THE ORIGINS OF JUDICIAL CONTROL OF FEDERAL EXECUTIVE ACTION

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The contest between the judicial and executive branches over the power of the courts to subject to judicial review administrative action legislative or judicial in character has been waged for over a century. In Marbury v. Madison1 the Supreme Court tentatively asserted its right to invalidate acts of the executive, as well as those of Congress, that were contrary to law. During the Jacksonian period the Court for the first time decided that it had the right to call the executive to account. But despite the firm position early taken by the Court, only when Congress has actively intervened on the Court’s side has the judiciary made real gains against the executive. In consequence the effective weapons of the Court have been largely statutory review proceedings rather than common law writs.

Several factors long served to delay a decisive conclusion on any phase of the contest. These were the immaturity of our social and economic regulatory legislation during the first century of the Supreme Court’s existence, the earlier preference of the Court for an oblique approach through original de novo review proceedings, and doubts as to the value and constitutional validity of an appellate approach. Only after many decades of statutory experimentation did Congress finally establish the policy of direct appellate review of administrative orders and only within the last few years has the Supreme Court held such approach constitutionally valid.

The constitutional issues have been whether the executive or the Supreme Court is the final arbiter in determining that the executive has fulfilled his constitutional duty of taking “care that the laws be

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1 Cranch 137 (U. S. 1803).
faithfully executed" and whether under Article III a constitutional court has power to review administrative determinations through appellate proceedings. Congress has had a stake in the situation for the laws are its laws. From time to time depending on its temper, strength, and understanding Congress joined in the struggle.

The Kendall Case.—A year after Roger B. Taney of Maryland first took his seat on the Supreme Court as successor to John Marshall, Francis Scott Key argued before the Court a case that, according to the new Chief Justice, "attracted some share of public attention." It was Kendall v. United States ex rel. Stokes. Key in his argument declared with great earnestness: "We hold this principle as applicable to all the distinct independent departments of our government: . . . [For the Constitution] to prescribe limits to power is idle, if the holder is to be the sole and unquestioned judge of what the limits are; if his possession of the power is conclusively proved by its assertion, he has unlimited power." But Key was not arguing that the judiciary should be judge of the limits of the powers of Congress or of the executive—precisely the opposite. His view was that were the judiciary the judge, it would have unlimited power. According to Key one of the three depositaries of power under the Constitution is placed on such an eminence that it may determine the limits of the powers to be exercised by either of the other of such depositaries. The Constitution alone prescribes the limits. Each of the three branches of Government is left by the Constitution to the independent maintenance of its own rights.

These were Jacksonian views. Andrew Jackson had left the Presidency only the year before. To his mind the executive, being an independent and coordinate branch of the Government, was not bound by decisions of the courts. So far as concerned powers vested in the executive, the President had the uncontrolled right to see to the execution of the laws and the Constitution as he (not the courts) understood them.

Amos Kendall had been appointed Postmaster General by Jackson. The Circuit Court of the District of Columbia had adjudged the limits of Kendall's powers by ordering the issuance of a writ of mandamus to compel him to pay certain claims for extra services rendered in carriage of the mails between Baltimore and Philadelphia, Washington and

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*Francis Scott Key, author of the National Anthem, was a member of the Maryland bar and a brother-in-law of Taney. Since 1833 Key had been United States District Attorney for the District of Columbia.


*Id. at 536.
other points. The claims had been credited and allowed by Kendall's predecessor, but in 1835 Kendall on entering office reexamined and disallowed them. Congress then by law authorized the Solicitor of the Treasury to determine the claims and directed the Postmaster General to credit the claimants with whatever sums the Solicitor decided to be due them. The Solicitor allowed the claims and communicated his decision to Kendall after the Attorney General had confirmed the Solicitor's construction of the law. Kendall then paid the claims in part but refused to pay an additional award of $39,462 made by the Solicitor for an additional six months period. In his autobiography Kendall refers to private understandings resulting in very low bids by claimants, later "improved"; to free transportation given members of Congress and other officials; to the offer to his wife of a carriage and pair of horses if she would induce him to allow the claims; and to the Solicitor's friendship for the claimants. Whether these or other considerations influenced Kendall is immaterial. The fact was he held his ground.

The claimants appealed to President Jackson who in view of the "difference of opinion between the Solicitor and the Postmaster General" referred the matter to Congress "as the best expounder of the intent and meaning of their own law."\textsuperscript{5} The Senate Judiciary Committee reported that Congress had had no intention that the Postmaster General should revise the Solicitor's determination. The full amount he decided to be due should be paid, and no further action of Congress was necessary. Whereupon the Senate adopted a resolution unanimously that the Postmaster General was warranted in paying and ought to pay the claims. But Kendall continued to refuse and on petition of the claimants the mandamus was ordered issued by the circuit court. In his answer Kendall had said: "It is doubted whether, under the Constitution of the United States, it confers on the Judiciary Department of the Government, authority to control the Executive Department in the exercise of its functions, of whatsoever character."\textsuperscript{6}

According to Key the case involved a conflict between two of the great depositaries of constitutional power. The judiciary had assumed a power that the executive resisted. According to Richard Coxe, his opponent, the case involved a consideration of high powers claimed by public officers in withholding their action where specific duties are imposed by positive statute;—of the means by which legislative author-

\textsuperscript{5}Ibid. at 534.

\textsuperscript{6}Ibid.
ity may be enforced;—and indeed, whether the judiciary be, or not, a coordinate and independent department of the Government.

The Constitution while distributing powers among the three branches of Government embodies no express statement as to whether each branch is to determine the scope of its own powers or whether some one branch, particularly the judiciary, is to be the final judge of the powers of either or both the others. *Marbury v. Madison* a quarter century earlier decided this question as between the judiciary and Congress. *Kendall v. United States* decided it as between the judiciary and the executive and thereby made possible the greater part of what we now know as federal administrative law.

The Postmaster General insisted that the President, not the courts, had the constitutional duty of taking care that the laws be faithfully executed.7 It rested with the President to see that this duty was carried out through the Postmaster General in the present case and therefore the Postmaster General was responsible to the President and not the courts. The President, if he determined the Postmaster General was imperfectly executing the law, could remove him.8 If inferior officers are to serve two masters, the President and the courts, which, the Postmaster General asked, is to prevail in case their commands conflict? Counsel for the claimants sarcastically commented that the claimants are to have no remedy save such as the Postmaster General "may graciously please to extend."

7U. S. Const. Art. II, § 3.

8Attorney General Butler who with Key defended the Postmaster General stated the argument as follows:

"What we say is, that where Congress pass a law for the guidance and government of the executive, in matters properly concerning the executive department, it belongs to the president to take care that this law be faithfully executed; and we apply to such a case the remark of Gen. Hamilton, in Pacificus, that 'he who is to execute the laws, must first judge for himself of their meaning.' Pacificus, Letter 1st. If, therefore, the executive be clearly satisfied as to the meaning of such a law, it is his bounden duty to see that the subordinate officers of his department conform with fidelity to that meaning; for no other execution, however pure the motive from which it springs, is a faithful execution of the law. In a case of this kind, one which thus concerns the proper executive business of the nation, we do, indeed, deny the power of the judiciary to interfere in advance, and to instruct the executive officer how to act for the benefit of an individual who may have an interest in the subject; but we hold, that every officer, from the lowest to the highest, who, in executing such a law, violates the legal rights of any individual, is liable to private action; and if this act proceed from corrupt motives, to impeachment, and in some cases, to indictment also." [Emphasis supplied.] Kendall v. United States *ex rel.* Stokes, 12 Pet. 524, 600 (U. S. 1838).
Justice Thompson wrote the majority opinion. The court upheld the issuance of the mandamus but the Justice tread lightly:

"the proceeding has been treated as an infringement upon the executive department of the government; which has led to a very extended range of argument on the independence and duties of that department; but which, according to the view taken by the court of the case, is entirely misapplied. We do not think the proceedings in this case interfere in any respect whatever, with the rights or duties of the executive; or that it involves any conflict of powers between the executive and judicial departments of the government."9

Chief Justice Taney in his dissent could "hardly understand, how so many grave questions of constitutional power have been introduced into the discussion of a case like this, and so earnestly debated on both sides."10

But there was no disguising the issue. The right to collateral review through the relatively unimportant common law remedies, such as trover, detinue, assumpsit, and replevin, against executive officers who had acted in excess of their jurisdiction, was not questioned. But could their actions be directly reviewed by the courts through mandamus, injunction or appeal?

In Marbury v. Madison the Supreme Court had of necessity to make a choice in proceeding with its double-barrelled objective of becoming the ultimate judge as to whether Congress or the executive had in any given instance acted within the law. The Court was in a position to assert such power over the executive branch by holding constitutional the act of Congress giving the Supreme Court original jurisdiction to issue mandamus and then proceeding to issue the writ against the Secretary of State. On the other hand the Court was also in a position to assert such power over the legislative branch by holding the act unconstitutional but in that event the mandamus could not issue. The Court chose to adjudge the act of Congress unconstitutional and thereby assert a power to control action of the legislative branch. But not content with this Chief Justice Marshall, although no judgment was entered against the Executive, proceeded in his opinion to assert the power of the Court also to control action of the executive branch.

Marshall's view was that as to "political powers" vested in the President by the Constitution, the President was accountable only to the country in his political character and to his own conscience. But where an executive officer is directed by law to do certain acts affecting indi-

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9 Id. at 610.
10 Id. at 626.
individual rights, he is amenable to the laws and "cannot at his discretion sport away the vested rights of others." The individual who considers himself injured may resort to the "laws of his country" for a remedy. At the same time the Court was careful to disclaim any pretensions of jurisdiction to intermeddle with the prerogatives of the executive. It is said that it is not the office of the person to whom the writ is directed, but the nature of the thing to be done, that determines the propriety of issuing mandamus.

But in *Marbury v. Madison* the Supreme Court, after asserting its right to control executive action, avoided forcing the issue with the executive. In the *Kendall* case likewise there was every opportunity to avoid forcing the issue by holding that the Circuit Court of the District of Columbia had not been vested by Congress with power to issue mandamus. In fact the majority and minority split on this precise point. Nevertheless the Court this time saw to it that the mandamus

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33Chief Justice Marshall said:

"By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. . . .

"But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

"The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Marbury v. Madison*, 1 Cranch 137, 165-6 (U. S. 1803).

35Marshall said: "... it is not wonderful that in such a case as this the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some, as an attempt to intrude in the cabinet, and to intermeddle with the prerogatives of the executive.

"It is scarcely necessary for the court to disclaim all pretensions to such jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Id.* at 169, 170.
issued. It held that mandamus would issue where the executive function was "ministerial."\textsuperscript{13} Thereafter for many years the conflict left the broad ground of executive independence and was fought over the narrow ground of what executive duties were ministerial.

The Kendall case rounded out the Supreme Court's theory of its Constitutional authority finally to determine metes and bounds of the powers of all three branches of the Government. On this phase of the controversy all members of the Court were in agreement. Congress could by law impose upon executive officers duties that Congress thought proper and that were not repugnant to rights protected by the Constitution. In such cases the duties grow out of and are subject to the control of the law, and not to the direction of the President. Justice Thompson met the issue squarely:

"It was urged at the bar that the Postmaster General was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law, and this right of the President is claimed as growing out of the obligation imposed upon him by the Constitution to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power which has no countenance for its support in any part of the Constitution, and is asserting a principle which, if carried out in its results to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice."\textsuperscript{14}

The National Intelligencer congratulated its readers on the court's "spirit of independence" and "resistance to the insidious encroachments of despotism." The decision, it said "will stand as a beacon to mark to demagogues in office, for all future time, the point to which their presumption and tyrannous disposition will be rebuked and effectively stayed."\textsuperscript{15}

This newspaper also at a subsequent date related a curious and perhaps apochryphal incident that it claimed to have occurred when the opinion was read in court. Attorney General Butler, who with Key argued the cause of the Postmaster General, rose and said that the Court had taken counsel as urging that the constitutional obligation

\textsuperscript{13}Attorney General Butler conceded this but limited "ministerial" so that the concession was valueless and amounted actually to a denial of the power. The duty of a clerk of court to record or give a compared copy of a judgment were his examples of ministerial duties.

\textsuperscript{14}See note 3 supra at 612, 613.

\textsuperscript{15}National Intelligencer, Washington, D. C., March 13, 1838, p. 3, col. 2.
imposed on the President to see that the laws were faithfully executed implied a power to forbid their execution. For himself he disclaimed such a doctrine and asked the court to expunge or modify that portion of the opinion so as to exonerate him from the imputation of having asserted any such principle. Justice Thompson observed he had endeavored faithfully and impartially to state the arguments of counsel. Justice Baldwin said there was no misapprehension whatever in the statement of the argument and Justice McKinley added that the doctrine attributed to counsel constituted the entire drift of their argument during the eight days counsel were heard. Justice Wayne then announced there was no mistake. He had listened with equal astonishment and indignation to the doctrine advanced by counsel and favored modifying the opinion on one ground only—that no memorial should go down to posterity which would state that such a dangerous and unfounded doctrine had ever been addressed to the court.¹⁶

The court in its opinion drew the distinction between executive and ministerial functions. The latter were subject to court control by mandamus, but not the former. This line of demarcation proved a bit mysterious. In Decatur v. Paulding¹⁷ two years later, the Court denied mandamus as regards an executive function that differed in exceedingly insubstantial legal respects,¹⁸ if at all, from those in the Kendall case two years before. Having forged its weapon the Supreme Court was content to bide a better day to wage vigorous battle with it.¹⁹ After

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¹⁶National Intelligencer, Washington, D. C., October 14, 1854, p. 3, col. 6. The newspaper asserts that the opinion was modified and that the original opinion as read is to be found in the archives of the court in the handwriting of Justice Thompson. An examination of the opinion book, minutes, and record in the case fail, however, to disclose any trace of the incident or of an original unmodified opinion.

¹⁷14 Pet. 497 (U. S. 1840). Justice Catron in a separate opinion commented:

"Between the circuit court of this district, and the executive administration of the United States, there is an open contest for power. The court claims jurisdiction to coerce by mandamus, in all cases where an officer of the government of any grade refuses to perform a ministerial duty; and of necessity claims the right to determine, in every case, what is such duty; or whether it is an executive duty, when the power to coerce performance is not claimed. Where the line of demarcation lies, the court reserves to itself the power to determine. Any sensible distinction applicable to all cases, it is impossible to lay down, as I think; such are the refinements, and mere verbal distinctions, as to leave an almost unlimited discretion to the court." Id. at 518.

¹⁸Each case involved the proper interpretation of Acts of Congress—in the Kendall case whether the Solicitor of the Treasury had jurisdiction to determine the claim and whether the Postmaster General had the duty of paying the award made; in the Decatur case, whether the claimant was entitled to claim under one or both of two Acts.

¹⁹President Van Buren following the decision in the Kendall case devoted to it a sub-
Marbury v. Madison was decided in 1803 it was fifty-four years before the Supreme Court held another act of Congress unconstitutional. After the Kendall case in 1838 it was forty-two years (1880) before the Supreme Court held another executive function to be ministerial.

The Common Law Remedies.—Prior to 1887 the fields of federal administration where review proceedings might have been desirable were few,—mainly customs and internal revenue, the regulation of immigration and navigation, and proprietary functions of the Government such as those relating to public lands, patents, postal service, and pensions and other claims. Congress had no considered policy of court review of administrative action and these fields, with few exceptions, were open only to whatever relief common law and equitable remedies afforded.

Among the remedies at law was an action for damages,\textsuperscript{20} for money had and received,\textsuperscript{21} or for recovery of property.\textsuperscript{22} Practically these were of little importance outside of revenue matters. Moreover, review of administrative orders by certiorari was apparently never attempted during this period. In 1913 when the attempt was first made certiorari was held by the Supreme Court to be unavailable for such purposes.\textsuperscript{23}

The Judiciary Act of 1789 gave the federal courts authority to issue "writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law."\textsuperscript{24} Among such writs was that of mandamus.

\textsuperscript{20}Tracy v. Swartout, 10 Pet. 80 (U. S. 1836).
\textsuperscript{22}However, suit for replevin was barred against revenue officers. \textit{Rev. Stat.} § 934 (1875), 28 U. S. C. § 747 (1940).
\textsuperscript{23}Degge v. Hitchcock, 229 U. S. 162 (1913). \textit{See Ex Parte} Vallandigham, 1 Wall. 243 (U. S. 1864); \textit{In re} Vidal, 179 U. S. 126 (1900); Reaves v. Ainsworth, 219 U. S. 296 (1911).
\textsuperscript{24}\textit{Rev. Stat.} § 716 (1875). The provisions of the same Act conferring original jurisdiction on the Supreme Court to issue mandamus were held unconstitutional. Marbury v. Madison, 1 Cranch 137, 173-176 (U. S. 1803). Mandamus was recently abolished by the Rules of Civil Procedure for the District Courts of the United States. However, the
This authority, however, was inapplicable to review of administrative orders for it was held to permit use of the writs only as an auxiliary to some suit over which the court had present or prospective jurisdiction original or appellate. The jurisdiction must already exist and could not be conferred by the writ.25

Mandamus was, however, available in the courts of the District of Columbia,26 within whose jurisdiction could be found most of the principal officers of the Government. Also the equitable remedy of injunction was available in all the federal courts including those of the District of Columbia. In most situations these two remedies afforded the only means for judicial consideration of administrative orders but their value was slight. Mandamus would not lie to review an exercise of judgment or discretion by an administrative officer or agency not to perform a function similar to that of a writ of error.27 Thus it would not lie to correct errors made by administrative officers or agencies in construing the law,28 much less to correct discretionary action of the type now dealt with as arbitrary or as being without substantial evidence to support it. The desire to avoid possibility of conflict between the courts and executive officers ran strong.

When the remedy of injunction was first employed to review administrative action the Supreme Court held that the doctrine of non-reviewability of administrative discretion was as applicable to the writ of injunction as to the writ of mandamus.29

relief heretofore available by mandamus may be obtained by appropriate action or appropriate motion under the practice prescribed in the Rules.


For examples of ministerial duties as to which mandamus would issue, see Butterworth v. United States ex rel. Hoe, 112 U. S. 50 (1884); United States ex rel. McBride v. Schurz, 102 U. S. 378 (1880); Kendall v. United States ex rel. Stokes, 12 Pet. 524 (U. S. 1838).
29Litchfield v. Richards, 9 Wall. 575 (U. S. 1870); Gaines v. Thompson, 7 Wall. 347 (U. S. 1869). See also Mississippi v. Johnson, 4 Wall. 475 (U. S. 1866).
The Statutory Remedies.—Ultimately Congress came to the aid of the courts. In 1887 it entered on a program of vesting the executive with broad regulatory powers over economic and social matters of national concern, and enacted the original Interstate Commerce Act. During the half century and more since that date a network of important economic and social regulatory measures has been spread over the pages of the Statutes at Large.

The common law and equitable remedies as developed up to this period promised little help in dealing with problems of judicial review of administrative orders of a legislative or judicial character emerging from such Acts. Therefore as a part of the program Congress began the development of and has continually experimented with statutory procedures under which the courts are specifically authorized to review executive orders following an administrative hearing and record. While prior to 1887 Congress had no established policy for review of administrative orders, since that time it has firmly established the policy of statutory review proceedings for orders issued under its major regulatory Acts.

In the meantime claims problems analogous to those on the Kendall and Decatur cases had been met by the Court of Claims legislation.

Contemporaneously in the light of the new Congressional policy of court review of administrative orders of a legislative or judicial character the Supreme Court expanded somewhat the availability of the common law remedies of mandamus and injunction, particularly the latter.

Mandamus has had a curious development under which two conflicting lines of decision have arisen. Compare Roberts v. United States ex rel. Valentine, 176 U. S. 221 (1900); Lane v. Hoglund, 244 U. S. 174 (1917); and Work v. United States ex rel. McAlester-Edwards Coal Co., 262 U. S. 200 (1923), in which mandamus was granted, with United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316 (1903); United States ex rel. Parish v. McVeagh, 214 U. S. 124 (1909); United States ex rel. Ness v. Fisher, 223 U. S. 683 (1912); and United States ex rel. Knight v. Lane, 228 U. S. 6 (1913); United States ex rel. Hall v. Payne, 254 U. S. 343 (1920); and United States ex rel. Girard Trust Co. v. Helvering, 301 U. S. 540, 543 (1937), in which mandamus was denied. The foregoing cases split on the question whether administrative construction of a statute is a discretionary, and so non-reviewable, function. In Work v. United States ex rel. Rives, 267 U. S. 175 (1925), the statute specifically committed the determination to administrative discretion and the court logically denied mandamus. More recently there has evolved the doctrine that where the construction of the statute is "not free from doubt" or "beyond peradventure clear," the administrative interpretation is "discretionary" and will not be reviewed by mandamus, Wilbur v. United States ex rel. Kadrie, 281 U. S. 206 (1930), even though the legal question goes to the jurisdiction of the administrative officer or agency. United States ex rel. Chicago Great Western R. Co. v. Interstate Commerce Commission, 294 U. S. 50 (1935). Contra: Interstate Commerce Commission v. United States ex rel. Humboldt SS. Co., 224 U. S. 474 (1912).
Four general types of statutory review proceedings have been developed. One of these is the review *de novo*, an original proceeding to enforce an administrative order that has no other penal or civil sanctions. The record is not brought up from below as on appeal or certiorari but is made in court and there is no statutory prescription of the extent of the review to be given by the court save that in some instances the administrative findings are declared to be prima facie evidence of the facts found.

A second general type of statutory review proceeding is the statutory bill in equity, an original proceeding to prevent enforcement of an administrative order that has been given the statutory sanction of heavy penalties for its violation. At the start the statutory bill in equity was a *de novo* proceeding and was without statutory prescription of the extent of review. However under court decisions it rapidly developed into an appellate proceeding in which the review was based solely on the evidence of record before the administrative officer or agency. Further by court decision the extent of the judicial review was limited by doctrines as to the necessity for administrative findings of fact and as to the conclusiveness of such findings where issues of "jurisdictional" or "constitutional" fact are not involved.

