held corporations. One rather unusual proposal, to allow unincorporated enterprises such as proprietorships and partnerships the option to be taxed as corporations, is given brief attention.

In this Part also is considered the question whether either graduated taxation of corporate income or excess profits taxation is desirable from the standpoint of curbing monopoly and encouraging small business competition. The conclusion reached is that the tax system would not be an effective medium for checking monopoly, and that excess profits taxation, in particular, usually hits small business much harder than big business.
Part Three of the book is devoted to certain detailed aspects of corporate income taxation. The reviewer will but briefly mention the topics considered, though each of them merits a careful study. They are: the effect of the Section 102 "penalty surtax" on current accumulations of corporate earnings; the unfortunate impetus given to debt rather than equity financing by the fact that bond interest is deductible, whereas dividends paid are not; mitigation of the rigors and inequities of the annual accounting period, by means of averaging devices over a period of years, longer carry-overs of business losses, etc.; changes in depreciation and depletion allowances and the allowance of deductions for research and development costs, so as to make sure that a taxpayer may recover such costs entirely against taxable income; and the desirability of eliminating the two per cent penalty tax on consolidated taxable income and of making amendments to the consolidated return regulations in order more closely to conform to true concepts of accepted consolidated accounting practices.

Tax treaties and other tax provisions which affect international trade are the subject matter of Part Four. As a means of avoiding international double taxation of both corporations and individuals, the desirability of bilateral agreements, such as our tax conventions with France, Sweden, Canada, and the United Kingdom, is urged. It is pointed out that such agreements are of great advantage to American individuals and companies operating in foreign countries.

Whether the present tax system discourages business enterprise is the topic discussed in Part Five. Three of the participants take the affirmative and one the negative. Those for the affirmative strenuously contend that venture capital is made almost unobtainable by the present confiscatory rates of taxation, which destroy incentives to invest, to produce, and to develop. On the other side it is contended that individuals in high income tax brackets are in fact freely investing in the capital markets, that the best method of encouraging business enterprise and expansion is to increase the purchasing power of the great mass of American consumers; and that the latter can be accomplished by raising wages, reducing prices, or increasing taxes on corporations and high individual incomes.

The concluding Part Six of the volume is devoted to the question whether the taxing power should be employed to regulate the economy. Here again the question is ably argued on both sides, the conservative view being that taxation should be an instrument for the sole purpose of raising revenue and the liberal approach being that taxation should
be designed primarily to stabilize the economy and eliminate the vicious cycle of "boom and bust".

In the opinion of the reviewer this volume is excellent reading. The subject matter is thought provoking and quite timely, particularly in view of the fact that the present Congress is contemplating a rather extensive revision of the Internal Revenue Code. The topics here discussed are among those being actively considered in the proposed revision.

JAMES FAY HALL, JR.†


Only the person who has successfully bridged the gap between law school and the active practice of law can thoroughly appreciate the problems which beset the fledgling lawyer. That gap may be a very short hiatus to the cool, level-headed man but it often proves to be an impassable chasm for the emotional or the ill-advised.

John Evarts Tracy, fully qualified for his task by twenty-six years of practice and by years of teaching in the Law School of the University of Michigan, has written a delightfully interesting book, The Successful Practice of Law which seeks to reduce the horrifying aspects of that gap to the barest minimum.

The law schools do a magnificent job of teaching substantive law. Many of them do more than an adequate job of teaching procedural law. But none of them has been able to prevent its graduates from having a sensation of utter helplessness when the responsibilities of their first cases are thrust upon them. Critic of the entire world at the moment he obtains his diploma the young lawyer begins to learn the virtue of humility when his participation in the law changes from the analytical to the synthetical side.

Tracy's book is not pedantic. Nor is it written in that chummy disarming style affected by one who would mislead the student as to the realities of professional life. It is a down-to-earth appraisal of the young lawyer's problems by one who himself had to meet those same problems and has seen other men meet them with varying success over a broad span of years.

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The book is written on a high plane. Although there are only seven pages avowedly devoted to the subject of legal ethics, I believe that most readers will observe that many topics embraced within that subject are touched upon throughout the work. The chapter entitled "How to Obtain Clients" does not give the answer which the struggling lawyer might seize as a touchstone but deals with the conventional methods by which lawyers become established in their profession.

Of particular value to the new lawyer are the chapters dealing with the drafting of legal instruments, the searching of titles and the fixing of fees.

Mr. Tracy writes from the viewpoint of one who has had wide corporation and trial experience. He seems at his best in the chapters entitled "How to Prepare a Case for Trial" and "How to Try a Jury Case". These chapters tie in very nicely with the appendix which is a transcript of the testimony (running some ninety pages) of a case tried in Michigan. Mr. Tracy comments on the progress of the case as it is unfolded through the testimony of successive witnesses, discusses many of the objections made to proffered testimony, considers the legal correctness of rulings made by the judge and intimateas his opinion respecting colloquies between opposing counsel.

I think that Tracy's book is worthy of reading by all students who contemplate entering on the practice of law.

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