The third general type of statutory review proceeding is the petition for review, an original proceeding to enforce or set aside an administrative order that usually has no penal or civil sanctions. The proceeding is strictly appellate and not *de novo* in that by statute the administra-

Where affirmative rather than negative administrative action is involved, injunction takes the place of mandamus, and this remedy has fared better. In 1893 injunction was first granted to review administrative action. The case involved the jurisdiction of the administrative officer for his action was alleged to be beyond the authority delegated to him and therefore ultra vires. Noble v. Union River Logging Railroad, 147 U. S. 165 (1893). But compare American School of Magnetic Healing v. McAnnulty, 187 U. S. 94 (1902), *with* Bates & Guild Co. v. Payne, 194 U. S. 106 (1904). Injunction will be denied where the statute specifically commits the determination to administrative discretion. Adams v. Nagle, 303 U. S. 532 (1938); Perkins v. Lukens Steel Co., 310 U. S. 113, 127–8 (1940).


tive record is brought before the court and the court decision is based thereon. Also the extent of the judicial review is defined through statutory prescriptions as to administrative findings and their conclusiveness.

The final general type of statutory review proceeding is the direct appeal. Here an appeal is taken to a court from the administrative order in substantially the same manner as from a lower court decision. The statute usually contains prescriptions as to the extent of the judicial review to be given.

These Congressional experiments involved a number of constitutional questions—whether review of administrative action may be only through an original proceeding or may be appellate; whether the review must be de novo or may be based solely on the administrative record; and whether the extent of judicial review may be unrestricted or must be "narrow" and confined to "questions of law"?

The earliest of these statutory proceedings is the review de novo. Since 1906, however, the newer types of statutory review proceedings, the statutory bill in equity, the petition for review, and the direct appeal, have evolved in the order named and now exist side by side. Today review de novo is only occasionally selected by Congress. However, historically it is of great importance since, following the conclusion of the Supreme Court in the Kendall case, that the executive branch could be called to account for its actions through mandamus or its counterpart the mandatory injunction, the present basic principles of judicial review of executive or administrative action were largely developed in connection with review de novo rather than the writs of mandamus and injunction.

The Ritchie Case.—The problem of developing statutory review proceedings remained complicated for many years by an early doubt that existed as to whether a constitutional court could be required by Act of Congress to review an order of an administrative officer or agency otherwise than in an original de novo suit. Thus the Act of March 3, 1851,\(^9\) provided for "appeals" from the Board of Commissioners on Private Land Claims in California to a United States District Court. Judgment was to be rendered by the court on the pleadings and evidence before the Board of Commissioners and such additional evidence as the court might order. In \textit{United States v. Ritchie},\(^3\) decided in 1855, the


\(^3\) 17 How. 525, 533-534 (U. S. 1855). To the same effect see Grisar v. McDowell, 6 Wall. 363 (U. S. 1868). Cf. as to appeals from a legislative court to a constitutional
objection was raised that the Board of Commissioners was not a court and so was not and could not be vested with "judicial power," that is, the judicial power that by Article III of the Constitution is conferred solely on the constitutional courts. On the other hand the district court being a constitutional court could exercise only Article III judicial power and would not be so doing in deciding an appeal from the Board of Commissioners. Therefore, the argument ran, the Act was unconstitutional.

This question of the constitutional validity of legislation providing for appeals from an administrative officer or agency to a constitutional court was not squarely decided by the Supreme Court until 1933. In the Ritchie case the Supreme Court avoided the issue. It said that the proceeding while called an appeal by Congress was in substance an original suit in the constitutional court; the removal of the certified transcript of the proceeding, papers, and evidence from the Board of Commissioners to the court was but a mode of instituting such original suit; and the court was not merely to reexamine the case as heard and decided by the Board of Commissioners but on the contrary was to hear it de novo. By this reasoning the court was able to conclude that the Act was constitutional. The implication is clear, however, that an appellate proceeding would have been declared unconstitutional.

Statutory Review De Novo Proceedings.—The Ritchie case falling as it does in the period between the Kendall case and 1880 when the court was still reluctant to review administrative action by mandamus or other direct proceedings reflects its desire to approach the problem obliquely through collateral de novo proceedings and thereby lessen the possibility of conflict with the executive. Later, recalling to mind Hayburn's Case, the court on the other hand did not wish to place itself in the position of performing non-judicial administrative duties as would result from de novo review or alternately of becoming merely an executioner of administrative orders "in a ministerial way."

With the original Interstate Commerce Act of 1887 Congress first intervened in the situation in a substantial manner through legislation. In framing that Act, Congress was faced with two problems—an adequate proceeding to enforce the orders of the Interstate Commerce


2 Dall. 409 (U. S. 1792).
Commission, and an adequate proceeding for court review of such orders before they became effective. The injunction afforded a solution in that the court could review the order and, if valid, enforce it by court decree in the same proceeding. The proceeding would also avoid the difficulties implied in the Ritchie case for the proceeding would be an original de novo suit. There was little in the history of the use of the injunction as a means of reviewing administrative action that afforded any likelihood of substantial court review of the discretionary powers vested in the Commission. But neither had the courts given consideration to a situation where Congress had sought court review of administrative action by making statutory provision for it and had by statute facilitated such review by requiring administrative hearing, record, and findings thereon.

Save for the Ritchie case, statutory review de novo proceedings began with the original Interstate Commerce Act. There Congress provided that orders of the Commission were enforceable only on application by the Commission or any person interested to a federal circuit court sitting in equity, for an injunction restraining the carrier from continuing to violate the Commission's order. The Commission's order was not itself binding in the sense that violation of it was subject to penalties or similar sanctions. The Act further required the Commission to make a report on any investigation by it and to include in the report the findings of fact on which the Commission's conclusions were based. To give some added weight to the Commission's order the Act declared that in all judicial proceedings such findings of fact shall be "prima facie evidence as to each and every fact found."

\*24 Stat. 384 (1886), 49 U. S. C. §§ 15, 16 (1940). Doubt arose as to whether the enforcement provisions were valid, particularly in cases involving reparation orders, inasmuch as a jury trial was barred by the requirement that the court sit in equity. The view was that a claim for pecuniary damages presented a case at common law in which under the Constitution the defendant was entitled to a jury trial even though the complainant might have waived it by invoking the particular type of proceeding. In consequence the Commission refused to order, require, or recommend pecuniary reparation. Cf. Western New York & P. R. Co. v. Penn Refining Co., 137 Fed. 343, 349 (C. C. A. 3d 1905), and cases cited. An amendment to meet this situation was made by Congress in 1889. 25 Stat. 859 (1889), 49 U. S. C. § 16 (1940). The amendment divided the Commission's orders into two classes, those founded, and those not founded, on a controversy requiring a trial by jury under the Seventh Amendment to the Constitution. In the former, the court sat as a court of law with a jury unless waived; in the latter, as a court of equity without a jury. The prima facie effect of the Commission's findings was retained for both the law and equity proceedings.

\*24 Stat. 384 (1886), 49 U. S. C. § 14 (1940). There was also a repetitious provision
From the outset the courts concluded that the Act did not impose on them non-judicial duties and that the proceeding for enforcement was an original and independent proceeding. The courts being required to give the findings of the Commission prima facie effect only, there was no encroachment on the courts' proper functions. That requirement was merely a rule of evidence and as such not open to valid constitutional objection. 38

There promptly cropped out a tendency often present in administrative proceedings where review is not of a strictly appellate character. Carriers frequently withheld the larger part of their evidence from the Commission and first adduced it in the circuit court. While the Supreme Court expressed its disapproval of this procedure on the part of the carriers, at the same time it stated that in the trial in the circuit court neither party was to be restricted to the evidence that was before the Commission. 39 New evidence, as well as that given before the Commission, was commonly introduced before the circuit court. The proceeding was therefore in practice as well as legal theory de novo, and the courts were not concluded by the findings of the Commission or confined to the evidence before it but would determine the case on the evidence adduced in the circuit court. 40

A distinction between questions of law and questions of fact was applied. It succeeded the older distinction between ministerial and discretionary functions applied in non-statutory review by mandamus or injunction. Whether the Commission had power to prescribe reasonable rates for the future was a question of law for the courts to determine. But whether an existing rate was reasonable was a question of fact. On this latter question it was the function of the Commission to consider the facts, give them their proper weight, and make its findings to

that in enforcement proceedings the findings of fact in the report shall be "prima facie evidence of the matters therein stated." 24 STAT. 385 (1886), 49 U. S. C. § 16 (1940).


which the court in turn would give proper effect as prima facie evidence.41

What constituted the proper effect to be given to the fact findings of the Commission as prima facie evidence remained a nebulous concept.42


The following cases turned on "questions of law":

In Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific R. Co., 167 U. S. 479 (1897), the order of the Commission was refused enforcement by the Court on the ground that it prescribed rates for the future which was an exercise of a legislative power not granted the Commission by the statute. Thereafter the Commission confined itself to recommending new rates.

In several cases an order of the Commission was refused enforcement on the ground that the Commission had misinterpreted the provision of the statute relating to "traffic of like kind under substantially similar circumstances and conditions" and as a result had excluded from consideration evidence before it that it should have considered. In all these cases the Court carefully considered the evidence for the purpose of showing that the facts were of a sort that the Commission should have considered. Texas and Pacific R. Co. v. Interstate Commerce Commission, 162 U. S. 197 (1896); Interstate Commerce Commission v. Alabama Midland R. Co., 168 U. S. 144 (1897); Louisville and Nashville R. Co. v. Behlmer, 175 U. S. 648 (1900); East Tennessee, Virginia & Georgia R. Co. v. Interstate Commerce Commission, 181 U. S. 1 (1901); Interstate Commerce Commission v. Clyde S.S. Co., 181 U. S. 29 (1901).

42The Supreme Court said that the conclusions of the Commission based on the findings were presumed to be correct and, when concurred in by the circuit court, would not be set aside unless the record before that court established that clear and unmistakable error had been committed. Cincinnati, Hamilton and Dayton R. Co. v. Interstate Commerce Commission, 206 U. S. 142 (1907); Illinois Central R. Co. v. Interstate Commerce Commission, 206 U. S. 441 (1907). It was in this latter case that the court made the oft quoted remark: "The findings of the Commission are made by law prima facie true, and the Supreme Court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience."


On the other hand the circuit court should weigh the evidence before it and if such evidence overcame the prima facie case made by the findings [Cincinnati, New Orleans and Texas Pacific R. Co. v. Interstate Commerce Commission, 162 U. S. 184 (1896); Interstate Commerce Commission v. Alabama Midland R. Co., 168 U. S. 144 (1897)], or if the Commission in making its findings ignored evidence before it that it should have considered (Texas and Pacific R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 239 (1896); Interstate Commerce Commission v. Alabama Midland Co., 168 U. S. 144 (1897); Louisville & Nashville R. Co. v. Behlmer, 175 U. S. 648 (1900); East Tennessee,
An appellate court that rejected the Commission's findings and refused enforcement of its order would not make an independent investigation of the facts and formulate substitute findings even though the record were in a condition to do so. On the contrary, the court would in effect direct that the cause be remanded by the circuit court to the Commission in order that it might, if it saw fit, make new findings of fact and determine the matter in conformity to law. In such redetermination the Commission would proceed on the evidence already introduced and on any additional evidence that it might allow to be introduced.43

Railroad counsel commented that the hearing before the Commission "had no significance except as preliminary to a judicial proceeding." Ultimately, however, in a series of cases arising before, but decided after, the Hepburn Act of 1906 had superseded the statutory review provisions of the original Interstate Commerce Act, the Supreme Court showed a tendency to accept the Commission's findings if the controversy turned primarily on issues of fact.44 Earlier cases in which the court had exhaustively considered the evidence in the record before the circuit court and had usually refused to enforce the Commission's findings and conclusions, were explained as being cases in which there was "a single, distinct and dominant proposition of law which the Commission had rejected." Those cases involved "mere constructions of the statute, delegations of the Commission's duties and powers."45 Whether the Commission gave too much weight to some parts of the evidence and too little weight to other parts was a question of fact and not of law, and the court intimated that this was not its concern so long as the Commission did consider all the circumstances pertinent to the problem before it.

Virginia and Georgia R. Co. v. Interstate Commerce Commission, 181 U. S. 1 (1901); Interstate Commerce Commission v. Clyde S.S. Co., 181 U. S. 29 (1901), then the circuit court should not accept the Commission's findings as the basis for its action.


Illinois Central R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 457, 466 (1907).
In general the review of the Commission's orders provided by the original Interstate Commerce Act of 1887 lacked appellate characteristics. Thus the review proceeding was an original proceeding in the lowest federal court and the administrative record was not brought before the court as by a writ of certiorari. It was a de novo proceeding in that the review was not based exclusively on the evidence before the Commission but on the evidence adduced by the parties in court. This evidence would include not only the findings and order of the Commission as a part of the pleadings but it would also include a transcript of the evidence before the Commission, if introduced by one of the parties, and such additional evidence as the parties might offer. However, slanting toward the appellate concept was the principle finally adopted that the findings of the Commission were to be accepted by the courts unless the evidence of record in the circuit court failed to sustain them or pertinent evidence was ignored in making them; also the principle that in such event the case in effect was to be remanded to the Commission for further administrative proceedings.

So it came about that by a handful of decisions around the turn of the century arising under long since repealed provisions of the original Interstate Commerce Act, the Supreme Court arrived at the rudiments of the legal principles that still govern in statutory review proceedings the relationship of the courts to administrative action based on an administrative hearing, record, and findings. The court's function was to be one of review. Not only would the court see to it that non-discretionary executive action was carried out in accordance with law but also the court would not leave wholly uncontrolled discretionary executive action as it had previously done under non-statutory mandamus and equity proceedings. It would not limit itself to ministerial enforcement of the order nor even to correction of the more obvious errors of statutory interpretation made by the administrative agency in arriving at the order or in determining its jurisdiction. On the contrary the evidence would be considered by the court in the light of whether it supported or failed to support the order. But neither would the court go to the opposite extreme. It would not make and substitute for the administrative order one that the court deemed proper. It would not wholly take over the administrative function. Thus the limited review on fact issues that ultimately became the doctrine of "conclusiveness" of administrative findings of fact supported by at least some evidence, had its beginnings.

Once these relationships were established there was left open for
future decision a field that after all is comparatively narrow,—mainly refinements as to the quantum of deference to be paid the administrative findings of fact, and the necessity for them and for the conformance of the order to them; questions as to the extent to which the court should limit itself to the evidence in the administrative record or give de novo consideration to any issue of fact by permitting additional evidence to be offered in court; questions of court control over the "due process" of the administrative procedure; and questions as to the exclusiveness of the administrative jurisdiction in the first instance\(^46\) and the necessity for first exhausting administrative remedies.

*Later De Novo Proceedings.*—The review provisions of the original Interstate Commerce Act were superseded by those still in effect under the amendatory Hepburn Act of 1906.\(^47\) By the Hepburn Act orders of the Commission are classified as those for the payment of money, i.e., reparation orders, and all other orders, i.e., non-reparation orders. As to reparation orders (but not non-reparation orders) there was retained with a little remodeling the former system of court review in an independent de novo enforcement proceeding in which the administrative findings of fact have prima facie effect.

A reparation order is an award of damages for injury incurred from unjustly discriminatory or unreasonable rates and the like, together with a direction to the carrier to pay the amount awarded. The statute declares it to be the duty of the carrier to comply with the order. The statute further provides that such an order can be enforced by any person for whose benefit it is made. Suit is instituted by a petition filed in a federal circuit court (now district court) or in a state court of general jurisdiction setting forth the cause for damages and the order of the Commission. The plaintiff having sought the Commission’s order brings suit, whether in federal or state court, because of the carrier’s refusal to comply with the order and may not recover more than the amount awarded by the order. The order and refusal to comply is a condition precedent to the suit. But the cause of action is not created by the order. It rests on the liability of the carrier for the injury caused.\(^48\) If the suit is brought in the federal court it is in all respects

\(^46\) Even here the foundations had been laid. See Texas and Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 (1907).


like other civil suits for damages except that the findings and order of the Commission "shall be prima facie evidence of the facts therein stated."

In *Meeker v. Lehigh Valley R. Co.* the constitutionality of the Hepburn Act proceeding for review of reparation orders by suit in a federal court was upheld. Again the court regarded the provision for prima facie effect of the Commission's findings of fact as a mere rule of evidence, a presumption that is rebuttable. It pointed out that no defenses are cut off, no obstacles are imposed to a full contest upon the issues, and the right to trial by jury is preserved. There is no denial of due process of law. Further the findings need state only the ultimate, not the evidential facts.

If the order and findings of the Commission are introduced at the trial in court but no other evidence, then their effect as prima facie evidence is to establish the plaintiff's case. If it is urged that the evidence before the Commission was not sufficient to support its findings, then it is necessary that a transcript of such evidence be introduced at the trial. Unless all the evidence before the Commission is introduced at the trial, it is impossible for the court to conclude that such evidence was insufficient to support the findings and order. The order therefore will be sustained. However, new evidence, in addition to all the evidence that was before the Commission, may be introduced at the trial. The question then is whether the evidence introduced at the trial supports the Commission's findings and order. If it does, the order will be sustained.

While in federal regulatory legislation review of administrative orders by a statutory original *de novo* suit has given way to review by the statutory bill in equity or by the statutory petition for review or

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4936 U. S. 412 (1915).
statutory direct appeal, still this older type of review is retained in a substantial number of instances even in recent legislation. Thus the proceeding established by the Hepburn Act for review of reparation orders under the Interstate Commerce Act has been followed by Congress for reparation orders under the Shipping Act of 1916, the Packers and Stockyards Act of 1921, the Perishable Agricultural Commodities Act of 1930, and the Federal Communications Act of 1934. Also review de novo proceedings for non-reparation orders have been provided in the Capper-Volstead Cooperative Associations Act of 1922, the Fishermen’s Cooperative Associations Act of 1934, and presumably in the rather ambiguous Foreign Trade Zone Act of 1934. This application of a statutory de novo review proceeding to non-reparation orders is a reversion to a form of review that had apparently been abandoned for such orders by Congress in 1906. In the light of more recent constitutional developments the application of such a broad form of review to matters of public right as distinguished from matters of private right suggests possible constitutional difficulties.

Under the Revenue Act of 1924 the statutory review de novo proceeding was also provided for the review of orders of the Board of Tax Appeals. However, this method of review was soon altered to an appellate review by the Revenue Act of 1926.

Today on the foundation of the history making but long forgotten Kendall case, reinforced by the supplementary principles developed in the statutory review de novo under the Ritchie case and the original Interstate Commerce Act, there has been built the present structure of

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55 For this distinction see Crowell v. Benson, 285 U. S. 22 (1932).
59 Professor Dowling, however, gives it a place of honor in the second and third editions of his casebook, see NOEL T. DOWLING, CASES ON CONSTITUTIONAL LAW 69 (3d ed. 1946).
judicial control of executive or administrative action. With Congressional aid the movement has subsequently proceeded with Supreme Court approval through the statutory bill in equity, the petition for review,65 and the direct appeal. Now it is recognized that direct appeal from administrative action is wholly appropriate if it has a statutory basis66 and that an original de novo proceeding is not essential to the bringing of review of administrative action within the judicial powers of a "constitutional" (as distinguished from a "legislative") court.67 However, to fall within the judicial powers of a constitutional court there is one essential, though vague, requirement. The extent of the judicial review prescribed by statute must not result in the court proceeding becoming other than a "case" or "controversy" so that the review is administrative rather than judicial in character.68

Finally the recent Administrative Procedure Act has tied some of the threads together by making judicial review of administrative action the rule except where specifically precluded by statute or by statutory commitment of the administrative action to the administrator's discretion. The form of review is left to special statutory prescription or in its absence or inadequacy to any applicable form of legal action including declaratory judgment, writ of prohibition, mandatory injunction or habeas corpus and at the same time the attempt is made to define the scope of review.69 However, it has taken just over a century of constitutional development to nail down in substantial fashion by a combination of Judicial and Congressional action the doctrine that it is a duty of the courts, and not exclusively that of the Executive, to see to it not only that "the laws be faithfully executed" but also that discretion committed to the executive under the laws be fairly administered.

65Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U. S. 716 (1929).
IMMUNITY OF THE STATE FROM SUIT BY ITS CITIZENS—TOWARD A MORE ENLIGHTENED CONCEPT

Homer Allen Walkup*

PART I

"... For in a way beset with those that contend, on one side for too great Liberty, and on the other side for too much Authority, 'tis hard to passe between the points of both unwounded..."

Russian Volunteer Fleet v. U. S.² squarely presented the fundamental conflict between governmental ethics and governmental philosophy involved in the sovereign immunity doctrine. A Russian corporation sued the United States in the Court of Claims to recover damages with respect to two ships which it had had under construction in this country, and which had been seized by the Emergency Fleet Corporation. The relevant statute consented to such a suit by citizens or subjects of any government which accorded to United States citizens the right of suit against the foreign government in its courts. The Supreme Court reversed the decision of the Court of Claims which had dismissed the litigation on the ground that the consent to suit by "citizens or subjects of any government" applied only to citizens or subjects of a government recognized by the United States, the Soviet government not having been then so recognized. The opinion of the Court, per Chief Justice Hughes, assumed that property of our nationals in Russia was subject to confiscation by the authorities in control of that state. Nonetheless, it was considered that the Judiciary Statute had to be interpreted in a manner consistent with the constitutional guaranty against the taking of private property for public use without just compensation therefor.³ Lynch v. U. S. averted head-on collision between the sovereign immunity doctrine and the Fifth Amendment through tortured statutory construction.⁴

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²Thomas Hobbes, in letter to M. Francis Godolphin, April 15/25, 1651, Paris, introducing Leviathan.

³282 U. S. 481 (1931).

⁴Alien friends being held to come within the ambit of that guaranty.

⁵292 U. S. 571 (1934). The Economy Act of 1933, in repealing several statutes pertaining
Dicta in *Perry v. U. S.*—the Gold Clause Case upholding the power of the federal government to vary the terms of its solemn bonded obligations—presents the philosophical-ethical conflict in bold relief. Mr. Justice Stone's assertion of the futility of polemic disputation, since "... by the exercise of the undoubted power of the Government to withdraw the privilege of suit upon its gold clause obligation," the matter could have been transferred wholly to the realm of speculation, was countered by the observation of the Chief Justice that "The Congress cannot invoke the sovereign power of the people to override their will" as declared in the Constitution.8

The foregoing cases are believed to delimit a borderline with respect to judicial relaxation of the immunity of the United States against suits *ex nominem* to which it has not consented. Oddly enough, the most extreme involved a suit by a foreign nation rather than by a citizen. In all of them, a consent to suit had been given by the Congress, the issue being as to the extent of withdrawal or limitation of that consent. In the *Perry* case, Chief Justice Hughes did not express doubt with respect to the nonsuability of the government upon an obligation as to which no consent to suit had ever been given, but only as to the validity of withdrawal of a consent to suit in existence at the time the governmental obligation was contracted. Hence, what is this rule, not mentioned in the Constitution (in so far as the federal government is concerned) which transcends even our most sacred express constitutional guaranties? From whence does it come?

The fundamental issue involved is that of the relative supremacy of the law as opposed to the state or ruling power. Scott offers abundant evidence that the dominant philosophy through the ages has been that

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5*294 U. S. 330 (1935).*

6*Id. at 360.*

7*Id. at 353.*

8See further and contrast U. S. v. Union Pacific R. Co., 98 U. S. 569 (1879), with The Sinking Fund Cases, 99 U. S. 700 (1879), all growing out of the Credit Mobilier Scandal, and involving differentiation by the Court between the rights of the United States as a
states and rulers are subordinate to law,⁹ but the contrary theory appears to have had advocates who succeeded in reaching a somewhat wider audience.¹⁰ Although Bodin’s statement that there can be no

creditor of the corporation which was being plundered, and as sovereign in protecting the public interest. The line seems tenuous indeed.

⁹Scott, Law, The State and The International Community 324 et seq. (1939). Scott asserts that the concept of supremacy of law may be traced to Aristotle, although the constitution advocated by Aristotle was to be imposed upon—not originate from—the people. The Stoics are given credit for combining the notion of political equality with the Aristotelian concept of supremacy of law, producing the political pillars of the Roman state. U1p. 1.4.1: “Whatever the Emperor has decreed has the force of law since by the lex regia which was passed concerning his sovereignty, the people conferred upon him all their own authority and power.” The first ten words of the foregoing statement translated from the Corpus Juris will sometimes be found cited to support absolute monarchic principles, the remainder of the sentence, beginning with the word “since”, which so clearly indicated the source of the royal power, being omitted through inadvertence or design. The Italian, Marsiglio, [Defensor Pacis (C. W. Previte-Orton’s trans., 1928)] writing in the Fourteenth Century, reiterated the proposition that the chief executive was but the temporary repository of the ultimate power of the people. In 1528, almost fifty years before Bodin’s Six Livres was published, Francisco de Vitoria delivered De Potestate Civili from his chair in the University of Salamanca, Spain, urging that the king was bound by his own laws.

³⁰Ibid. Scott traces the aberrances, which culminated in the works of Bodin, as follows. St. Gregory the Great in the Sixth Century advanced the theory of absolute power of the temporal ruler, the same doctrine being upheld by Gregory of Catino in the Twelfth Century. Circum 1379, Wycliffe’s De Officio Regis treated of the wickedness of failing to fulfill the duty of absolute obedience to the ruler, a contemporary related point of view expressed by Bartolus and his pupil, Baldus, being that while the ruler “ought” to comply with the law, he was actually legibus solutus. De Ortu et Auctoritate Imperii Romani, written about 1446 by Aeneas Sylvius (later Pope Pius II) declared both the absolute power of the emperor and his supra-legal status. Machiavelli’s absolute and unscrupulous prince represented one of the earliest Sixteenth Century viewpoints. The earlier writings of Martin Luther asserted the supremacy, by divine right, of the king over both subjects and law, but Luther later altered his theories. Tyndale’s Exposition on Matthew (1532) flatly asserted that “The authority of the King is the authority of God.”

In 1576, Jean Bodin, a practitioner and lecturer on law, and a scholarly historian, published his Six Books of the Republic, which, although too astutely authored to afford much comfort to those prating of “divine” rights, did place the king above responsibility to the people, their representatives, and their law; the sovereign being considered subject only to the law of nature, the Divine law, and the law of nations. Bodin recognized that the power originated from the people, but the unconditional grant of such power to the prince was considered to have placed him next to God. Such “sworn promises” as the prince may have made to his subjects (regardless of whether the grant of power was conditioned thereon) were dependent for their efficacy upon their reasonableness—this being a matter for the prince’s determination; any obligation existing rested merely upon promise—not oath—as it was too belittling for the prince to be oathbound to his inferiors. The
right as against the authority which makes the law upon which the right depends, was not to be enunciated for centuries, there is no authoritative evidence that there was ever a time in either Anglo-Saxon or Norman England that a king or a lord having power to establish a court was himself suable in the court so established. On the other hand, the earliest legal writers quite positively assert the contrary. Considering that the earlier feudal courts had as their primary raison d'etre the provision of a forum in which the lord could lay down the law to his subordinates—not administer justice among them—the result is hardly surprising. The royal courts having begun as administrative agents of capstone was provided by the proposition that even though the promissory obligation were reasonable, the prince might disregard the obligation if his private convenience and domestic affairs were thereby disturbed.

Michael L'Hopital, for many years Chancellor of France, and contemporary of Bodin, thought that the king ought voluntarily to submit to law, although not bound thereby. Pro Regibus Apologia, published in 1581 by Adam Blackwood, a Scotsman, argued the unlimited authority of the king and the absence of legal restraint on the royal power, later echoed and amplified in The True Law of Free Monarchies, written in 1598 by Blackwood's King, James VI of Scotland, who five years later became James I of Great Britain. In 1596, De Republica by Peter Gregory of Toulouse expounded at length the theory of unlimited sovereignty. William Barclay's De Regno et Regali Potestate in 1600 maintained the king above all control either by subjects or law. In 1605 the tractate, Regales Disputationes Tres, of Alberico Gentili relied upon Ulpianus to support the absolute and unlimited princepate, overlooking the simultaneous recognition by Ulpianus of the ultimate source of the power.

Hobbes', De Cive (1642), Leviathan (1671) and Behemoth (1679), starkly set forth the ultima thule of absolutism, recognizing with regret the practical impossibility of governmental control of thought itself, though enthusiastically advocating the best possible substitute in control by the state of all external modes of influencing thought. See, Vaughan, Studies in the History of Political Philosophy (England 1925).

Mr. Justice Holmes' theory "that there can be no legal right as against the authority that makes that law upon which the right depends," expressed in Kawanankoa v. Polynblank, 205 U.S. 349, 353 (1907), and elaborated in The Western Maid (U.S. v. Thompson), 257 U.S. 419 (1922), was borrowed (with full credit to the authors) from Bodin and Hobbes. For recent discussion relative to this aspect of Holmes' philosophy, see, Palmer, Hobbes, Holmes and Hitler, 31 A.B.A. J. 569 (1945); Palmer, Defense Against Leviathan, 32 A.B.A. J. 328 (1946); Letter of Walter L. Nossaman, with reply by Ben W. Palmer, 32 A.B.A. J. 615 (1946); Briggs, Justice Holmes Was Not a Ladder to Hitler, 32 A.B.A. J. 631 (1946), and Palmer, Reply to Mr. Charles W. Briggs, 32 A.B.A. J. 635 (1946). It should be noted in this connection that another manner of stating the supremacy of the law versus supremacy of the state proposition, is in terms of the jurisprudential issue of natural law as opposed to positive law. The authoritarian political theories of Bodin and Hobbes were followed by Bentham, and articulated and applied to the law by Austin. Hence the description of "there can be no legal right as against the authority which makes the law upon which the right depends" as "an Austinian concept."
the king, later becoming proprietary enterprises conducted purely for profit, one would hardly expect to establish rights therein against either principal or proprietor. The procedural rationalization of the nonsuability of the king was that inasmuch as all writs emanated from the king, he could not, by his own writ, command himself. There is a thoroughly discredited line of authority asserting the proposition that the king was at one time freely suable, all such authority stemming from what Holdsworth terms a "1307 counsel's fable."\(^3\)

From the bare fact of the nonsuability of lords and kings in their own courts, one should not leap to the conclusion that there were any widely entertained notions of royal supremacy or incapacity for wrongdoing on the part of lords or king in medieval English concept.\(^2\) Neither in

\(^{3}\)Y. B. 33-35 Edw. I (R. S.) 407, cited in 3 Holdsworth, History of English Law 462 (1922). The highly apocryphal *Mirror of Justices*, published, perhaps by one Andrew Horne, a fishmonger, in the latter part of the reign of Edward I, though there is evidence that it may have been written at an earlier date and possibly brought up to date by Horne or some other person or persons, stated, c. 1, sec. 3, that at sometime prior to a period ending between the reigns of Alfred and Edward I, "it was ordained, that the king's courts should be open to all plaints by which they had original writs without delay, as well against the king or the queen, as against any other of the people, for every injury but in case of life, when the plaint held without writ." This was virtually a repetition of the 1307 counsel's fable. Chapter 5, sec. 1, styled Abuses of The Common Law, complained that "the first and chief abuse is that the king is above the law, whereas he ought to be subject to it, as it is contained in his oath." The *Mirror* was in the nature of a paranoiac tract, dwelling at length upon what was wrong with the Fourteenth Century socio-political order, and hearkening back to the good old days of King Alfred when corrupt judges were hanged by the score. It was largely ignored for centuries until Sir Edward Coke picked it up and credulously accepted it as a correct statement of earlier law. For this reason, it will be found cited from time to time by American jurists, and propositions historically thus supported should be viewed with strong suspicion. Judges and counsel in the reign of Edward III reasserted the fable of early free suability of the king, indicating the era of such suability to have existed up through the reign of Henry III. Y. B. Hil. 22 Edw. III, pl. 25; Y. B. Trin. 24 Edw. III, pl. 40 (Wilughby, J); Whistler's Case, Y. B. Mich. 43 Edw. III, pl. 12, 10 Coke 64a, (statement by Cavendish, *arguendo*). The fact that Bracton, who lived and wrote during the reign of Henry III, repeatedly states that the king was not so suable (n. 15, *infra*), best belies the statements contained in the Year Books. American judges have, however, been misled thereby. See opinion of Wilson, J., in Chisholm, Ex'r. v. Georgia, 2 Dall. 419 (U. S. 1793); and opinion of Miller, J., in U. S. v. Lee, 106 U. S. 196 (1882). Gray, J., wrestled manfully with the proposition in the oft-cited case of Briggs v. Light Boats, 11 Allen 198 (Mass. 1865).

theory nor in fact was the supremacy of the royal power a foregone conclusion, as illustrated by Bracton's insinuations (the subject being a quite delicate one circa 1238) that ultimate power probably resided in the barons and earls.\textsuperscript{13} Bracton quite clearly indicated that the king was subordinate to law,\textsuperscript{14} although he repeatedly and unequivocally stated that the king could not be sued in his own courts.\textsuperscript{15} Thus the crown prerogative began as the purely feudal theory that the king was not suable in his own courts.\textsuperscript{16} The feudal origin is rendered unmistakable by the so-called "statute" \textit{De Prerogativa Regis},\textsuperscript{17} consisting almost entirely of statements of feudal privileges. The mantle of immunity did not, however, fully blanket the king's officials.\textsuperscript{18}

wrongdoing. He places strong reliance upon \textit{The Men of St. Albans, Placita in Cancellaria, Tower Series, f. 2, m. 23}, as indicating the relative positions of king and law in medieval concept. In that case, Henry III had granted to the freeholders of St. Albans a charter conferring perpetual immunity from the royal writ of attainder, which charter was confirmed both by Edw. II and Edw. III. Nonetheless, after the charter had been successfully interposed to defeat an attainer, the King's Attorney procured its revocation on \textit{scire facias}, upon the ground that the charter was contrary to the \textit{common law}, depriving complainants of their legal remedy. (Actually, might this case be made the basis for an argument contrary to Ehrlich's thesis?) He further cites the cases from the Year Books of Edward III (note 11, \textit{supra}), not as authority for the propositions therein asserted, but as indicating that had Thirteenth and Fourteenth Century lawyers and jurists been imbued with any notions of sovereign divinity or infallibility, it would have been quite inconceivable to them that the king had ever been suable.

\textsuperscript{13}\textit{Ibid.}

\textsuperscript{14}BRACTON, \textit{De Legibus et Consuetudinibus Angliae}, 5b: "\textit{Ipse autem rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem. Attribuit igitur rex legi, quod lex attribuit ei, videlicet, dominium et potestatem, non est enim rex, ubi dominatur voluntas et non lex.}" Literally, "The king himself ought not to be under men, but under God and under law, for the law makes the King. The King should therefore attribute to the law that which the law confers upon him, namely, dominion and power, for there is no King where will, and not law, is dominant."

\textsuperscript{15}Id. at 34b, 168b, 171b, 212a, 261a, 270b, 382b.

\textsuperscript{16}3 Holdsworth, \textit{History of English Law}, 462 (1922), "The idea which in later law appears in the form of the maxim that the king can do no wrong is in this period simply the application of the ordinary rule that a lord cannot be sued in his own court. . . ." POLLOCK AND MAITLAND, \textit{History of English Law} 502 (2d ed. 1898): "He cannot be compelled to answer in his own court, but this is true of every petty lord of every petty manor; that there happens to be in this world no court above his court is, we may say, an accident."

\textsuperscript{17}This was one of a group of miscellaneous documents, dated between 1255-1290, found between the end of the \textit{Vetara Statuta} at the close of the reign of Edward II, and the beginning \textit{Nova Statuta} at the commencement of the reign of Edward III. Although accepted as a genuine statute throughout the Middle Ages, its authenticity is doubtful.

\textsuperscript{18}Ehrlich, \textit{supra} note 12. The First Statute of Westminster, 1275, 3 Edw. I, c. 24 pro-
Removal of the Church from the temporal governmental sphere in the Sixteenth Century left a political vacuum—no less abhorrent to nature than its physical counterpart—which was largely filled by expanded power of the crown. It was then that the concept of sovereignty now existing—a concept whereby a degree of divinity is attributed to an incorporeal state—entity—acquired general currency.\textsuperscript{19} It was then that men were inspired to write landmark books, some motivated by pent up grievances,\textsuperscript{20} others, doubtless, by the desire to promote and defend an order found personally profitable and pleasing.

Grotius, contemporaneously swimming in the same philosophical stream as Bodin and Hobbes, founded a system of international law with sovereignty as its cornerstone. Though this fact is deplored with substantial unanimity by the writers,\textsuperscript{21} it is difficult to see what sub-

vided an assize of novel disseisin against sheriffs, escheators, and other of the king's bailiffs, who, without authority, disseised one of a freehold The Second Statute of Westminster, 1285, 13 Edw. I, provided an action of false imprisonment against sheriffs. (Note section 421 (h) of the Federal Tort Claims Act, 60 Stat. 842 (1946), 28 U. S. C. § 943 (h) (Supp. 1946), excepting, \textit{inter alia}, claims for false imprisonment from the consent to suit conferred by the statute). The \textit{Articuli Super Cartas}, 1300, 28 Edw. I, c. 18, gave the writ of waste against escheaters of the king. Ehrlich alleges the existence of evidence that the Chancellor would issue writs to the King's Exchequer, directing the Barons in the Exchequer to make adjustments for persons who had been aggrieved therein.

\textsuperscript{19}HOLDSWORTH, \textit{op. cit. supra} at 208: "The doctrine of sovereignty was a new doctrine in the Sixteenth Century; nor is it readily grasped until the existence of a conflict between several competitors for political power makes it necessary to decide which of these various competitors can in last resort enforce its will. . . ."

\textsuperscript{20}\textit{Id.} at 214: "... grievances political or religious, acutely felt, are the forces which inspire men to raise fundamental questions, and to write books which become landmarks in the science of politics. If it is true that a country is happy which has no history, it is equally true that it is happy in its form of government if its subjects are not moved to probe deeply into the theories which underlie that form of government. . . ."

\textsuperscript{21}See SCOTT, LAW, THE STATE AND THE INTERNATIONAL COMMUNITY, 324, \textit{et seq.} (1939). Scott cites JENKS, \textit{THE NEW JURISPRUDENCE}, 82-84 (1933), referring to Grotius' theory of sovereignty in the international law field: "... the theory of sovereignty seems, at the present day, to be one of the greatest stumbling-blocks in the path of international progress... the theory on which it was founded was, in fact, a toleration of anarchy... even since the Great War, the world has been struggling to escape from the theory of sovereignty in international affairs—from its jealousies, its rivalries, its preposterous pretensions, and its apprehensions—and to build up out of the ruins left by the war, a more wholesome theory of international society."

One may note VAUTTEL, LAW OF NATIONS, bk. 2, § 213, written only about a century after \textit{De Jure Belli et Pacis} (Grotius), and indicating some feeling as to ethical deficiencies inhering in doctrines pertaining to the immunities of sovereigns. After stating that promises, conventions, and private obligations of the sovereign are subject to the same rules as those
stitute doctrine could have been or can be employed in the absence of precedent submission of major powers to the authority of a Tennysonian world federation. Be that as it may, it is deemed important to note for instant purposes that pragmatic reasons which may be urged in support of immunities of sovereignties *inter se* and with respect to citizens and subjects of other sovereigns, do not similarly require that such immunities exist as between a sovereignty and its constituent elements. Therefore, rules and precedents should not be indiscriminately cited of private persons, Vattel states: "If there exists any difficulty on this account, it is equally conformable to prudence, to the delicacy of sentiment, which ought to be particularly conspicuous in a sovereign, and to the love of justice, to cause them to be decided by the tribunals of the state. This is the practice of the states that are civilized and governed by laws."

Cases pertaining to international immunities are legion, e.g., Vavasseur v. Krupp, L. R. 9 Ch. Div. 351 (1878), refusal to enjoin transshipment from England by representatives of the Japanese Mikado of munitions purchased in Germany, upon allegations that the munitions in question infringed an English patent; The Duff Development Co., Ltd., v. The Government of Kelantan [1924], A. C. 797, refusal by the court to enforce an arbitration award made under a previous agreement with a sovereign state, where there was no consent to suit on the award as of the time of institution of the action; The Exchange v. M'Caddon et al., 7 Cranch 116 (U. S. 1812), immunity of French war vessel from libel in rem while in United States territorial waters, on claim of U. S. nationals that the vessel had been forcibly and unlawfully taken from them, slightly under two years before the action was brought, by order of the government of France.

An exception to the international law doctrine of sovereign immunity (following an exception similarly established as between some states and their nationals) is that involving commercial undertakings by a sovereign power, carried on in a foreign jurisdiction. HAGUE RULES, adopted by International Law Association. 33rd REPORT OF INT'L L. ASSN vol. 2, p. 251; The Ice King (Reichsgericht in Civil Matters, Germany, 1921) Ann. Digest, 1919-1922, Case No. 102, p. 150, refused to apply the so-called HAGUE RULES to give jurisdiction to German Courts over a commercial steamer belonging to the United States of America. In the same year in "The Pesaro," 277 F. 473 (S. D. N. Y., 1921), Judge Mack delivered a superb opinion holding a commercial vessel owned and operated by the Italian government, subject to in rem jurisdiction in the same manner as would be any private vessel. In what one writer characterized as "one of the most unfortunate decisions ever made by the Supreme Court" Judge Mack's view was not followed in Berizzi Bros. Co. v. SS Pesaro, 271 U. S. 562 (1926) (not the same case originally decided by Judge Mack, though one involving an identical factual situation). In Republic of Mexico v. Hoffman (The Baja California), 324 U. S. 30 (1945) the Supreme Court retreated from the position taken in the Pesaro case to the extent of holding that bare legal title in a foreign sovereign (the ship was chartered under a bareboat charter to a private operator) would not confer immunity. Mr. Justice Frankfurter delivered a vigorous concurring opinion, in which he was joined by Mr. Justice Black, urging that the Pesaro case be overruled absolutely. See Kuhn, Arthur J., *The Extension of Sovereign Immunity to Government-Owned Commercial Corporations*, 39 Am. J. Int'l. Law 772 (1945); Sanborn, Frederic R., *The Immunity of Government Owned Merchant Vessels*, id. at 794.
and applied.\textsuperscript{22} A forthright judicial statement that the international doctrine of sovereign immunity rests upon a basis of practical necessity, where as the domestic rule rests upon (though not incontrovertibly justified by) administrative conveniences and preference of the interests of the public over those of individual citizens, should constitute the first step toward an enlightened concept.

**Suits by Citizens Against the Sovereign, *eo nomine***

At the time our cisatlantic republic came into being, the English law relative to the Crown Prerogatives\textsuperscript{23} had crystallized, and Blackstone had summoned up sufficient courage to discuss this "... topic, that in some former ages was thought too delicate and sacred to be profaned by the pen of a subject...."\textsuperscript{24} He classified the prerogatives as (1) Direct, and (2) Incidental. The incidental prerogatives were stated to be those exceptions in the case of the Crown from rules established for the rest of the community, for example, the King is not subject to assessment of costs in connection with litigation; the King can never be a joint tenant; the King's debt shall be preferred over those of his subjects. These, of course, are incidental to such branches of the law as procedure, real property, creditors' rights, and are digested under those branches. To summarize Blackstone's categorization of the direct prerogatives, the first of which is the immediate ancestor of our own sovereign immunity doctrine:

\textsuperscript{22}For example, see dissenting opinion written by Mr. Justice Gray in U. S. v. Lee, 106 U. S. 196, 226 (1882), citing Vavasseur v. Krupp and the Exchange, *supra* note 21, in contending against the exception to the sovereign immunity rule established by the majority, permitting possessory actions for real estate against government agents. The majority opinion, which otherwise dealt with the dissent point by point, did not suggest a possible differentiation between international and municipal rules. While on the Massachusetts Court, Mr. Justice Gray, in Briggs v. Light Boats, 11 Allen 158, 186 (Mass. 1865), holding no mechanic's lien assertible against light boats built under contract with the federal government, stated, "... and no reason can be suggested why a foreign government should have greater privilege from suits in the courts of this Commonwealth than the Supreme government of this Country."

\textsuperscript{23}From *praesidio* (before) and *rogo* (to ask), hence something asked before or in preference to everything else. Finch, C. J., stated the maxim, "The prerogative is that law in the case of the King that is law in the case of no subject." See *Anson, 2 Law and Custom* 2; *Dicey, Law of the Constitution* 368 (6th ed. 1902); 2 *Stephens Commentaries* 588 (16th ed. 1914). Prerogative has been given a more modern definition as the "discretionary authority of the executive," that is, things which the King, or his servants acting for him may do without the authority of Acts of Parliament.

\textsuperscript{24}Bl. Comm. *237.*
(1) The King's power is absolute; the King is perfect and infallible: the King is superior to everything. Hence, "... no suit or action can be brought against the King, even in civil matters because no court can have jurisdiction over him. ..."25 The only remedy against private oppression is by petition to the King as a matter of grace. The only remedy against public oppression is by impeachment of the King's advisers for deceiving his majesty. Since the King can do no wrong, if there be any error apparent in a governmental act, e.g., the making of a grant, it must be presumed that the Crown was imposed upon, as to say that the King erred would damage him in the eyes of his subjects.

(2) The Prerogative in foreign relations and domestic affairs
   A. The King is the representative of the people in contacts with other nations, and possesses sole power with respect to dispatching and maintaining ambassadors, making treaties, granting letters of marque and reprisal, issuance of passports, etc.
   B. In domestic affairs, the King is a part of the legislature, the generalissimo of the armed forces of the nation, and the regulator of domestic commerce and navigation.

(3) The King is the fountain of justice.
(4) The King is the fountain of honor, office and privilege.
(5) The King is the arbiter of commerce in such respects as weights and measures; currency and coinage.
(6) The King is the head of the church.

The first of the direct prerogatives as stated by Blackstone would appear to represent many of the concepts concerning government which supplied our predecessors with revolutionary battle cries, and it is mildly surprising that plangent demands were not made for its ruthless extirpation from whatever form of postrevolutionary government established. Prohibitions against conferring titles of nobility were imposed upon central and state governments under both the Articles of Confederation and the Constitution, coupled with a companion ban upon acceptance by federal officers of presents, emoluments, offices, and titles, from kings, princes and foreign states.26 (Thus removing the label though leaving goods and container intact). Otherwise, the matter received scant attention at the time the government was founded, and has since been largely slighted by historians.

Only one aspect of the question arose at the time the Constitution was under consideration—that of suits against states, brought by individuals in the federal courts. It is unfortunate that the issue so arose, as ad hominem considerations of states' rights, distrust of federal courts,

25Id. at *243.
and distaste for being compelled to pay state debts, precluded examination and decision of the broader politico-philosophic question. Hamilton accorded parenthetical treatment to the matter in one of The Federalist papers,27 brushing the question aside with platitudinous allusions to the inherent nature of sovereignty. During June 18-20, 1788, in the Virginia Convention on the Adoption of the Federal Constitution, George Mason and Patrick Henry heatedly protested that the grant of federal jurisdiction over suits between a state and citizens of another state would have the disgraceful effect of enabling individuals to hale states before the bar of justice, and to procure orders that such states discharge their honest indebtedness. Madison and Marshall denied that the provision would have the effect claimed, asserting that its sole function was to permit actions by states as parties plaintiff against individual citizens of other states.28

Just six years after the Constitution ceased to be a controversial proposal, there came before the Supreme Court for decision a case in which one Chisholm, the executor of a South Carolina decedent, had brought, in the federal courts, an action of assumpsit against the State of Georgia. Edmund Randolph, Attorney General of the United States, formerly member of the Virginia delegation to the Philadelphia Convention,29 argued the case on behalf of the plaintiff. Though making no secret of the conflict between his personal feelings and his duty as advocate, Randolph urged quite forcefully that it was no degradation

27 The Federalist No. 81 (Hamilton). "Though it may be rather a digression from the immediate subject of this paper, I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities: a suggestion which the following considerations prove to be without foundation.

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. . . . The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsory force. They confer no right of action, independent of the sovereign will. . . ."

28 3 Elliott's Debates 527-560 (2d ed. 1836).

29 Also former member of the Virginia House of Delegates in 1782 (together with Patrick Henry, Jefferson, Madison, Richard Henry Lee, George Mason, John Marshall)—the most pressing matter then engaging the attention of that Assembly being the search for ways and means of evading the payment of pre-Revolutionary War debts owed by Virginia to Great Britain—the Treaty of Peace having provided that such debts should be paid. Hendricks, Bulwark of the Republic 168 (1937).
of state sovereignty to submit to the supreme judiciary of the United States, but by way of anticipating an objection, he further argued that the United States itself would not be similarly suable without its consent. This was stated to be by reason of peculiar prééminences of the head of a federation relative to its inferior members. Chief Justice Jay and Mr. Justice Cushing held the action to lie against the state, though expressing doubt with respect to a similar suit against the United States. The Chief Justice indicated, however, that his moral and ethical senses would be gratified rather than otherwise by such a result. Mr. Justice Blair considered that by adopting the Constitution, the states relinquished their sovereignty to this extent. Mr. Justice Wilson correctly stated that the inviolability of the King or sovereign is a feudal doctrine,30 and implied that such frippery had no place in a government wherein the people were sovereign. Mr. Justice Iredell, the lone dissenter, deemed the sovereign power, in so far as concerned granting or withholding consent to suit,31 to reside in the legislature as the elected representatives of the people, which consent had not here been given by the Legislature of Georgia.32 Few indeed are the dissenting opinions of sole justices which are so authoritative. The Eleventh Amendment to the Constitution33 was proposed and ratified for the purpose of annull-

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30Though incorrectly stating that Saxon Kings were freely suable, a repetition of the 1307 counsel's fable, discussed in note 11, supra.
31See the subsequent case of Penhallow v. Doane, 3 Dall. 54, 93-94 (U. S. 1795), indicating Mr. Justice Iredell's concept of sovereignty as residing in the body of the people solely as an entity, not as an aggregate of individuals. Practicality alone was considered to justify the exercise of this power by a majority on behalf of the whole. One who premises his thinking upon the proposition that the individual member of society should be sovereign, except only to the extent that the welfare of the community requires that he be governed and regulated, would probably not have discovered too agreeable a traveling companion in Mr. Justice Iredell.
32Mr. Justice Iredell concluded his opinion with a pessimistic reflection on the policy which the Attorney General had urged upon the court, saying that he hoped all the good the Attorney General had mentioned would come from it, and "none of the evils with which, I have the concern to say, it appears to me to be pregnant." Chisholm, Ex'r. v. Georgia, 2 Dall. 419, 450 (U. S. 1793).
33The Eleventh Amendment was proposed to the legislatures of the several states by the Third Congress on September 5, 1794, and by message of the President to Congress dated January 8, 1798, was declared to have been ratified by the legislatures of three-fourths of the States.

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."
ing the decision of the majority in *Chisholm v. Georgia*,\(^3^4\) and in case after case in which the Eleventh Amendment has been in terms inapplicable, the opinion of Mr. Justice Iredell has been held to represent the law.\(^3^5\)

Hollingsworth v. Virginia, 3 Dall. 378 (U. S. 1795)—having been validly adopted, the Amendment deprived federal courts of jurisdiction in past or future cases in which a state was sued by a citizen of another state or citizens or subjects of a foreign state. Cohen v. Virginia, 6 Wheat. 264 (U. S. 1821) held that the immunity rule did not bar writs of error from the Supreme Court to the highest court of the state where a federal right was involved. The case is also noteworthy for Marshall's iconoclastic observation that the Eleventh Amendment grew out of the fear that states would be sued in federal courts for their debts.

\(^{3^2}\)2 Dall. 419 (U. S. 1793).

\(^{3^3}\)New Hampshire v. Louisiana; New York v. Louisiana, 108 U. S. 76, (1883)—where States took assignments of bonds of Louisiana from their own citizens and brought actions against the obligor State, the sovereign plaintiffs were held to be purely nominal, and suit was considered barred by the Eleventh Amendment. Hans v. Louisiana, 134 U. S. 1 (1890)—suit by a citizen of Louisiana against the State of Louisiana held barred from federal jurisdiction, although not prohibited by the Eleventh Amendment; the reasoning of Bradley, J., speaking for the majority of the Court, being that the highest authority in the country (viz., the people) concurred with the opinion of Mr. Justice Iredell, rather than that of the majority in *Chisholm v. Georgia*. Mr. Justice Harlan purportedly concurred, although his objection to the majority opinion—on the ground that *Chisholm v. Georgia* correctly stated the then existing law—logically placed him in complete dissent. North Carolina v. Temple, 134 U. S. 22 (1890), reached the same result with respect to a suit by a North Carolina citizen against the State Auditor of North Carolina (this being held in effect a suit against the state). Smith v. Reeves, 178 U. S. 436 (1900) barred a suit in federal courts against a state officer by a railroad corporation chartered by Congress (ergo, not a citizen of another state). In Duhne v. New Jersey, 251 U. S. 311 (1920), a citizen of New Jersey asked leave to file an original bill in the Supreme Court against the State of New Jersey and others, under the authority of Article III, Section 2, Cl. 2, providing, "In all cases . . . in which a State shall be party, the supreme Court shall have original jurisdiction." The rule of *Hans v. Louisiana* was held to limit the original jurisdiction of the Supreme Court as provided in Article III. *Ex parte:* In the Matter of the State of New York, 256 U. S. 490 (1921)—relying upon the fact that the Eleventh Amendment prohibits only "any suit in law or equity," a libel *in rem* in admiralty was filed in a district court against tugs which were under charter party to the State of New York at the time of a collision. The Supreme Court granted mandamus and prohibition, Mr. Justice Pitney speaking of the "fundamental rule of which the [Eleventh] Amendment is but an exemplification. . . ." *Id.* at 498.

See discussion on page 1 of the text concerning Russian Volunteer Fleet v. U. S., 282 U. S. 481 (1931) (permitting Russian nationals to sue the United States in the Court of Claims in the absence of consent therefor). This prior decision presented somewhat of a problem when *Monaco v. Mississippi*, 292 U. S. 313 (1934), came before the Court. There a foreign state itself—not a citizen thereof—sought to sue one of the United States. Was State sovereignty to be held of a higher order than that of the federal government? The
The law concerning suits against the United States or any state *eo nomine* is that stated in Mr. Justice Iredell's dissenting opinion, that such a suit can be maintained only upon consent previously given by the legislative branch of government. The same rule applies to dependent sovereignties other than States of the Union which are under the aegis of the United States.

The opinion by Chief Justice Hughes (who had also written the opinion in the *Russian Volunteer Fleet* case) held the Eleventh Amendment to be a bar, although asserting the subsidiary ground for the decision that Article I, section 10, giving the federal government exclusive power in the field of foreign affairs, would prohibit the suit if the Eleventh Amendment did not do so.

Worcester County Trust Co. v. Riley, 302 U. S. 292 (1937) forbade application of a federal interpleader statute to interplead taxing authorities of two states with a view to determining the domicile of a decedent for purposes of inheritance tax liability respecting intangibles. The absence of any real adverse interest in the complainant assumed in an interpleader suit was of no avail here, although the equitable converse of New Hampshire v. Louisiana: New York v. Louisiana, *supra*, might have been recognized.

The rule that executive or judicial officials cannot waive the governmental immunity is axiomatic, Minnesota v. U. S., 305 U. S. 382 (1939). But see Clark v. Barnard, 108 U. S. 436 (1883), where a general appearance on behalf of the state in a suit pending against the State Treasurer held a waiver of immunity; Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273 (1906), upheld an injunction against a State Attorney General, prohibiting his bringing suit on behalf of South Carolina to collect certain back taxes. The reasoning was that in Humphrey v. Pengues, 16 Wall. 244 (U. S. 1872), the Court had enjoined a county treasurer seeking to impose the same type of taxes upon the plaintiff's predecessor in title, in which suit the then Attorney General of the State had filed an answer on behalf of the County Treasurer. This action by the Attorney General was considered to have constituted a waiver of the immunity of the state in the *Pengues* case, and that decision being *res judicata* of the present action, the court might issue the injunction to protect its jurisdiction. (But if there were an utter lack of jurisdiction in the present case, how could any order be issued—regardless of the holding in the previous case?)

Puerto Rico v. Ramos, 232 U. S. 627 (1913), Richardson v. Fajardo Sugar Co., 241 U. S. 44 (1915)—where a state joins as party to litigation at its own request, it cannot later claim immunity, not being permitted to go into and out of court at will. Here a long-standing administrative construction of a statute recognized the authority of the Attorney General to enter an appearance on behalf of the state. But see Missouri v. Fiske, 290 U. S. 18 (1933)—a request to a court by a state—purely as a matter of comity—temporarily to withhold distribution of certain funds, was not sufficient to constitute "consent" to permit orders to be issued binding the state out of the same litigation, even though the state had intervened in the proceedings.

may sue States without their consent, the act of the state in coming into the Union being held to import consent, but the converse is not true. Consent may be conditioned at will may be withdrawn at any time, and withdrawal by a state of consent to be sued does not constitute an impairment of any contractual obligation. As to whether a state has or has not in fact consented to be sued, the interpretation by the court of last resort in the state is conclusive. A suggestion by the

in the District Court of Missouri, the United States filed a claim for back royalties due on Choctaw and Chickasaw coal lands leased to the defendant, the defendant counterclaiming and obtaining an affirmative degree on the counterclaim. The statute consenting to cross claims in such cases was in terms applicable only to suits filed in federal courts in the Indian Territory—Missouri not being in the Indian Territory. The United States later sued the surety on the lessee's bond for the same royalties upon which claim had been filed in the Missouri proceeding. The Court, per Mr. Justice Reed, held the Missouri decree not voidable, but void, and held that it was not res judicata of the action against the surety. The Court expressly considered, but refused to apply, the principle of Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371 (1940), holding res judicata a decree in bankruptcy, even though based upon an unconstitutional Municipal Bankruptcy statute. Application of the Chicot County principle where a sovereign immunity waiver was involved was deemed contrary to "paramount public policy." U. S. v. Hellard, 322 U. S. 363 (1944)—failure to comply with statute requiring service upon the Superintendent of the Five Civilized Tribes, rendered void a decree in a partition suit.

Kawananaokoa v. Polyblank, 205 U. S. 349 (1907)—When inability of a court to join all parties and sell all land in a foreclosure proceeding, is due to a conveyance of a part of the property to the sovereign Territory of Hawaii, the court is not thereby barred from proceeding with such parties and property as it can validly have before it. Porto Rico v. Rosaly Y Castillo, 227 U. S. 270 (1913)—Even though the Organic Act of a Territory specifically provides that it may "sue and be sued," these words will not be given the construction universally accorded elsewhere in the law, (governmental corporations included), but will be held to mean that Porto Rico can be sued only with its consent. Reason: Otherwise the government provided would not be an American plan of government, but one in which the legislative power concerning claims is subordinated to the judicial. It must be assumed that Congress intended to provide Porto Rico with a government "founded upon the American system."

*U. S. v. Texas, 143 U. S. 621 (1892). In a previous case of U. S. v. North Carolina, 136 U. S. 211 (1890), the jurisdictional question was not raised.

**Kansas v. U. S., 204 U. S. 331 (1907).

Beers v. Arkansas, 20 How. 527 (U. S. 1857). But see State v. La Plata River & Cherry Creek Ditch Co., 101 Colo. 368, 73 P. 2d 997 (1937), holding invalid under the State Constitution a statute authorizing the Governor to direct the Attorney General to intervene in litigation, but prohibiting money judgments against the State. In Colorado, at least, the State cannot have its roses sans thorns.


Executive Branch of Government as to the title or interest of a foreign sovereign in the subject matter of litigation may be sufficient to require dismissal thereof, but a somewhat more substantial showing is required where the fact that the action is against a domestic sovereignty isn’t immediately apparent from the face of the record. General consent by the federal government to be sued does not constitute consent to be sued in state courts. Recent cases indicate that in suits for refunds of state taxes, at least, a State statute consenting to such suits need be explicit indeed before it will be construed as consenting to such suits in the federal courts.

Counterclaims have had an interesting history, the general principles presently applicable being: (1) consent must be given for the counterclaim or cross suit, just as for the original action; (2) the statute, which has been liberally interpreted to grant such consent, requires, with narrowly circumscribed exceptions, that any “claim for a credit” shall have been presented to the General Accounting Office for examination before it may be admitted upon trial of a suit brought by the United States; (3) In other than admiralty cases (not within the purview of the statute mentioned above), the credit, counterclaim, or cross-claim can extend no further than to extinguishment of liability, affirmative

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44The Schooner Exchange v. McFaddon and others, 7 Cranch 116 (U. S. 1812). See Scott and Jaeger, Cases on International Law, 451, n. 21 (1937) relating dismissal of attachment on November 16, 1934, in District Court, E. D., Pa., of the Cucuta, a Colombian government ship, upon representations made by the Department of State to the Department of Justice, transmitted by Justice to the District Attorney who suggested to the Court the public character of the vessel.

45South Carolina v. Wesley, 155 U. S. 42 (1895).

46Carr v. U. S., 98 U. S. 433 (1879); Minnesota v. U. S., 305 U. S. 382 (1939)—a 1901 statute provided that suits to condemn lands allotted in severalty to Indians might be brought “in the same manner as land owned in fee.” The prevailing legislation permitted condemnation of land owned in fee in State court proceedings. Despite the almost unavoidable inference of the statute concerning lands allotted in severalty, it was held insufficient to constitute consent of the U. S. to a State court proceeding to condemn land so allotted. The fact that the case had been removed to the federal courts by stipulation of the United States Attorney was immaterial, as he could not waive the immunity.

47Kennecott Copper Corp. v. State Tax Commission, 327 U. S. 573 (1946); Ford Motor Co. v. Dept. of Treasury of Indiana, 323 U. S. 459 (1945); Great Northern Life Ins. Co. v. Read, 322 U. S. 47 (1944). These cases are discussed in the text following.
judgment for the defendant on the counterclaim not being deemed consented to.\footnote{See Note, 53 Harv. L. Rev. 336 (1939).}

The Act of March 3, 1797, c. 74, Rev. Stat. § 951 (1875), 28 U. S. C. § 774 (1940), provides for allowance of cross-claims in suits brought by the United States where the claim in question has been presented to accounting officers of the government and disallowed. U. S. v. Wilkins, 6 Wheat. 135 (U. S. 1821), held the 1797 Act to confer jurisdiction on the Court to adjust all accounts between the parties, and so far as the defendant's counterclaim was based upon a contract whereby he was to receive the "reasonable value" of rations furnished by U. S. troops in Tennessee, Wilkins was entitled to have such "reasonable value" determined by a jury. In U. S. v. Bank of the Metropolis, 15 Pet. 377 (U. S. 1841) affirmative judgment on counterclaim against the United States was affirmed without comment. In Reeside v. Walker, 11 How. 272 (U. S. 1850), the government had encountered a circuit court jury in suing the State courts of Pennsylvania which rendered a $188,496.06 verdict for the defendant on his counterclaim. In holding that mandamus would not lie to compel the Secretary of the Treasury to pay the judgment, Mr. Justice Woodbury uttered the dictum that to permit affirmative judgments on counterclaims would constitute a circuitous evasion of the rule prohibiting direct suits. U. S. v. Tillou, Eckford's Executor, 6 Wall. 484 (U. S. 1868) was a suit in the Court of Claims upon an affirmative judgment on a counterclaim, rendered in a suit in which the United States had sued sureties on a port collector's bond. Here it was squarely held that the recovery on the counterclaim could at most extinguish the claim of the United States. See U. S. v. Shaw, 309 U. S. 495 (1940)—A contractor with the Shipping Board converted certain materials, whereas the Shipping Board breached its agreement to pay a materialman for lumber supplied the contractor. Both the United States and the materialman obtained judgments against the contractor, and on his death, both filed their judgments in the probate proceeding in the state courts. The state probate court offset the judgment of the materialman against the judgment of the United States, and rendered a judgment against the United States for the difference between the two judgments and interest. It was held that even though the probate court judgment would not be enforcible, it should be limited to the dismissal of the claim of the United States, as otherwise it would be res judicata of that claim. The assumption by the United States of Shipping Board liabilities in 1936, was not considered a waiver of the immunity of the United States to suit in the state courts.

For the rule in admiralty cases, see Luckenbach Steamship Company and the U. S. v. The Thekla, 266 U. S. 328 (1924), holding a libel to be like a bill for an accounting, importing an obligation to pay the balance, if it should prove to be against the plaintiff—the fact that the plaintiff was the United States being deemed immaterial. Compare the opinion by Holmes, J., in the Thekla with his opinion in Kawanakajima v. Polyblank, 205 U. S. 349 (1907). In the Thekla, Holmes concedes that under Illinois Central R. Co. v. Public Utilities Commission, 245 U. S. 493 (1918), Washington Southern Navigation Co. v. Baltimore & Philadelphia Co., 263 U. S. 629 (1924), and Nassau Smelting & Refining Co. v. U. S., 266 U. S. 101 (1924), no distinction can be made between a cross bill or a cross libel and an original bill or libel in so far as concerns the necessity for consent by the government. The 1797 Act does not apply to admiralty cases, and there was at the time no federal statute from which consent of the government to be sued could be inferred.
Admiralty cases represent, by and large, the most notable attempts by the judiciary to ameliorate the rigors of the immunity rule in a situation wherein there was never any practical reason for its application, and wherein there are ample arguments from the standpoint of history and fundamental admiralty concept which militate against sovereign immunity in this respect.49

In filing its claim in the proceeding, the United States expressly stated that its action in so doing was "without submitting itself to the jurisdiction." If "... there can be no legal right as against the authority that makes the law on which the right depends. ..." then how can the Thekla be justified on the ground that, "The reasons that have prevailed against creating a government liability in tort do not apply to a case like this, and on the other hand, the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest. ..."? 266 U. S. 328, 340-41 (1924).

49U. S. v. Wilder, 8 Fed. Cas. 601, No. 16,694 (C. C. N. Y. 1838), an opinion by Mr. Justice Story, on circuit, held that a lien for the general average—a lien arising by operation of law—existed on government cargo as on any other, and stated that a lien for salvage would similarly exist. Further dicta asserted that a mechanics' or other contract lien would not exist. Story reasoned that the very fact that suit would not lie against the United States on in personam claims for general average contribution or salvage, constituted an a fortiori reason for the rule announced. The purpose of the rule in the one case being to eliminate the necessity for showing any favoritism at a time when the safety of the ship demanded the jettisoning of some of her cargo, and, in the other, to encourage diligence in efforts to preserve property following maritime disaster, the United States, its ships and cargoes, might suffer through the application of the immunity doctrine to defeat the in rem liens. Briggs v. Light Boats, 11 Allen 158 (Mass. 1865) confirmed Story's dictum relative to the nonexistence of mechanics' and other contract liens. The Siren, 7 Wall. 152 (U. S. 1869)—where a U. S. prize under the operation of a Navy prize crew collided with another vessel, the owners of the injured private vessel were permitted to intervene in the condemnation proceeding to assert their lien on the prize. The Davis, 10 Wall. 15 (U. S. 1870) upheld Mr. Justice Story's view with respect to a lien for salvage on the particular facts, although the opinion equivocated to the extent of indicating that the result might have been otherwise had the cargo been in the possession of the government or its agents (rather than a private carrier) when the lien attached.

The Lake Monroe, 250 U. S. 246 (1919) held that the Shipping Act of 1916, by providing that merchant vessels owned by the United States should be subject to the same liabilities as private vessels, consented to libel in rem and restraint of such vessels. Ex parte. In the Matter of the State of New York, 256 U. S. 490 (1921) held the federal courts to have no jurisdiction of a libel in rem against tugs under charter to the State of New York at the time the cause of action arose. U. S. v. Thompson (The Western Maid), 257 U. S. 419 (1922) held no in rem lien to attach to a public vessel (by reason of a collision as to which there was no consent to suit) which might be enforced upon its return to private ownership. Holmes, J., wrote the majority opinion, and notwithstanding his opinion in the Thekla, he reasserted and elaborated on the thesis advanced in Kawananakoa v. Polylkran. "The United States has not consented to be sued for torts, and therefore it cannot be said that, in a legal sense, the United States has been guilty of a tort. For a tort is
No attempted synopsis of a subject such as that of sovereign immunity from suits *eo nomine* being complete without some language under the rubric "construction," courts dogmatically state that waivers of sovereign immunity shall be "strictly construed." As in other fields, the relation of such a statement to the law is like that of the manual of arms to wars—no brief would ever be complete without it, but it isn't going to decide many engagements.50

a tort in a legal sense only because the law has made it so.' (Therefore it could not be said that a right existed which merely remained in suspension due to the lack of consent of the Government to be sued thereon). "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law, but that are elusive to the grasp. . . ." Mc-Kenna, J., writing a dissenting opinion in which joined by Justices Day and Clark, spoke grimly of the maxim of stare decisis, "... which ought to have force enough to resist a change based upon finesse of reasoning, or attracted by the possible accomplishment of a theoretical correctness." 257 U. S. 419, 433 (1922).

See Eastern Transportation Co. v. U. S., 272 U. S. 675 (1927) and Canadian Aviator, Ltd. v. U. S., 324 U. S. 215 (1945), wherein short shrift indeed is given to the dogma that statutes waiving the sovereign immunity shall be "strictly construed," at least in so far as the Suits in Admiralty Act and the Public Vessels Act are concerned. See further, American Stevedores, Inc. v. Porello and the United States, 330 U. S. 446 (1947) wherein consent to suit for "damages caused by a public vessel of the United States" was held to permit a personal injury suit based upon the negligence of the United States in failing to provide a locking device for a beam lying athwart a hatch on a public vessel. But Clyde-Mallory Line v. SS Eglantine and the U. S., 317 U. S. 395 (1943) refused to enlarge consent of the Government to suit by what was rather clearly inadvertence in statutory draftsmanship.

Admiralty cases present a situation in which distinction might well have been made judicially (rather than by deferring to the legislative branch of government) between suits against vessels owned by foreign sovereigns and those owned by the United States. The immunity in the former instance may perhaps be justified on the ground that entertaining such litigation constitutes too extensive a judicial excursion into the field of foreign affairs. The inapplicability of this principle to suits by citizens against vessels of the domestic sovereign is obvious. Neither the potential number of such suits nor the possibility of fictitious and manufactured ship collisions constitutes any great hazard to governmental convenience or the public treasury. Maritime law having origins separate and apart from the feudal common law roots, and the personification of the vessel being perhaps the most basic concept, there should be no immunity as concerns in *rem* libels. Perhaps the justification may lie in the somewhat chauvinistic utterance of Gray, J., in Briggs v. Light Boats, *supra*, to the effect that a foreign government should not have a greater immunity than that of our own mighty nation.

50See Eastern Transportation Co. v. U. S. and Canadian Aviator, Ltd. v. U. S., discussed in the preceding note. Nassau Smelting & Refining Co. v. U. S., 266 U. S. 101 (1924)—a statute authorized adjustment by the Secretary of War, with appeal to the Court of Claims, of contracts not executed in the manner prescribed by law. The United States sued the Refining Company to recover $15,000.00 for goods allegedly sold and delivered.
From the legislative standpoint, the situation as respects the sovereign immunity from suit has been well epitomized by Professor Borchard:

The defendant pleaded: (1) The contract upon which the goods in question were received was not executed as the law prescribed; (2) three counterclaims, totalling $14,300. Held, that inasmuch as the defendant claimed the contract not to have been executed in the manner prescribed by law, he placed himself within the terms of the statute providing adjustment by the Secretary of War, and the remedy therein prescribed was exclusive. The defendant's counterclaims were dismissed, and judgment awarded to the United States on the pleadings. Hence a Congress seeking to provide an additional remedy to claimants must be circumspect lest existing general consent be thereby narrowed.

Johnson v. Shipping Board, 280 U. S. 320 (1930) involved several tort suits for injuries received aboard or about Shipping Board vessels, and one contract claim for failure to deliver a cargo of sugar as per alleged agreement. All suits were brought after the limitations of the Suits in Admiralty Act had expired, but within the period of limitations of various state statutes (hence raising the issue as to the effect of the general consent to suit against the U. S. Shipping Board Emergency Fleet Corporation) and within the limitations of the Tucker Act (general consent of the United States to suit with respect to the contract claim involved). The Court held the remedy conferred by the Suits in Admiralty Act to be exclusive, in effect limiting (without any legislative mandate) the general consent conferred by the prior statutes. Brady v. Roosevelt Steamship Company, 317 U.S. 575 (1943) expressly overruled the Johnson case in so far as it would have operated to bar a tort suit against a private contract operator of a ship owned by the Maritime Commission, the contract requiring exoneration of the operator by the government. Here it was held that the plaintiff might elect remedies under the Suits in Admiralty Act or other relevant provisions of State or federal law. The language of Mr. Justice Douglas is express that, "... when it comes to the utilization of corporate facilities in the broadening phases of federal activities in the commercial or business field, immunity from suit is not favored. ..." 317 U. S. 575, 580 (1943). In Hust v. Moore-McCormack Lines, 327 U. S. 771 (1946) the Court disregarded both a statute and administrative interpretation thereof, claimed by dissenting Justices Reed, Frankfurter, and Burton to have been specifically intended to limit consent only to suits under the Suits in Admiralty Act, an upheld election of remedies in accordance with the Brady decision.

The traditional construction of waivers of the sovereign immunity was stated by Mr. Justice Davis in Nicholl v. U. S., 7 Wall. 122, 126 (U. S. 1869); "... Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute..." That Congress has provided administrative consideration and determination of claims will not be held to imply consent to suit upon such claims nor appeal to the courts from the administrative decision. U. S. v. Babcock, 150 U. S. 328 (1919). U. S. v. Sherwood, 312 U. S. 584 (1941), although under the Federal Rules, nonjoinder of a necessary party might be cured by motion in the district court, this was held to alter in nowise the rule that if a necessary party would have to be joined as co-defendant with the government, the suit must fail. The consent of the government to suit must be strictly construed, and cannot be enlarged by the Federal Rules.

For the trend of construction where strict interpretation of the waiver of the sovereign immunity might result in denial of a clear constitutional right, see the beginning of the text.
"The history of claims against the United States presents a picture of the gradual transfer of claims by Congress from the political to legal channels—first in contract cases, then in small tort and special types of tort claims like patent and admiralty claims. . . ."51 Since August 2, 1946, a further sentence might be added to the effect that transfer of the greater number of tort claims has now been effected. Only a brief sketch of the legislative development can be here presented, and no more than a general description of the Federal Tort Claims Act of 1946.52 Reference is made, however, to detailed and qualitatively superlative articles dealing with both historical development and analysis of the most recent legislation on the subject.53

The first private bill passed by the United States Congress was the Act of June 14, 1790,54 providing for the remission to Thomas Jenkins & Company of $167.50 representing duties paid on a shipment which had been destroyed by fire. April 13, 1792,55 saw the first private legislation providing for the relief of a tort claimant, indemnifying the Trustees of the Public Grammar School and Academy of Wilmington, Delaware, for use and occupation of that school and for damages thereto resulting from occupation by troops during the Revolutionary War. The volume of this business thereafter and the adeptness with which it was handled is perhaps best illustrated by an entry in the diary of President John Quincy Adams, under date of February 23, 1832:

"There ought to be no private business before Congress. There is a great defect in our institutions by the want of a court of exchequer or chamber of accounts. It is judicial business, and legislative assemblies ought to have nothing to do with it. One-half of the time of Congress is consumed by it, and there is no common rule of justice for any two of the cases decided. A deliberative assembly is the worst of all tribunals for the administration of justice."56, 57

The Congress did not limit its relief to private legislation "for the relief

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546 Stat. 2 (1790).
556 Stat. 8 (1792).
56JOHN QUINCY ADAMS, Memoirs 480 (C. F. Adams ed. 1877).
57Indebtedness for the Adams' quotation, and for the two early statutes, notes 54 and 55, is acknowledged to Judge Holtzoff, Tort Claims Against the United States, 25 A.B.A.J. 828 (1939).
of ———,” but in some general legislation provided special proceedings for judicial review, or gave the general consent of the government to particular suits.58

The Court of Claims was established by Act of February 24, 1855,59 providing, “The said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein, and also all claims which may be referred to it by either house of Congress.” The determination of the court amounted to no more than an administrative award, which required an Act of Congress to carry it into execution. Abraham Lincoln, in his first annual message to the Congress, submitted December 3, 1861, pointed out the need for a more

58 For example, an Act of May 15, 1820, enacted under the authority to “levy on the body and the goods of the king's debtor,” provided that the Secretary of the Treasury might distrain property of a government officer who was deficient in his accounts. The Act provided that a person thereby aggrieved could apply to the “District Judge” for an injunction, and if such injunction were refused, he might lay the matter before the District Judge of the Supreme Court, who could either grant an injunction or permit appeal to the Circuit Court. See U. S. v. Nourse, 6 Pet. 470 (U. S. 1832); U. S. v. Nourse, 9 Pet. 8 (U. S. 1835);—holding (1) that the petition to the District Judge was not equivalent to one to a district court, and where the injunction was granted by the District Judge, even though sitting as a court, general statutes pertaining to appeals gave the United States no right to appeal the grant of such injunction, and the only right of appeal granted in the Act was that of the officer upon refusal to grant the injunction. (2) When the case arose the second time, Chief Justice Marshall held that even though the “District Judge” was not a “court” and the government had no appeal from his decision, such decision granting the injunction requested was res judicata to a subsequent suit by the United States against the government officer allegedly short in his accounts. The same statute was before the Court again in Murray v. Hoboken Land and Improvement Company, 19 How. 272 (U. S. 1855), a case arising out of the Swartwout scandal, the distress procedure provided by the statute being held constitutional; although not a “judicial proceeding,” it was considered to be a matter upon which the judicial power was capable of acting. As a further example of consent by the Congress to a particular type of suit concerning a particular subject matter, see Van Ness v. City of Washington and the United States, 4 Pet. 232 (U. S. 1830). This was a suit arising out of the Act of May 7, 1822, c. 96, providing for changing the canal location to drain low ground near Pennsylvania Avenue, Washington, D. C., and for parks and other public improvements, the Act further authorizing heirs of the former proprietors of the land upon which the City was laid out, to sue in equity by suit in the nature of a petition of right to determine any compensation to which they might be entitled by virtue of reservations contained in grants or otherwise. In the Van Ness case, the Court, per Story, J., ascertained that the alienation by the former owners had been absolute, with no rights remaining in them.

convenient means for the adjustment of claims against the government, particularly in view of the increase in the number of such claims brought about by the Civil War. His message stressed that the investigation and adjudication of claims belonged, in their very nature, to the judicial department, and while the Court of Claims, as established, had proved valuable in the investigation of claims, its want of power to make its judgment final rendered it unable to carry out the very purpose of its organization, which was to remove this branch of business from the Halls of Congress.60

An Act of March 3, 1863,61 amended the 1855 statute to authorize the Secretary of the Treasury, upon presentation of a judgment of the Court of Claims and upon his estimate of an appropriation therefor, to pay the judgment out of any general appropriation made by law for the satisfaction of private claims. In Gordon v. U. S.62 it was held that this statute, by necessary implication, gave the Secretary of the Treasury power to revise the judgments of the Court of Claims, and that he would further have the power to revise a judgment of the Supreme Court affirming a judgment of the Court of Claims. For this reason the Supreme Court declined to entertain appeals from judgments of the Court of Claims, despite the specific statutory provision for such appeals. The statute was amended by an Act of March 17, 1866, to negative the implied power of revision of the judgment by the Secretary of the Treasury, and as indicated by Gibbons v. U. S.63 and numerous following cases, Courts of Claims judgments were thereafter reviewed by the Supreme Court in due course. The 1863 Act further added to the matters cognizable by the Court (as set forth on page 33) the limiting phrase "in cases not sounding in tort." This phrase has remained to the present time, although now necessarily amended to the extent that the Federal Tort Claims Act provided that (by mutual consent of the parties) review of district court orders in tort cases may be made by the Court of Claims.

The Tucker Act of March 3, 1887,64 conferred jurisdiction upon District Courts, concurrent with the Court of Claims, over claims not in excess of $10,000. Subsequent statutes enlarging federal liability,

60 supra RICHARDSON, Messages and Papers of the Presidents 51. Taken from Holtzoff, supra note 57.
61 REV. STAT. § 951 (1875); 28 U. S. C. § 244 (1940).
62 Wall. 561 (U. S. 1864).
63 Wall. 269 (U. S. 1869).
through consent to suit and otherwise, were: (1) consent to suit for alleged patent infringement;\(^{65}\) (2) consent to suit for alleged tortious acts in connection with governmental ownership and operation of merchant vessels, railroads, and collateral services during World War I;\(^{66}\) (3) recovery of damages caused by public vessels of the United States;\(^{67}\) (4) protection of governmental employees by the Federal Employees Compensation Act;\(^{68}\) (5) a 1919 Act providing compensation for damage to property by Army aircraft;\(^{69}\) (6) The Budget and Accounting Act of June 10, 1921\(^{70}\) authorizing the General Accounting Office to act as agent of Congress generally in settling claims against the United States; (7) The Small Tort Claims Act of 1922;\(^{71}\) and (8) various other Acts conferring powers upon Department Heads to settle specified classes of claims up to a specified amount,\(^{72}\) the provisions of some such temporary legislation being renewed in annual deficiency appropriation bills or otherwise.

Beginning in 1923, efforts were commenced by Representative Underhill, of Massachusetts, who had authored the Small Tort Claims Act in 1922, to procure the enactment of a general statute permitting judicial action upon tort claims against the government. These efforts culminated in the passage by the Congress, in 1929, of such a bill, which was given a pocket veto by President Coolidge.\(^{73}\) Efforts to obtain repassage and approval of such legislation continued through the 74th Congress (1935), and renewal of such efforts beginning in the 76th Congress (1939) culminated in final passage and approval of the present Federal Tort Claims Act during the Second Session of the 79th Congress (1946).

\(^{65}\)See McGuire, Tort Claims Against the United States, 19 GEORGETOWN L. J. 133 (1931), for an "inside" account of the circumstances bringing about the veto.


President Roosevelt, in his message to Congress of January 14, 1942, made an eloquent plea for tort claims legislation,\textsuperscript{74} pointing to the fact that private claim bills averaged more than 2,000 per Congress, a substantial portion of which were tort claim bills; and that existing procedures for treatment by Claims Committees and through special acts were slow, expensive, and unfair, both to the Congress and to the claimants.

Sketchily summarizing the Federal Tort Claims Act of 1946,\textsuperscript{75} it confers upon agency heads authority to settle claims for money damages only up to $1,000.00 for loss or damage to property, personal injury, or death, occurring under circumstances which, under the law of the place where the negligent act or omission occurred, would render the United States liable if a private person. District courts, sitting without a jury, are given exclusive jurisdiction to hear and determine all claims against the United States arising under the same circumstances, regardless of the amount of the claim. Excepted from the consent granted by the Act are claims based upon: (a) acts or omissions while exercising due care in executing a statute or regulation, regardless of validity; and performance or failure to perform a discretionary function, regardless of abuse of discretion; (b) loss, miscarriage, or negligent transmission of postal matter; (c) assessment or collection of taxes and customs duties or detention of goods by law enforcement officers; (d) admiralty claims; (e) negligent administration of the Trading with the Enemy Act; (f) damages resulting from imposition of a quarantine; (g) injury or damage while passing through the Panama Canal and in Canal Zone waters; (h) assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentations, deceit, or interference with contract rights; (i) damages caused by fiscal operations of the Treasury or by regulation of the monetary system; (j) combatant activities in time of war; (k) claims arising in a foreign country; (l) claims arising from activities of the Tennessee Valley Authority. It is needless to remark that the exception of some of the above from the consent provided in the Tort Claims Act does not mean that the tort claimant is without remedy, as some such exceptions were


\textsuperscript{75} An admittedly dangerous practice. For anyone having occasion to acquire anything more than a general idea as to the provisions of the Act, the painstaking analysis by Gottlieb, \textit{The Federal Tort Claims Act—A Statutory Interpretation}, 35 Georgetown L. J. 1 (1946), is \textit{must} reading.
made only because the subject was fully covered by other legislation, e.g., (d), (g), (l).

The Federal Tort Claims Act allows costs to the successful claimant, not including attorneys' fees. Otherwise it would appear that the same body of law which has grown up around contract suits in the Court of Claims and in District Courts, under the Tucker Act, will be applicable to tort actions under the new legislation. In this connection may be mentioned *U. S. v. Sherwood*, reaffirming the rule that if a necessary party to the suit would have to be joined as co-defendant with the federal government, the suit must be dismissed. In this 1941 decision, the late Chief Justice (then Justice) Stone reaffirmed the dogma relative to strict construction of waivers of the sovereign immunity, hence this is also a factor worthy of reckoning. The reasoning given for lack of jurisdiction in cases wherein there are necessary parties co-defendant with the United States, is that this tends to introduce extraneous issues, compelling the government to litigate matters outside the scope of its own acts and functions. In actuality, it is felt that here, as elsewhere, the real controlling consideration is the royalistic feeling that it is unbefitting the dignity and majesty of the government to be thus joined with Doe and Roe.

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76 Attention should be invited to section 422 of the Act, 28 U.S.C. § 944 (1946 Supp.) limiting, under criminal penalties, the amount of fees which may be received by attorneys for claimants.


78 312 U. S. 584 (1941).
ADMINISTRATIVE LAW

ADMINISTRATIVE FINALITY And DUE PROCESS OF LAW

"... the Constitution fixes limits to the rate making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. ... Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained." (Emphasis supplied).

* * *

"... I think no good reason exists for making special exception of issues of fact bearing upon a constitutional right. The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed. ... the supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court." (Emphasis supplied).

These contradictory statements\(^1\) were announced by two of our most eminent jurists in ruling on one of the most controversial problems of administrative law. That problem is: What finality attaches to the findings of an administrative agency wherein the issue of confiscation was raised?

This article will sketch the historic background of this legal controversy, and attempt an evaluation of the rule as it appears today.

In May, 1947, the highest tribunal of the State of New York was called upon to render its judgment as to what was the responsibility of the judiciary under the Constitution in reviewing a rate case containing a claim of confiscation; *Staten Island Edison Corporation v. Maltbie et al.*\(^2\) In this case, the plaintiff utility, located and doing business in the State of New York and subject to the control of the Public Service

\(^1\)The first quotation is from the Court's opinion delivered by Chief Justice Hughes, in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51-52 (1936); the second quotation is from the same case, and will be found in the concurring opinion thereto of Justice Brandeis, at pages 73 and 84.

\(^2\)296 N.Y. 374, 73 N.E. 2d 705 (1947).
Commission for that state, sought an injunction to permanently enjoin the enforcement of temporary and final rate orders fixing rates for plaintiff's electric service. The trial court granted defendant's motion for judgment on the pleadings and dismissed the complaint. The Appellate Division reversed the lower court and granted a temporary injunction. From this decision the Commission took an appeal to the Court of Appeals.

In affirming the action of the Appellate Division, the state's highest tribunal ruled that because the plaintiff utility had claimed that the rates fixed by the Commission were confiscatory, and thus in violation of its constitutional right to receive a fair return upon its property devoted to public use, the utility was entitled to a fair opportunity to submit the issue of confiscation to a judicial tribunal for determination upon the court's independent judgment as to both law and facts.

In so holding the court relied completely on the much discussed opinion of the United States Supreme Court in Ohio Valley Water Co. v. Ben Avon Borough.3

Possibly the Ben Avon case has stimulated more periodical comment in the field of administrative law than any other ruling of the Supreme Court.4

This decision of the Supreme Court, in which three judges dissented, involved a rate order of the Pennsylvania Public Service Commission fixing the maximum rates to be charged by the Ohio Valley Water Company. The company, claiming error in the valuation of its plant, appealed under the state Public Service Act to the Superior Court, and that court, passing on the weight of the evidence, decided that there had been an under valuation and sent the case back to the Commission. The

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3253 U.S. 287 (1920).
4The following are some of the leading discussions: Freund, The Right to a Judicial Review in Rate Controversies, 27 W. Va. L. Q. 207 (1921); Green, The Ohio Valley Water Case, 4 ILL. L. Q. 44 (1921); Isaacs, Judicial Review of Administrative Findings, 30 YALE L. J. 781 (1921); Cooper, Administrative Justice and the Role of Discretion, 47 YALE L. J. 577 (1938); Albertsworth, Judicial Review of Administrative Action by the Federal Supreme Court, 35 HARV. L. REV. 127 (1921); Wiell, Administrative Finality, 38 HARV. L. REV. 447 (1925); Buchanan, The Ohio Valley Water Company Case and the Valuation of Railroads, 30 HARV. L. REV. 1033 (1927); 50 HARV. L. REV. 78 (1936). Additional interesting material is furnished in a series of essays written under the sponsorship of the American Bar Association entitled: To What Extent Should the Decisions of Administrative Bodies Be Reviewable by the Courts?, 25 A.B.A.J. 453, 543, 770, 838, 940, 1018 (1939).
Pennsylvania Supreme Court reversed the Superior Court, holding that since there was competent evidence supporting the Commission's valuation, such valuation was under the statute conclusive and final. The United States Supreme Court in turn reversed the Pennsylvania Supreme Court on the ground that, as interpreted, the statute precluded the independent determination by the court to which the company was entitled under the due process clause of the Fourteenth Amendment. Mr. Justice Reynolds, speaking for the Court, said:

"The order here involved prescribed a complete schedule of maximum future rates and was legislative in character." (Citing cases). "In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."7

This language of the Court gave rise to one of the most troublesome and debated issues in administrative law.

Here, clearly stated for the first time, was the philosophy that due process of law requires that, when the issue of confiscation is raised as a result of administrative rulings in a rate case, the reviewing court must exercise its independent judgment upon the facts as well as the law. Completely discarded as incompatible with the due process clause, was the normal scope of judicial review in administrative rate cases—a review limited to determining whether there was notice and a fair hearing, adequate findings, and substantial evidence to support the agency's order.

It was the foregoing language of the Supreme Court that the highest court in the State of New York twenty-seven years later seized upon to support its holding in the *Staten Island* case.8 Between the two dates, however, we find decisions by the Supreme Court which provide interesting reading in estimating the current validity of the holding of the *Ben Avon* case.

Approximately sixteen years after the *Ben Avon* decision, the Supreme Court, in *St. Joseph Stock Yards Co. v. United States*,9 grasped an op-

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8253 U. S. 287, 289 (1920).
973 N. E. 2d 705, 707 (1947).

Other cases where the Court partially relied on the so-called *Ben Avon* doctrine are as follows:

Bluefield Water Works & Improvement Co. v. Public Service Commission, 262 U. S. 679
portunity to restate its interpretation of the requirements of due process when the alleged constitutional issue of "confiscation" is raised in a rate controversy.\footnote{298 The Georgetown Law Journal [Vol. 36: p. 337}

The \textit{St. Joseph} case involved a controversy over rates set by the Secretary of Agriculture under the Packers and Stock Yards Act.\footnote{11} The Court was sharply divided in its reason for unanimously affirming the judgment below. Four justices concurring in the result, three of whom, for reasons stated in the separate concurring opinion of Mr. Justice Brandeis, did not agree with the opinion of the majority because that opinion was an attempt to bolster the Court's opinion in the \textit{Ben Avon} case.\footnote{12}

In the trial of this case, the district court did not exercise its independent judgment on the facts because it perceived no firm rule (or good

\footnote{10}Prior to the \textit{St. Joseph} case, however, the Court had decided the celebrated case of Crowell \textit{v. Benson}, 285 U.S. 22 (1932). In this case the Court created a new issue described as a "jurisdictional" fact question which many writers have seen fit to compare with the "constitutional" fact question announced in the \textit{Ben Avon} case. The theory of the Court's decision in \textit{Crowell v. Benson} was that whenever it was necessary to resolve a controversial set of facts in order to determine the applicability of a federal statute, which ruling would thus determine the jurisdiction of the federal court to hear the case, the parties involved were entitled to have the basic fact issues decided in a "trial de novo." Many fine distinctions and comparisons may be pursued in a discussion of the right to an independent review on a "constitutional" fact issue as contrasted with the right to a hearing \textit{de novo} on a so-called "jurisdictional" fact question, but it is not the purpose of this article to do so.

Significantly, the decision in the \textit{Crowell v. Benson} case was based on Article III of the Constitution, defining the extent of judicial power, and not on the due process clause. For an interesting and complete review of the questions raised by the \textit{Crowell v. Benson} case; and for the opinion of a leading authority in the administrative law field as to what limitations should be placed upon the reasoning of the Court therein, see Dickinson, \textit{Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of Constitutional Fact"}, 80 U. of PA. L. REV. 1055 (1932). See also the opinion of Justice Brandeis in the \textit{St. Joseph} case to the effect that the principle of the two cases are not similar, 298 U.S. 38, 82 (1936).

\footnote{29}42 STAT. 159 (1921), 7 U.S.C. § 181 et seq. (1934).

\footnote{31}Mr. Justice Roberts concurred in the result. Mr. Justice Brandeis in a separate opinion concurred in the result on separate grounds. Mr. Justice Stone and Mr. Justice Cardozo in a separate opinion concurred in the result for reasons stated in Mr. Justice Brandeis' opinion.
reason) which required a reviewing court to grant a *de novo* review of a rate controversy in which the issue of confiscation was raised. In the district court's view, even though the issue of confiscation was present, a reviewing court was required to accept the findings of the administrative agency if they were supported by substantial evidence. The Supreme Court did not support this view and, in holding otherwise, it said:

"The fixing of rates is a legislative act. . . . Exercising its rate making authority, the legislature has a broad discretion. It may exercise that authority directly or through the agency it creates or appoints to act for that purpose in accordance with appropriate standards. The court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents as to matters within the province of either. . . . When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within the sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. . . . In such cases, the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority."

At this point the views of majority of the Court, the opinion of the district court, and the opinion of the minority of the Court expressed in the concurring opinion of Mr. Justice Brandeis (shared in by Mr. Justice Stone and Mr. Justice Cardozo) are all in agreement. However, the majority now opens the breach:

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13It would appear that the district court was hopeful of a renunciation by the Court of its holding in the *Ben Avon* case. Realizing full well the clear holding of that and succeeding cases, the district court was persuasive in its language:

"Findings of fact made by the Secretary of Agriculture in a proceeding under the Packers and Stock Yards Act are made conclusive by statute. By that act the laws pertaining to orders of the Interstate Commerce Commission are made applicable to orders of the Secretary. Title 7, USCA § 217. The Interstate Commerce Act, Title 49, USCA § 16 (12), makes the findings of the Interstate Commerce Commission conclusive if supported by substantial evidence. Tagg Bros. & Moorehead v. United States, 280 U.S. 420, 440 (see footnote on p. 444). . . . If in a judicial review of an order of the Secretary his findings supported by substantial evidence are conclusive upon the reviewing court in every case where a constitutional issue is not involved, why are they not conclusive when a constitutional issue is involved? Is there anything in the Constitution which expressly makes findings of fact by a jury of unexperienced laymen, if supported by substantial evidence, conclusive, that prohibits Congress making findings of fact by a highly trained and especially qualified administrative agency likewise conclusive, provided they are supported by substantial evidence?" 11 F. Supp. 322, 327 (1935).

Compare these views with dissenting opinion in the *Staten Island* case, *infra*, and with the opinion of the Supreme Court of New York in the *Staten Island* case, 270 App. Div. 55, 65, 58 N.Y.S. 2d 818, 826 (1946).
"But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained . . . to say that their [administrative agencies'] findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously impair the security inherent in our judicial safeguards. . . . Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority. This is the purport of the decisions above cited with respect to the exercise of an independent judicial judgment upon the facts where confiscation is alleged. The question under the Packers and Stock Yards Act is not different from that arising under any other act, and we see no reason why those decisions should be overruled."14

It was the vigorous denunciation of the Court's opinion in the separate opinion of Justice Brandeis that attracted the greatest legal literary support. It is interesting to note that although there are basic differences between the views of the majority and those in the opinion of Justice Brandeis yet the latter opinion expresses as strong a plea for the sanctity of constitutional rights as that professed by the majority.

It was Justice Brandeis' opinion that stated:

"Like the lower court, I think no good reason exists for making special exception of issues of fact bearing upon a constitutional right. The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed."15

After proceeding in much detail and with cogency to illustrate the inconsistency between the Courts' opinion in this as well as in the Ben Avon case and some of its other rulings, (some of which will be discussed

14298 U.S. 38, 52 (1936).
15298 U.S. 38, 73 (1936).
in connection with other cases later in this article) Mr. Justice Brandeis continued,

"The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality. But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court. If it did, the power of courts to set aside findings of fact by an administrative tribunal would be broader than their power to set aside a jury's verdict. The Constitution contains no such command."16

The opinion of the minority of the Court in the St. Joseph case as an expression of what should be the scope of judicial review of cases similar to the Ben Avon case, was prophesized by many to eventually become the opinion of the majority of the Court.17 It is submitted that this forecast has proved to be correct.

One other important phase of this subject was clearly solved by the Court in the St. Joseph opinion. It was possible after the Ben Avon decision to construe the language of the Court therein to mean that in a judicial proceeding involving the issue of confiscation all evidence bearing on the controversy should be submitted de novo, the legal definition given to such term being "anew". Such a proceeding would thus represent a trial de novo. Interpretation of the Court's mandate on the requirements of due process revolves around the meaning to be given to the word independent in the phrase used by the Court to describe the type of judgment a court is required to render on the factual and legal issues. Fortunately, however, all doubts as to the Court's meaning on this facet of the problem were clearly resolved by the Court in another section of its St. Joseph opinion wherein it issued instructions that in cases where the issue of confiscation was raised, the record of the proceedings before the administrative agency should be before the court, and further that the Court frowned on any attempt to introduce new evidence at the court proceedings which had not been offered or which was withheld from the administrative proceeding. Its comment to the effect that judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert agency, gives to those who were "stunned" by Ben Avon pronounce-

16298 U.S. 38, 84 (1936).
17Landis, Administrative Policies and the Courts, 47 Yale L. J. 519, 529 (1938).
ments some solace in that at least the administrative proceedings are not to be regarded simply as an "empty show".

The above rulings of the Court show clearly that the proceedings are to be restricted to that of a review of the record developed before the administrative agency. Courts and litigants searching for a term to describe the type of "independent review" to be given in these cases have applied the phrase "review de novo". In various sections of this article it will be necessary to quote court opinions using these two phrases, and it is necessary to sharply distinguish "trial de novo" and "review de novo" in order to clearly follow the trend in judicial approach to this problem.

It can be contended that within a period of two months after the St. Joseph case, the Supreme Court desired to weaken the effect of its former decisive holding in the Ben Avon case. In Acker v. United States, the question involved was the reasonableness of rates charged market agencies doing business at the Union Stockyards in Chicago. The Secretary of Agriculture, acting under the Packers and Stock Yards Act, ordered an inquiry and gave notice of a hearing to determine the reasonableness of such rates. The rates subsequently fixed by the Secretary were assailed by appellants, who conducted market agencies, as unreasonable. After a petition for rehearing was refused by the Secretary, appellants sought injunctive relief in the district court. The three-judge district court granted an interlocutory injunction but on final hearing dismissed the bill, holding that the Secretary's findings were supported by substantial evidence. In the light of the evidence before it, and that adduced at the trial, the court adopted the Secretary's findings as its own; adjudged the prescribed rates reasonable, and concluded the orders entered were not arbitrary and did not operate so as to take the agencies property without due process of law.

The appellants contended in the action before the Supreme Court, and in the court below, that many errors were committed by the Secretary in failing to recognize certain evidence, and in other ways, which errors appellants claimed resulted in the fixing of unreasonable and confiscatory rates.

Here the allegation of confiscation was clearly before the Court and its decision certainly cannot be said to strengthen the Ben Avon theory.

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18298 U.S. 426 (1936).

Decision in the St. Joseph case was rendered April 27, 1936; the decision in the Acker case was rendered May 18, 1936.
To do full justice to the delicate treatment of this issue, it is advisable to quote the Court:

"The appellants insist that they were entitled to a trial de novo on the issue of confiscation and on the issue of the denial of the petitions for rehearing.

"A majority of the District Court said: 'Having considered the new evidence offered for the first time in this court, and all the evidence offered before the Secretary, and having concluded, as we have, that there is no showing of confiscation, we find it unnecessary to determine whether the evidence offered for the first time in this Court was admissible. Tagg Bros. & Moorhead v. United States, 280 U.S. 420.' "19 (Emphasis supplied).

It is not too clear from the language used just what type of review was afforded. At least there is ground for the belief that the lower court restricted its review to the record to determine if it contained substantial evidence to support the ruling of the agency. Such a review of course would not satisfy the rule laid down in the Ben Avon case but would be simply representative of the normal scope of judicial review.20

Some support for the view that the Supreme Court recognized that the review granted by the lower court was not an independent one on the facts is found later in the opinion:

"One of the judges, [in the District Court] in a separate opinion, stated:

'I do not concur in the findings of this court which adopt in total the findings of fact made by the Secretary of Agriculture. Some of them, particularly those relating to salesmanship costs and allowances for business getting and maintaining expenses, are, in my opinion, against the weight of evidence. However, I am not prepared to say that the findings were made without any evidence to support them. I join, therefore, in the entry of the decree dismissing the bill.' "21 (Emphasis supplied).

\footnote{19}{298 U.S. 426, 433 (1936).}
\footnote{20}{This is the general description of the scope of judicial review. Interstate Commerce Commission v. Union Pacific Railroad Company, 222 U.S. 541, 547 (1912) is the classical case announcing this doctrine; it has been used by the court in the following cases, O'Keefe v. United States, 240 U.S. 294, 303 (1916); United States v. Carolina Freight Carriers Corp., 315 U.S. 475, 482, 490 (1942); Alton Railroad Co. v. United States, 315 U.S. 15, 23 (1942); Board of Trade of Kansas City v. United States, 314 U.S. 534, 546 (1942); Interstate Commerce Commission v. Hoboken Manufacturers Railroad Co., 320 U.S. 368, 378 (1943); United States v. Wabash Railroad Co., 321 U.S. 403, 408 (1944); Chicago, St. Paul, Minneapolis and Omaha Railway Co. v. United States, 322 U.S. 1, 3 (1944). Stated differently the general rule is that the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 286-87 (1939). Att'y. Gen. Comm. Ad. Proc., Gov't Agencies, Doc. No. 8, 77th Cong., 1st Sess. 87 (1941).}
\footnote{21}{298 U.S. 426, 433 (1936).}
It would thus appear that the district judge who separately concurred was not adopting an independent judgment on the facts, but was simply checking to see if there was evidence to support the opinion of the administrative agency.

As to the allegation of confiscation, the Supreme Court, immediately after citing the language above quoted, said:

"It is noted that in spite of the allegations of the bill the case does not involve any question of confiscation. The appellants employ little physical property in their business, and no complaint is made as to the allowance of interest on such as they do employ. They render a personal service and the issue before the Secretary was whether the uniform schedule of rates for that service was or was not reasonable. On this issue he was bound to afford the appellants due process. In fact he gave them adequate notice and accorded them a full hearing. He carefully weighed the evidence, as demonstrated by voluminous and detailed findings; he exposed with candor the facts and considerations forming the basis of his ultimate conclusions. The appellants had opportunity for a full presentation of their case. Under § 316 of the Packers and Stock Yards Act the District Court sits not to afford a trial de novo, but to review the administrative action. Tagg Bros. & Moorhead v. United States . . . no reason appears why the appellants could not be afforded due process of law by a review of any questions they deemed material upon the record as made in the administrative proceeding, or why the delay, expense and burden of a new trial should be imposed simply because they demanded it. The issue before the Secretary was not confiscation but the reasonableness of a charge for personal service. No new or different issue could have been presented upon a trial de novo. We think the court correctly held that its function was the consideration of questions raised upon the record made before the Secretary."22 (Emphasis supplied).

Two significant matters are raised by the language of the Court above. First, the reference that the issue was not confiscation closely followed by the statement that the plaintiffs employed very little capital in their business leads one to wonder whether the question of confiscation is restricted to a determination of the rate of return on an investment. The question might be framed so as to inquire whether a rate is confiscatory merely if it deprives a person of a fair compensation for his services, or need the rate actually deprive him of something more, such as *so great a lack of return* that he can not only fail to pay expenses but will also lose previous earnings. Such a theory leads to the next question which is raised by the Court's language that "the issue before the Secretary was not confiscation but the reasonableness of a charge for personal service." Acceptance of this statement at face value would mean that no

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22Cf. the language of Mr. Justice Brandeis in his dissenting opinion in the *St. Joseph* case, notes 15 and 16, supra.
denial of due process is involved in allowing an agency to set an *unreason-able* rate; the courts need not look at the evidence and form an independent opinion unless the rate is alleged to be confiscatory. Aside from the debatable premise that a court rather than the expert body is the better judge of what rate will be confiscatory, should one conclude that it is less onerous to allow an unreasonable rate to be set than to allow a confiscatory rate to go unadjusted? Such would appear to be the reasoning of the Court by the above language.

A thorough reading of those cases wherein the only objection raised against the action of the administrative agency was that its action was *unreasonable*, or that the rate was *unreasonable*, discloses that there is no doubt but that the review by a court in such a case is limited to determination whether there was sufficient substantial evidence in the record to support the ruling by the administrative body. Yet, when the magic word "confiscation" is pleaded, the doors are opened wide for the court to "second guess" the agency. As we note in later cases, rates can be unreasonable and yet not be confiscatory. As one writer has put it,

"... it will pass the wit of commissions and courts to differentiate 'unreasonably low but not confiscatory' from 'so unreasonably low as to be confiscatory', considering that the minimum rate of return conformable to due process has never been fixed."  

This point however illustrates only the difficulty inherent in such reasoning, but it does not solve the question that immediately comes to the foreground: Why is it not permissible under the Constitution to allow a confiscatory rate, yet permissible under the Constitution to allow an unreasonable rate?

Actually in a rate case we have two factors to determine before it can be known what revenue will result to the utility by the application of the rates set out in the rate order. These two factors are first, the *rate base*, and second the *rate of return*. In the calculation of the rate base it is essentially an accounting problem to determine the assets of the utility devoted to the performance of its service. It is true that a variety of methods may be used to determine the *value* of these assets, and the earlier decisions abound in discussions as to the proper method to follow. The determination of the rate of return is primarily a determination as to what constitutes a reasonable rate of return for a business with the same relative amount of risk. Once these two factors have been

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23 Freund, Administrative Powers Over Persons and Property, 298 (1928).
24 Welch, note 64, infra.
ascertained, the application of the rate of return against the rate base will result in what will be reasonable net earnings for the period involved. The utility is then authorized to charge rates of its customers which will result in its receiving that amount of net earnings.

It is apparent that most of the difficulties will be encountered in determining the rate base. Arguments will be many, practical and theoretical, why one method of determining this base is sounder than another method. In general, no great amount of difficulty is experienced in determining a fair and reasonable rate of return. It is of course apparent that the application of an agreed upon rate of return on a rate base computed by one method resulting in a figure of $x$ as a rate base, will result in a different amount of net earnings, than the same rate of return applied on a rate base computed a different method resulting in a figure of $y$. This is simply saying that the amount of income will be different if a stable rate of return is applied against two different amounts determined to be the rate base using two different methods.25

The problem of ascertaining operating costs for the period is often less troublesome than ascertaining the value of the utility assets. In any case it is fair to say that if a reasonably sound basis is used to determine costs (such as experience, trends, etc), no protracted argument between the commission and the utility ordinarily results.

Thus narrowed down the only remaining factor is what profit, or rate of profit will result to the investors.

It is of course apparent that granted an agreed upon cost factor the use of a rate of return of 6% against a rate base of $1,500,000.00 will provide a larger return on investment than 6% on a rate base of $1,000,000.

Essentially, therefore, the essence of the problem is what return on investment will the Commission approve. Actually this is where the interest lies. Few, if any, cases involve the claim by a utility that the rate base and rate of return used by the Commission will not cover costs. Usually it is argued that the Commission’s determination of the rate base

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25 This explanation, of course, is fundamental rate making, but it is submitted that in each case one has both a rate base and a rate of return to deal with. Now the application of a rate of return equal to 6% against a base of $1,000,000.00 will result in net earnings of $60,000.00. If, however, the utility thought the rate base should have been $1,500,000.00, the valuation of the commission of $1,000,000.00 would have the same net effect (as far as determining the utility’s permissible net earnings as if the rate of return had been 4% (4% × $1,500,000.00 = $60,000.00).
and rate of return will only provide a return on investment less than that enjoyed by similar businesses having an equal risk element.

The writer contends that the allegation of "confiscation" is merely a device to gain a different type of review on substantially similar cases. The parties are litigating for a "reasonable" return on investment.\textsuperscript{26}

It is of course apparent that this conclusion places all rate cases on an equal footing. Nowhere can it be found that the courts have insisted that where it is alleged the rate order of the Commission is simply unreasonable, an independent determination of the facts is necessary.

If this is the proper conclusion, then it becomes apparent that the courts have been intrigued by the word "confiscation" into granting a more extensive review than would have been granted if the same factors had been present but the utility had failed to use the word "confiscation."

It is submitted that both types of cases are essentially dealing with the question of the rate of return to the investor, and, if the Commission's judgment is to be regarded as final if supported by the evidence in one case, it should be regarded as final in the other case.

Perhaps it is not necessary to be disturbed over these apparent inconsistencies, in view of the present trend of the judicial thinking on the main problem.\textsuperscript{27}

Chronologically, the next leading decision of the Supreme Court on this problem appeared in connection with its review of the Rowan & Nichols Oil Co. cases.\textsuperscript{28} These cases involved orders of the Railroad Commission of Texas establishing proration quotas for oil production, allowing each well to produce a stated percentage of "hourly potential" capacity and treating marginal wells specially. The Rowan & Nichols Co. raised the issues of discrimination and confiscation. The district court enjoined the enforcement of the orders,\textsuperscript{29} the circuit court affirmed,\textsuperscript{30} but the Supreme Court reversed the decrees in both cases, each

\textsuperscript{26}Bluefield Water Works & Improvement Co. v. Public Service Commission, 262 U.S. 679 (1923).

\textsuperscript{27}The writer of this article would have desired, if space permitted, to attempt a more thorough analysis of this problem with this approach. Compare the conclusion reached by another commentator, Freund, loc. cit. note 23, at 299.

\textsuperscript{28}No. 1, 310 U.S. 573 (1940). No. 2, 311 U.S. 570 (1941).


\textsuperscript{30}No. 1, Railroad Commission of Texas v. Rowan & Nichols Oil Co., 107 F. 2d 70 (C.C.A. 5th 1939). No. 2, Appeal direct to Supreme Court.
time with three judges dissenting.\textsuperscript{31}

In its decision on the first case the Court stated the proposition which has been heralded as the recession of the Court from its autocratic holding in the Ben Avon case. Mr. Justice Frankfurter speaking for the Court said:

"Except where the jurisdiction rests, as it does not here, on diversity of citizenship, the only question open to a federal tribunal is whether the state action complained of has transgressed whatever restrictions the vague contours of the Due Process Clause may place upon the exercise of the state's regulatory power. A controversy like this always calls for a fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted.

"It is not for the federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better."\textsuperscript{32}

In Mr. Justice Frankfurter's opinion the lower courts in this case "appear to have been dominated by their own conception of the fairness and reasonableness of the challenged order." But whether a system of proration need be based on some other factor or combination of factors "is in itself a question for administrative and not judicial judgment."\textsuperscript{33}

"Certainly in a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering upon conjecture even for those learned in the art, it would be presumptuous for courts, on the basis of conflicting expert testimony, to deem the view of the administrative tribunal, acting under legislative authority, offensive to the Fourteenth Amendment."\textsuperscript{34}

Justice Roberts, in an opinion shared by Chief Justice Hughes and Justice McReynolds, dissented. Especially significant is their statement that the majority opinion "announces principles with respect to the review of administrative action challenged under the due process clause directly contrary to those which have been established."\textsuperscript{35}

Meanwhile the Railroad Commission of Texas had issued a new proration order to replace that which it had been enjoined from enforcing by the District Court. The Rowan & Nichols Co. and others found the same weakness, statutory and constitutional, in this order as it had in

\textsuperscript{31}See note 28, \textit{supra}.

\textsuperscript{32}310 U. S. 573, 580, 584 (1940).

\textsuperscript{33}Id. at 581.

\textsuperscript{34}Ibid.

\textsuperscript{35}Id. at 585.
the previous one, and again applied for an injunction against its enforcement. Again the district court granted the injunction, this time by a three-judge district court and an appeal this time was taken directly to the Supreme Court. Again the Court reversed in an opinion by Mr. Justice Frankfurter:

"When we consider the limiting conditions of litigation—the adaptability of the judicial process only to issues definitely circumscribed and susceptible of being judged by the techniques and criteria within the special competence of lawyers—it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and prophesies and impressions of expert witnesses."86

The opinions of the Court in these cases have been hailed by the supporters of the minority holdings in the Ben Avon and St. Joseph cases as evidence of the transition of the Court from an overzealous judicial control of the administrative processes to one of laudable judicial restraint. Just how broadly the language of the Court can be properly construed in determining legitimate scope of judicial review in all its aspects remains to be seen. It cannot be denied that the Court has to an appreciable extent withdrawn from active participation where it believes that probably a "toss of the coin" is the best guess under the circumstances. Some who would follow a cautious approach state that independent judicial determination in these cases is still guaranteed. In support of this construction of the Rowan & Nichols cases, this group points to the fact that the cases were not rate cases, and thus the effect of the Court's language is not to be accepted as applying "across the board" in all cases containing a "constitutional" fact issue. Further they point out that the Ben Avon case has not been expressly overruled. This last statement cannot be denied; and the New York Court of Appeals so concludes in fortifying its holding in the Staten Island case. Later in this article the author will attempt to analyze other opinions of the Court to determine whether there has been an implicit although not explicit overruling, or whether an express rejection of the Ben Avon decision is really significant.

However, as one writer has put it, if the Rowan & Nichols cases do not get the credit for overruling the doctrine of the Ben Avon case, it cannot be denied that the philosophy of the Court has shifted to the support of the doctrines originally announced by Justice Brandeis.87

86311 U.S. 570, 576 (1941).
87Barnett, Administrative Justice and Judicial Self-Restraint, 14 Miss. L. J. 305, 329
Subsequent to the clear indication in the *Rowan & Nichols* decision of a change in its approach to this difficult problem, the Supreme Court has furnished additional support for the view that judicial review, even where the issue of confiscation is raised, should be no different than review in any other case.

In *National Broadcasting Co. v. United States*, wherein plaintiffs claimed the regulation of the Commission would operate to deprive them of property without due process of law, the Court in affirming the lower court said:

"A procedural point calls for just a word. The District Court, by granting the Government's motion for summary judgment, disposed of the case upon the pleadings and upon the record made before the Commission. The Court below correctly held that its inquiry was limited to review of the evidence before the Commission. *Trial de novo* of the matters heard by the Commission and dealt with in its report would have been improper. See *Tagg Bros. v. United States*, 290 U. S. 420; *Acker v. United States*, 298 U. S. 426."

It is helpful to quote the language of the district court in this connection, in order to more clearly understand the portent of the Supreme Court holding. The District Court for the Southern District of New York speaking through Judge Learned Hand, said:

"There remains only the question of procedure: Whether a motion for summary judgment is proper, or whether, as the plaintiffs argue, the causes should

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(1942); Rothman, *Administrative Law—Scope of Judicial Review*, 39 Mich. L. Rev. 438, 448 (1941); Davis, *Judicial Emasculation of Administrative Action and Oil Proration: Another View*, 19 Texas L. Rev. 29, 58 (1941). The following comment is made in the last cited article:

"Many will inquire whether the decision overrules cases such as Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287 (1920); St. Joseph Stock Yards Co. v. United States, 298 U. S. 38 (1936); Crowell v. Benson, 285 U. S. 22 (1932). These cases required opportunity for submitting the issues of confiscation and some vague 'constitutional' or 'jurisdictional' issues 'to a judicial tribunal for determination upon its own independent judgment as to both law and facts.' The present decision raised the issue of confiscation and the question was probably both 'constitutional' and 'jurisdictional.' And the Supreme Court denied opportunity for independent judicial judgment. A multitude of analytical distinctions and differentiations might be mentioned, but I believe that would not be profitable. The *Rowan & Nichols* case is an oil proration case. I think it rests largely upon considerations peculiar to oil proration. It does not overrule the other cases. 'The problems subsumed by "judicial review" or "administrative discretion" must be dealt with organically; they must be related to the implications of the peculiar interest that invokes a "judicial review" or as to which "administrative discretion" is exercised.' Frankfurter, *The Task of Administrative Law*, 75 U. or Pa. L. Rev. 614, 619 (1927). But in my opinion whether or not the credit is given to the *Rowan & Nichols* case, these older cases are not now law and will be overruled at the Court's first opportunity."
go to trial and be heard upon evidence taken de novo. That depends upon what effect we should give to the Commission's findings."\(^\text{39}\)

After concluding that the scope of review in this action was the same as if the case were on appeal, the district court continued:

"This is confirmed by considering what use we could make of any evidence if we took it. It might go to show that the Commission had failed to give adequate notice to the plaintiff of what it proposed, or an adequate opportunity to put in their own evidence, or an adequate hearing upon all evidence; but aside from the fact that the record is before us and does not bear out such a contention, neither complaint, as we have just said, alleges anything of the kind. On the other hand, if the evidence went to contradict or overthrow the findings, we could not bring it into hotchpot with the evidence taken by the Commission, without deciding the issues in the first instance ourselves. We have no such power, it would upset the whole underlying scheme of an expert commission, whose orders must stand or fall under such evidence as it had before it. Tagg Bros. & Moorehead v. United States, 280 U.S. 420, \ldots; supplement that evidence he must apply to the Commission itself, § 405.

"The plaintiffs somewhat faintly invoke the doctrine of Crowell v. Benson, 285 U.S. 22, \ldots; Baltimore & Ohio Railroad Co. v. United States, 298 U.S. 349, \ldots; St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, \ldots. Assuming that that doctrine is still law (Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U.S. 573, \ldots Id., at 311 U.S. 570, \ldots.), it does not apply. The 'networks' are indubitably engaged in interstate commerce and so are their 'affiliates'; it is a question of law, not of fact, whether the regulations are within the Commission's powers, and the only issue of fact, assuming it can be called such, is whether there was evidence to support the findings. Unless the distinction between what is jurisdictional and what goes to the exercise of a power is to disappear altogether, the Commission's jurisdiction did not depend upon whether they rightly estimated the 'public convenience, interest, or necessity.' "\(^\text{40}\)

Shortly thereafter the Court was called upon to decide two cases dealing with rates applicable in the natural gas field under the authority of the Natural Gas Act of 1938.\(^\text{41}\) The first of these cases, Federal Power Commission v. Natural Gas Pipeline Co.,\(^\text{42}\) came to the Supreme Court on writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit.\(^\text{43}\) The allegation of confiscation resulting from the reduction of rates ordered by the Commission was placed squarely before the circuit


\(^{\text{40}}\) Ibid.


\(^{\text{43}}\) 315 U.S. 575 (1942).

\(^{\text{44}}\) 120 F. 2d 625 (1941).
This court experienced no difficulty in rejecting the contention that the normal scope of review was thereby automatically enlarged,

"Bearing in mind that our function is to review, not to make, findings of fact, . . . we conclude that there is substantial evidence to support the Commission's finding."45

The circuit court proceeded to other points in the case, wherein they disagreed with the Commission, and consequently directed that the order of the Commission directing reduction in rates be vacated and set aside. For this reason the decision of this court was reversed by the Supreme Court.

The issue of confiscation was also raised in the Supreme Court,46 and the Court's opinion clearly showed that its current and unanimous thought is compatible with that originally expounded so clearly by Justice Brandeis in his separate concurring opinion in the St. Joseph's case, and not with the Court's approach in the Ben Avon case. The language of the Court is explicit. Under the caption—The Scope of Judicial Review of Rates Prescribed by the Commission, it states:

"The ultimate question for our decision is whether the rate prescribed by the Commission is too low. The Statute declares, § 4 (a), that the rates of natural gas companies subject to the Act 'shall be just and reasonable and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.' Section 5 (a) directs the Commission to 'determine the just and reasonable rate' to be observed, and requires the Commission to 'fix the same by order'. . . . On review of the Commission's orders by a Circuit Court of Appeals as authorized by § 19 (b), the Commission's findings of fact 'if supported by substantial evidence shall be conclusive.'

*Section XV, of the Pipeline Company's Petition for Review of Interim Rate Order of Federal Power Commission:

"For the reasons expressly set forth in the statement of points attached hereto, said order of respondent Federal Power Commission, as modified, is erroneous and operates, and will continue to operate, to confiscate petitioners' property, property rights and revenues without due process of law, in violation of the due process clause of the Fifth Amendment to the Constitution of the United States. . . ."

5120 F. 2d 625, 634 (1941).

*Argument number VI, page 175, of the Pipeline Company's brief filed with the Supreme Court:

"The Court Erred in Not Sustaining Cross-Petitioners' Contention That The Commission's Order Should Be Set Aside Because it is Confiscatory in That it Denies Cross-Petitioners' a Fair Rate of Return. On page 179 of this brief it was stated: An order predicated upon the allowance of a rate of return barely sufficient to cover cost of financing (in this case it does not cover such cost) does not permit the earning of a reasonable return, and in a review proceeding of this character should be held invalid and set aside, even if it did not operate to confiscate cross-petitioners' property and revenues. But it is not necessary for the Court ever to reach that question in this case: for the order is patently confiscatory."
"By long standing usage in the field of rate regulations, the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense. ... Assuming that there is a zone of reasonableness within which the Commission is free to fix a rate varying in amount and higher than a confiscatory rate, ... the Commission is also free under § 5 (a) to decrease any rate which is not the 'lowest reasonable rate'. It follows that the Congressional standard prescribed by this statute coincides with that of the Constitution, and that the Courts are without authority under the statute to set aside as too low any 'reasonable rate' adopted by the Commission which is consistent with constitutional requirements."47

By this language the Court makes it clear that the statutory requirement of the Natural Gas Act fully satisfies the constitutional requirement of due process and that accordingly if the statutory standards are met, the Court's inquiry is at an end. How may a Commission assure itself that it is fixing a "reasonable rate"?

The court answers this question by saying,

"The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end."48

This language is a far cry from the power assumed by the Court in the St. Joseph case, where the Court expressly refused to limit its review to a determination of whether an administrative finding of reasonableness was supported by substantial evidence:

"But to say that their findings of fact may be conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards."49

The two decisions cannot be satisfactorily reconciled. In the St. Joseph opinion the Court declared that it would not tolerate a wrong conclusion on a fact question where constitutional guarantees were alleged to be violated irrespective of a showing of substantial evidence to support the

48Id. at 586.
49298 U.S. 38, 52 (1936).
conclusion reached.\textsuperscript{50} In the \textit{Pipeline} case, the Court refuses to exercise its independent judgment on questions of fact committed by Congress to administrative determination, and states that the statutory standard of substantial evidence to support a finding of reasonableness is conclusive.\textsuperscript{51}

The full extent of the Court’s repudiation of the \textit{Ben Avon} doctrine is more frankly stated in the concurring opinions in the \textit{Pipeline} case. Although the opinion is unanimous, two separate concurring opinions were filed. The first of these, shared in by Justices Black, Douglas, and Murphy, is critical, justifiably it is believed, of the disinclination by the majority to junk a doctrine to which it clearly does not subscribe but which it is not quite willing to write out of existence. Perhaps the haunting spectre of stare decisis is the deterrent, but more probably the Court wants to conserve its “ace in the hole” for the exceptional case of palpable administrative abuse.

The difference in approach by the concurring three justices is signified by the following statement:

“We concur with the Court’s judgment that the rate order of the Federal Power Commission, issued after a fair hearing upon findings of fact supported by substantial evidence, should have been sustained by the Court below. But in so far as the Court assumes that, regardless of the terms of the statute, the due process clause of the Fifth Amendment grants it power to invalidate an order as unconstitutional because it finds the charges to be unreasonable, we are unable to join in the opinion just announced.”\textsuperscript{52}

The justices next proceed to analyze completely the history of the Court’s philosophy on the subject of rate making. It would be unwieldy here to comment on all aspects of the opinion, important as it is, but the excellent presentation should be required reading for a full understanding of the changed philosophy of the Court since \textit{Ben Avon}

\textsuperscript{50}As to the respective abilities of a court and an expert commission to evaluate the difficult technical issues in a rate controversy, see the opinion of the Court in the \textit{Rowan & Nichols} cases, notes 34, 36, \textit{supra}, and the district court in the \textit{Natl. Broadcasting Co.} case, note 40, \textit{supra}. It is also informative to note that the Supreme Court in United Gas Public Service Company v. Texas, 303 U.S. 123 (1928), where the question of confiscation was raised, sustained the action of the trial court when it submitted this question to a jury, even though on appeal the gas company contended the trial by jury had deprived it of its right to an independent judicial determination. Certainly it cannot be rationally assumed that a layman jury is more qualified than the expert commission to rule on such an issue.

\textsuperscript{51}315 U.S. 575, 596 (1942).

\textsuperscript{52}\textit{Id.} at 599.
days. It is desirable, however, to emphasize certain portions of the opinion which deal with the specific issue here under discussion. In sketching the history of the judiciary's participation in rate matters, it was said:

"Rate making is a species of price fixing. In a recent series of cases, this Court has held that legislative price fixing is not prohibited by the due process clause.\textsuperscript{53} We believe that, in so holding, it has returned, in part at least, to the constitutional principles which prevailed for the first hundred years of our history. \textit{Munn v. Illinois}, 94 U.S. 113; \textit{Peik v. Chicago & N. W. Ry. Co.}, 94 U.S. 164; \textit{Cf. McCart v. Indianapolis Water Co.}, 302 U.S. 419, 427-428. The \textit{Munn} and \textit{Peik} cases, decided in 1877, Justices Field and Strong, dissenting, emphatically declared price fixing to be a constitutional prerogative of the legislative branch, not subject to judicial review or revision.\textsuperscript{54}

This is strong language, and represents a direct repudiation of the era of thinking ushered in by Justice Field and the adherents to the doctrine of "second guessing" by the judiciary—first enunciated in \textit{Chicago, M. & St. P. Ry. Co. v. Minnesota}, 134 U.S. 418 (1890). The concurring opinion continues:

"Under those views, . . . 'due process' means no less than 'reasonableness judicially determined.'\textsuperscript{55} In accordance with this elastic meaning which in the words of Mr. Justice Holmes, makes the sky the limit . . . \textsuperscript{55} of judicial power to declare legislative acts unconstitutional, the conclusions of judges, substituted for those of legislatures, become a broad and varying standard of constitutionality. . . . \textsuperscript{57} . . . We shall not attempt now to set out at length


\textsuperscript{54}315 U.S. 575, 599-600 (1942).


\textsuperscript{56}Citing \textit{Baldwin v. Missouri}, 281 U.S. 586, 595 (1930).

"I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down on what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable."

\textsuperscript{57}Here in a footnote to the opinion the Court continued:

"To hold that the Fourteenth Amendment was intended to and did provide protection from state invasions of the right of free speech and other clearly defined protections contained in the Bill of Rights, \textit{Drivers Union v. Meadowmoor Co.}, 312 U.S. 287, 301-302, is quite different from holding that 'due process,' an historical expression relating to procedure, \textit{Chambers v. Florida, supra}, confers a broad judicial power to invalidate all legislation which seems 'unreasonable' to courts. In the one instance,
the reasons for our belief that acceptance of such a meaning is historically unjustified and that it transfers to courts powers which, under the Constitution, belong to the legislative branch of government. But we feel that we must record our disagreement from an opinion which, although upholding the action of the Commission on these particular facts, nevertheless gives renewed vitality to a 'constitutional' doctrine which we are convinced has no support in the Constitution.

"The doctrine which makes of 'due process' an unlimited grant to courts to approve or reject policies selected by legislatures in accordance with the judges' notion of reasonableness had its origin in connection with legislative attempts to fix the prices charged by public utilities. And in no field has it had more paralyzing effects."58 (Emphasis supplied).

Additional comments in the opinion deserve attention.

"As we have said, rate making is one species of price-fixing. Price-fixing, like other forms of social legislation, may well diminish the value of the property which is regulated. But that is no obstacle to its validity. As stated by Mr. Justice Holmes in Black v. Hirsh, 256 U.S. 135, 153: 'The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay.'"59

"Explicit recognition of these principles will place the problems of rate-making in their proper setting under this statute."60

courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other, they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people."61

58 315 U. S. 575, 601 (1942). Here the Court cites: McCart v. Indianapolis Water Co., 302 U. S. 419, 423 (1938). The citation is to the dissenting opinion of Justice Black in that case. It was in this opinion, when in the course of making a strong plea for acceptance by the Court of a procedure which would assure finality and expedite settlement of the issues raised in rate cases generally, that the historic background of the Court's philosophy as illustrated by the Mann and Peik cases was first presented as the proper expression of due process. It is significant to note that this case was decided only two years after the St. Joseph case. Figures reported by Justice Black in his opinion show the average time consumed between the time a case is presented to a commission and is up for review by the Supreme Court to be approximately three and a half years. It was his suggestion that after that amount of time was consumed, if the case was remanded to the trial court, the whole procedure could possibly start again as a result of changed conditions occurring during the period of litigation.


60 315 U. S. 575, 604 (1942).
Again reiterating its point:

"... it is important to note, as we have indicated, that Congress has merely provided in § 5 of the Natural Gas Act that the rates fixed by the Commission shall be 'just and reasonable'. It has provided no standard beyond that. Congress, to be sure, has provided for judicial review. But § 19 (b) states that the 'Finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive'. In view of these provisions, we do not think it is permissible for the courts to concern themselves with any issues as to the economic merits of a rate base. The Commission has a broad area of discretion for selection of an appropriate rate base.

"It is not the function of the courts to prescribe what formula should be used. ... The decision in each case must turn on considerations of justness and fairness which cannot be cast into a legalistic formula. The rate of return to be allowed in any given case calls for a highly expert judgment. That judgment has been entrusted to the Commission. There it should rest." 61

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"The ... problem of rate-making is for the administrative experts, not the courts, and the ex post facto function previously performed by the courts should be reduced to the barest minimum which is consistent with the statutory mandate for judicial review. That review should be as confined and restricted as the review, under similar statutes, of orders of other administrative agencies." 62

Although the majority did not feel justified in "going all the way," or at least admitting it—certain it is that the three justices who shared the opinion so extensively quoted above, had no reluctance in stating the abstention courts should heed in the legislative realm of rate making.

Following closely upon this case was another decision on a rate controversy under the Natural Gas Act. The opinion of the Court in the Federal Power Commission v. Hope Natural Gas Co., 63 case closely parallels the opinion in the Pipeline case. The following short excerpt from the opinion clearly shows what will be the scope of review in the courts today:

"... when the Commission's order is challenged in the courts the question is whether that order 'viewed in its entirety' meets the requirements of the Act. Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. ... It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not

61 Id. at 606, 607.
62 Id. at 608.
63 320 U.S. 591 (1944).
become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.64

A close analysis of the Court’s reasoning in the Hope case reveals that it will be almost impossible to obtain a reversal of the commission, since “he who would upset the rate order . . . carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.” (Emphasis supplied) Bearing in mind that a rate order fixed by the commission is prospective in application, just how is it possible to convincingly prove it unjust and unreasonable in its consequences? Obviously the “consequences” or the results will have to be obtained before any convincing showing can be made. Thus we can see the wisdom in the courts thinking expressed so clearly in the Hope and Pipeline cases. What seems to have actually happened is that the Court has decided to call a halt to the “guessing game”, and confine its review to an inquiry as to whether the commission’s order is supported by substantial evidence. Once this is established, judicial scrutiny is at an end.

Proof that the Court will follow this procedure in the future is afforded by a series of opinions following upon the Hope case. In the Interstate Commerce Commission v. Jersey City,65 case the Court said,

> “Each of the findings of fact by the Commission appears to be supported by substantial evidence. . . . Reasonable persons could no doubt differ as to whether . . . the revenues of the lines will increase more than the operating costs, and as to various other features of the contest. But when this same railroad came to us complaining of such predicative findings we refused to review the weight of evidence and held that being supported by evidence the judgment of the Commission was final.”66

Then the Court cites the Hope decision and quotes the section here-tofore stated. The Court then continues,

> “The Commission considered that it had, and we find no reason to doubt that it had, the evidence before it that was needed to the discharge of its duty to the public and to the regulated railroad.

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64Id. at 602. For an interesting article on the transition of the Court's philosophy as to rate bases and methods of calculating the same, see Welch, Status of Regulatory Commissions Under the Hope Natural Gas Decision, 32 Georgetown L. J. 136 (1944).

65322 U.S. 503 (1944). This case was decided on May 29, 1944. The Hope case was decided on January 3, 1944.

66322 U.S. 503, 512 (1944).
“So long as there is warrant in the record for the judgment of the expert body it must stand. . . . ‘The judicial function is exhausted when there is found a rational basis for the conclusions approved by the administrative body’. Rochester Telephone Corp. v. United States, 307 U. S. 125, 145-46; Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282, 286-7.”

A very pertinent excerpt from New York v. United States, clearly shows that the Court is now going to abide by the substantial evidence rule, even where confiscation is alleged, unless it has convincing proof that the commission was wrong. Such proof, as was stated in discussing the Hope case, can only be obtained after the rate order has been effected and put into practice, and the Court’s opinion confirms this:

“Where the result of a rate order is not clearly shown to be confiscatory but its precise effect must await operations under it, this Court has refused to set it aside despite grave doubts as to its consequences. The District Court amply protected appellants when it overruled their claim that the interim rates are confiscatory without prejudice to another suit to challenge the legality of those rates if, after a fair test, they prove to be below the lowest reaches of a reasonable minimum or if the permanent rates do not meet that standard.”

Such is the background of one of the most controversial subjects in administrative or constitutional law. The Court of Appeals for the State of New York has been called upon to decide what might properly be termed the test case. In consideration of the background of this controversy, and in consideration of the individual philosophies of the present members of the Supreme Court of the United States, we can well wonder how it was possible for the New York Court to rule other than in accordance with the clear guide lines set up in the Rowan & Nichols, Pipeline, Hope, and later cases.

Perhaps it will be well to restate clearly the two sides of this problem. Keeping in mind that we are dealing only with cases where the issue of confiscation is raised, on the one hand we have the doctrine of independent judicial review of facts to ascertain if, according only to the opinion of each reviewing court, the answer given by the utility commission was the correct one. On the other hand, we have judicial review to determine whether, on the basis of the facts brought before the utility commission, it could reasonably have arrived at the conclusion it reached, that is, was there evidence of sufficient probative value available in the

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67Id. at 513.
68331 U.S. 284 (1947). This case was decided on May 12, 1947.
69331 U.S. 284, 340 (1947).
record on which the commission could base its decision. Stated simply, is it to be the opinion of the expert administrative body or is it to be the opinion of the law court judge? To answer this question we have to first determine what is "due process of law" under the circumstances. The long series of cases discussed in this article were attempts to answer this question. Has it been definitely answered? A fair, unbiased reading of the Court's opinion in the Pipeline and Hope cases implemented by the separate concurring opinions, together with the opinions in the Rowan & Nichols, the National Broadcasting Co., and New York v. United States cases would seem to lead us to but one answer. It is true, the Ben Avon case has never been explicitly overruled, but neither were the Munn and Peik cases.70

If the Staten Island case had been decided shortly after the Ben Avon case, no one would attempt to quarrel with its reasoning, but would have been content with questioning the wisdom of the Supreme Court in announcing a doctrine which could serve as a precedent for the state courts to follow. From an objective viewpoint, the New York court has decided this case on the basis of judicial expressions in the Ben Avon case and their restatement in the St. Joseph case. With commendable courage it has cited the cases which followed upon these earlier cases, but apparently their significance is lost upon the court, for no attempt is made to rationalize the patent differences which exist between them and the early decisions relied upon. The dissenting opinion of Judge Desmond, as will be later noted, is a significant exception.

It is reasonable to conclude, on the basis of the rulings in the cases heretofore discussed, that the Supreme Court has resolved the doubts as to the proper function of a reviewing court in a rate case even when the magic word "confiscation" is injected. On the other hand, the New York court's decision indicates that the doubts clearly remain.

It is unfortunate that the New York Court of Appeals could not have decided otherwise. We can say unfortunate because, in that instance, an appeal would likely have been taken, and the case might well have prompted an answer from the Supreme Court directly contrary to the Ben Avon philosophy.71

71At the date of this writing no appeal has been taken to the U.S. Supreme Court; the case is proceeding on the merits in the New York trial court. In the event of an adverse decision the Commission may request review by the United States Supreme Court.
The issue would have been met squarely, because it would have been very difficult to have framed a better test case of the *Ben Avon* rule than that which is afforded by the *Staten Island* facts.

It is necessary to recall that in the *Ben Avon* case the Pennsylvania statute there involved provided for judicial review of the utility commission's action by certiorari, and state practice limited the review on certiorari to questions of law. The Supreme Court held such provision to be inadequate because the presence of constitutional issues require a judicial review which will afford an opportunity for expression of the independent determination of the reviewing court on the facts as well as the law of the case. It is pertinent to remember that the Court considered whether there was an alternative procedure under Pennsylvania law open to the utility whereby it could have obtained the enlarged review. Upon its conclusion that there was insufficient evidence to support the commission's claim that an injunctive proceeding was an alternative procedure under another section of the state law, it concluded that no other procedural opportunity was available. It then proceeded to hold the ruling of the state utility commission invalid.

These facts were all involved in the *Staten Island* case. To fully understand the procedural aspect of the problem involved in this case, it is necessary to consider another case involving similar facts which came before the Court of Appeals and later by way of appeal before the United States Supreme Court. In *People ex rel. Consolidated Water Co. of Utica v. Maltbie*,72 the Court of Appeals held,

> "Upon the hearing of an order of certiorari to review a determination of the commission, the jurisdiction and powers of the Appellate Division are defined and limited by section 1304 [now section 1296] of the Civil Practice Act. These powers do not include an independent consideration by the court of any question of fact."73

In regard to the scope of review under these circumstances the Court of Appeals said,

> "In this court the determination of the commission upon any question of fact is not open to review. We may reverse a decision or annul a determination only for erroneous determination of a question of law, and after careful consideration of the appellant's argument, we find no errors there. Upon every point where the determination of the commission is challenged we find that there is evidence to support the conclusion of the commission and room for the exercise of choice."74

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7275 N. Y. 357, 9 N.E.2d 961 (1937).
On appeal to the United States Supreme Court it was held that inasmuch as the utility had *chosen* certiorari as the course of action on review it could not later be heard to complain that it had not been granted an independent judicial review. In support of its decision affirming the action of the lower court, which had dismissed the appeal for lack of jurisdiction on the basis that no substantial federal question was involved, the Court said:

"Appellant contends that it is entitled to the exercise of the independent judgment of a court as to the law and facts with respect to the issue of confiscation and that such a review has not been accorded because of the limitations imposed by the state practice in certiorari proceedings. . . . Appellant has no standing to raise this question as appellant itself sought review by certiorari and has not invoked the plenary jurisdiction of a court of equity and it does not appear that this remedy is not available under the state law."75

With this action as a guide and the decision as a precedent, the Staten Island Company took the only course of action any utility would have taken if it hoped it would obtain a "second guess" on the facts.

Thus in its initial action the utility sought an injunction against enforcement of the utility commission's orders. The trial court granted the defendant commission's motion to dismiss, but the appellate division reversed, granting a temporary stay, and certified to the Court of Appeals two questions:

1. Is the plaintiff entitled to maintain this action?
2. Does the complaint state facts sufficient to constitute a cause of action?

The injunction proceeding naturally was a request for equitable relief. In order to determine if equitable relief was necessary the court had to first determine that there was available no adequate remedy at law. The remedy at law here was certiorari. To hold this legal remedy sufficient would, in accordance with state practice, restrict the judicial review to one on questions of law only. Further the findings of the commission would be deemed conclusive on all fact issues if there was substantial evidence to support them. To hold that the remedy at law was inadequate necessarily would mean that the utility was entitled to a more extensive review. The utility in stating that the due process clause of the Fourteenth Amendment could not be satisfied by certiorari when there is present the issue of confiscation, claimed it must have equitable

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75303 U.S. 158, 159-160 (1938).
relief. In support of this claim the utility cited the *Ben Avon* case. In order to decide the case the Court of Appeals had to determine whether the *Ben Avon* case was still good law today. Unfortunately it decided it was.

On review of the opinion we note the court's assertion that the *Ben Avon* case has never been overruled. It claims support for this statement by citation to a group of the older cases in which are included the St. Joseph, and Crowell v. Benson decisions. None of the cases there cited are more current than the St. Joseph case.

Further along in its opinion the court attempts to neutralize the decisions of the Supreme Court in *Rowan & Nichols*, and in the cases arising under Natural Gas Act, *supra*.

In response to the strong plea of the trial judge that something rather extraordinary was required to justify the opportunity for the granting of successive independent judgments of the factual issues by the commission and each reviewing court,76 the court said, "We find no compelling necessity for a trial *de novo* of every rate case in which confiscation is claimed." Then giving qualified expression to recent Supreme Court cases it said:

"The illegality in such cases is confiscation or deprivation of property without due process of law. The legality of the rate must primarily depend upon the proceedings before the commission, and the record of those proceedings will of necessity be before the trial court since the statute authorizes determination in the first instance by the commission, and the courts may not properly consider the question without knowledge of the administrative record."77

Here the court cites the *Rowan & Nichols* cases. It cannot be doubted that these cases support the court's statement, but it seems an extravagance to attempt to use such significant cases in a manner that suggests that the points involved tend to support the decision of this court, when in reality this decision is contrary to the rules expressed in the *Rowan & Nichols* cases.

76Judge Foster in the trial court made a strong plea for recognition of the philosophy expressed in the recent Supreme Court cases:

"Obviously this is an important question in the field of public utility regulation. It is a simple matter to allege confiscation in any rate matter, and if such an allegation is sufficient to invoke the jurisdiction of equity then the way is open for separate trials of the same issues in every rate case; first before the commission, and later at an Equity Term of the Supreme Court. Something rather extraordinary is required to justify a procedure so protracted and cumbersome." At 270, App. Div. 55, 65, 88 N. Y. Supp. 2d 818, 826 (1946).

77296 N.Y. 374, —, 73 N.E.2d 705, 708 (1947).
The court continues with a platitude as to the controlling effect of the Supreme Court decisions:

"This appears to be the practice when injunction suits such as this are brought in the Federal Courts. We see no reason for departing from that practice in the trial of this action."78

What the court did not say here was that although by the District Court Jurisdiction Act of October 22, 1913 it was provided that the procedural remedy in the federal courts for judicial review was by injunction, yet the scope of judicial review using that remedy is the same as that afforded by certiorari in the New York courts.79

It is obvious what the Court of Appeals is discussing in the sections referred to above, is the propriety of the utility's demand for a trial de novo, in contrast to its right to have a review by the court. The court is issuing instructions that when actions of this type are brought before the equity court the action is a review proceeding rather than a new trial. All that the Court has said so far is obviously true, but also obviously unimportant to the principal question raised by the case. The important point is how extensive a review should the trial court grant when the case is before it.

The court again exercises ingenuity by openly referring to the Rowan & Nichols and the Pipeline and Hope cases:

"We find nothing inconsistent with such a practice in the oil and gas proration cases . . . or in the cases arising under the Federal Natural Gas Act. . . .

"The Federal Power Commission cases, supra, arose upon petitions to review orders of the Federal Power Commission under subdivision (b) of section 19 of the Natural Gas Act, U. S. C. A. Tit. 15, § 717r subd. [b]. In discussing the scope of review in these cases, Chief Justice Stone, writing for the Court in Federal Power Comm. v. Natural Gas Pipeline Co., supra, said at page 585 of 315 U. S. . . . ; 'By long standing usage in the field of rate regulation the "lowest reasonable rate" is one which is not confiscatory in the constitutional sense. . . . Assuming that there is a zone of reasonableness within which the Commission is free to fix a rate varying in amount and higher than a confiscatory rate . . . , the Commission is also free under § 5 (a) to decrease any rate which is not the "lowest reasonable rate." It follows that the Congressional standard prescribed by this statute coincides with that of the Constitution, and that the courts are without authority under the statute to set aside as too low any "reasonable rate" adopted by the Commission which is consistent with constitutional requirements.' The opinion then proceeds to a full review of the facts upon

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78Ibid.
79Freund, Administrative Powers Over Persons and Property, 268 (1928).
which the commission made its determination leading to the conclusion that such determination was consistent with constitutional requirements.80

At this point there is room to differ sharply with the opinion of the Court of Appeals. From a casual reading of the statement to the effect that the Court proceeded to a full review of the facts, it could be understood that there was a revaluation of the facts and the expression of independent determination. To this extent the statement is definitely misleading. The Court did proceed to review the record to determine if there was evidence of a substantial nature on which the commission could have based its decision. How else can we interpret the statement of the Court that the Commission’s method of calculating the rate was “supported by the evidence,” and still further, “The Courts are required to accept the Commission’s findings if they are supported by substantial evidence,”81 or still stronger, “If the Commission’s order, . . . produces no arbitrary result, our inquiry is at an end.”82

The Court of Appeals continues by saying that in none of the decisions it has cited was the right to try the issue of confiscation disputed. It adds, “Indeed that was the judicial process pursued in each one of these cases.”83 Again this statement is misleading. It is true that the issue of confiscation was raised in each of these proceedings, first in the commission hearing and later in the court review, but it cannot be contended that that was the sole reason for permitting the review. As noted in the Court of Appeals opinion the petition for review in the Pipeline case was by virtue of subdivision (b) of section 19 of the Natural Gas Act. It cannot be thought that the court intended to imply that such section simply grants a judicial review when confiscation is alleged by the utility.

Such a view of course clashes immediately with the fundamental principle that when an administrative body proceeds to act in a quasi-judicial manner, its determinations must provide for review by a court of competent jurisdiction to decide whether the proceeding in which the facts were adjudicated was conducted regularly.

It is still more difficult to justify this thought in contemplation of the precise language of Justice Frankfurter in the Rowan & Nichols case that, “A controversy like this calls for a fresh reminder that courts must not substitute their notions of expediency and fairness for those which

80 296 N. Y. 374, —, 73 N. E. 2d 705, 709 (1947).
81 See note 51 supra.
82 See note 48 supra.
83 296 N. Y. 374, —, 73 N. E. 2d 705, 709 (1947).
have guided the agencies to whom the formulation and execution of policy have been entrusted.\(^8\) And also, "It is not for the federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better."\(^8\) Still stronger, "... it would be presumptuous for courts, on the basis of conflicting expert testimony, to deem the view of the administrative tribunal, acting under legislative authority, offensive to the Fourteenth Amendment.\(^9\)

Certainly in consideration of the above Supreme Court statements, it is difficult to justify the statement that the right to try the issue was not disputed. Yet the court follows its last statement with the remark that

"The opinions are helpful in showing the deference with which a court should consider the findings and conclusions of an expert administrative commission. No doubt a court of equity in this State will be largely influenced by the practice which prevails in the Federal Courts."\(^8\)

It may well be that there is more than a general comment in the last sentence quoted from the court. It may be that this amounts to a direction to the lower court to restrict its review to a determination of whether there is substantial evidence in the record to support the findings of the commission. If the trial court is to be "largely influenced by the practice which prevails in the Federal courts" today, it cannot rightly do otherwise. Yet this interpretation certainly cannot be held to agree with the language clearly to the contrary elsewhere in the opinion. Further it cannot be denied that if the court intended that this procedure should be followed, it would not have disapproved the finding of the trial court that a review by certiorari was adequate. Under the Supreme Court's current decisions certiorari would have been adequate. It is thus only possible to conclude that the court was discussing merely the matter of trial de novo as contrasted with a review proceedings. The court's opinion discounted completely the separate concurring opinions of the Supreme Court in the Pipeline case. It has apparently failed to take into consideration the fact that even though the decision in the Pipeline found all members of the Court in agreement as to the result reached, yet four justices found it necessary to attempt to dispel forever any hope one could muster for the dying doctrine of the Ben Avon case.

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\(^8\) See note 32 supra.
\(^9\) Ibid.
\(^8\) See note 34 supra.
\(^7\) 296 N.Y. 374, —, 73 N.E.2d 705, 709 (1947).
conceding for argument that there was any available through a fair reading of the majority opinion.

In another part of its opinion the court quotes from Phillips v. Commissioner,\textsuperscript{88} a 1931 case which in part supports the Ben Avon rule. Using this quotation for support for the rule that administrative determinations of fact are not conclusive in cases wherein the confiscation issue is raised, it states that an analogy is found in the right to judicial determination of fact issues in \textit{habeas corpus} proceedings brought to determine the rightful application of a deportation order for one who claims to be a citizen. In this connection its cites \textit{Ng Fung Ho v. White}.\textsuperscript{89}

Following this reference to the constitutional guarantee where the \textit{liberty} of an individual is concerned the Court of Appeals said:

"There would indeed be a very drastic limitation upon the constitutional powers of the Supreme Court of the State if it may not enjoin an unconstitutional deprivation of property because of an administrative determination of constitutional findings of fact believed to be wrong upon a fair consideration of the record."

It will be noted that the court has shifted back to a discussion of constitutional guarantees where \textit{property} rights are involved. What it failed to say here or at the point where it attempted to draw analogies was that in other fields of law where property rights are affected there exist innumerable settled rules of law denying the privilege of independent consideration of fact issues by the courts. Cases involving property rights, that could be mentioned as not supporting the Phillips or Ben Avon cases, are in the field of eminent domain proceedings where the determination of a commission or jury as to factual issues of value are conclusive except for fraud or willful misconduct, \textit{Crane v. Hahlo},\textsuperscript{90} in the field of taxation where Congress has with the sanction of the Supreme Court broadly given finality to the determination by the Tax Court (previously the Board of Tax Appeals) of the facts concerning income, \textit{Helvering v. Rankin};\textsuperscript{91} or in the field of tariff regulation by the finality given to the valuations made by appraisers of imported merchandise belonging to American citizens, \textit{Passavant v. United States};\textsuperscript{92}

\textsuperscript{88}283 U.S. 589 (1931).
\textsuperscript{89}259 U.S. 276 (1920).
\textsuperscript{90}258 U.S. 142, 148 (1922). See also Backus v. Fort Street Union Depot Co., 169 U.S. 557, 569 (1898); United States v. Jones, 109 U.S. 513, 519 (1883).
\textsuperscript{92}148 U.S. 214, 219 (1893). See also Hilton v. Merritt, 110 U.S. 97, 107 (1884).
or in the field of assessments of value made for the purpose of *ad valorem* taxation.93

In all of the above cases will be found ample evidence that due process of law is not denied by the granting of conclusiveness to the findings of fact by expert commissions, or other fact-finding bodies.

It is encouraging however to note that it was probably not without some difficulty that the Court of Appeals was able to assemble a majority to support the views expressed for the court by Judge Thacher.

The dissenting opinion in the *Staten Island* case expressed by Judge Desmond was shared in by two other members of the seven man bench, including Chief Judge Loughran.

In an already lengthy article it is inadvisable to attempt to include a complete review of the law bearing on this controversial issue so clearly presented in the dissenting opinion. It is, however, encouraging to note that not only does this opinion clearly show the court's opinion is inconsistent with previous New York decisions, but is also incompatible with the decisions of the Supreme Court. Many of the determining factors that should have persuaded the majority to rule differently on this case, previously discussed in this article, are included in the dissenting opinion.

This opinion, after showing that the decision of the court in this case is clearly contrary to its previous decisions on the question,94 proceeds

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93Compare King v. Mullins, 171 U.S. 404, 429-431 (1898); Kentucky Railroad Tax Cases, 115 U.S. 321 (1885); State Railroad Tax Cases, 92 U.S. 575, 610 (1875).

94Cited in the opinion as controlling are: People ex rel. Central Park, North & East R. R. Co. v. Willcox, 194 N.Y. 383, 87 N.E. 517 (1909); People ex rel. New York & Queens Gas Co. v. McCall, 219 N.Y. 84, 113 N.E. 795 (1916); Miller v. Kling, 291 N.Y. 65, 50 N.E. 2d 546 (1943); People ex rel. Consolidated Water Co. of Utica v. Maltbie, 275 N.Y. 357, 9 N.E.2d 961 (1937). Judge Desmond's analysis of the meaning of the New York court's opinion in the Consolidated Water Co. case is as follows:

"In both the New York & Queens case and the Consolidated Water case, supra, there were claims of confiscation, but in each instance this court held that certiorari was a sufficient remedy. Both those cases went thereafter to the Supreme Court (245 U.S. 345, 38 S. Ct. 122, ... and 303 U.S. 158, 58 S. Ct. 506, ...) but the point we are here passing on was not decided by that tribunal, in either case. Both were certiorari cases and in neither did this court say in so many words that an equity suit might not have been brought to establish that the rates were confiscatory. But that was the plain meaning of Judge Lehman's language in the Consolidated Water case, at page 370 of 275 N.Y., at page 965 of 9 N.E.2d: 'It is true that a determination by a legislative or administrative body on a question of fact is not binding upon a court where the power of the legislative or administrative body is challenged. Cf. Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S. Ct. 527, ... v. Crowell v. Benson, 285 U.S. 22, 52 S. Ct. 285, ...; St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S. Ct. 720, ... Even so where the state gives to an administrative body power to determine questions of fact by judicial inquiry subject to review in the courts, no federal rights are denied by its order unless "there was such a want of hearing or such arbitrary or capricious action on the part of the Com-
to weigh the present value of adherence to the *Ben Avon* theory. In commenting on that case the opinion states, "Whether or not it has been (implicitly but not explicitly) overruled by later cases in the same court... we need not say. However, the so-called "Ben Avon rule" has been, to put it most mildly, weakened by those more recent decisions of the same court...." Continuing with analysis of the *Rowan & Nichols* cases the opinion quotes pertinent sections from the second case, one of which reads,

"... 'When we consider the limiting conditions of litigation—the adaptability of the judicial process only to issues definitely circumscribed and susceptible of being judged by the techniques and criteria within the special competence of lawyers—it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and prophecies and impressions of expert witnesses.' 311 U.S. 570, 575, 576, ....' The statement just quoted is fundamentally at variance with the holding now being made by this court in the present case: that the Federal Constitution requires that whenever a utility corporation alleges that a rate is confiscatory, the corporation is entitled to bring an equity suit and demand new, independent findings by the court as to whether or not the rate is reasonable and fair."96

The opinion continues with an analysis of the Natural Gas cases discussing much of the same material that has been presented earlier in this article, and in greater detail analyzes the majority opinion with respect to the due process clause.

One cannot help but repeat that it is unfortunate that the majority opinion is on the books. The long hard pull away from a doctrine stemming from a contested interpretation of the Constitution advanced in an opinion dated in 1890,97 interpreted as applicable to rate cases by a divided court in the *Ben Avon* case, and restated and reinforced in part at least by a divided court in the *St. Joseph* case, but practically nullified by recent Supreme Court cases, has at least in the state of New York been granted an extended lease on life. It would be helpful if we could

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96Citing the *Rowan & Nichols*, the *Pipeline*, and the *Hope* cases.
97296 N. Y. 374, 73 N. E. 2d 705, 712 (1947).
minimize the possible effect of this opinion. As one of our most learned contemporary authorities in the fields of constitutional and administrative law has put it, "But if the New York court can be fooled, maybe some one else can be deluded into making an artificial distinction between 'confiscation' and other issues."98

It is not feared today that the doctrine of the *Ben Avon* case could possibly be rationally extended.99 Rather it is believed that the recent Supreme Court cases have sufficiently disabused from most minds any doubts but that its doctrine is untenable.

The constant striving for certainty in the rules of law applicable to administrative law principles is of no minor importance. Great progress toward resolving difficulties in the procedural aspects of this branch of our law has seen fruition in the passage of the Administrative Procedure Act. Although definitely not definitive of substantive law, but best described as a codification of existing procedural rules,100 it has been hailed as one of the most important pieces of legislation ever presented to the Congress of the United States.101

In commenting on the Administrative Procedure Act Senator McCarron said,

"... Senate bill 7, the purpose of which is to improve the administration of justice by prescribing fair administrative procedure is a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government. It is designed to provide guarantees of due process in administrative procedure."102

Certainties in the principles of due process applicable to the substantive side of administrative law are no less desirable.

WILLIAM J. HICKEY

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98 Letter dated December 19, 1947, from Walter Gellhorn, Professor of Law, Columbia University, to the writer.


102 *Id* at 2149.
RECENT AGENCY RULINGS AND COURT DECISIONS

JUDICIAL REVIEW—Revocation by SEC of Exemption Under Rule U-49(c) from the Requirements of the Public Utility Holding Company Act Is Reviewable Under Section 24(a) of the Act.

The Securities and Exchange Commission on February 28, 1947 adopted an amendment to its Rule U-49(c) under the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. § 79 et seq. (1940). The only actual effect of this amendment was to withdraw an exemption from the requirements of the Public Utility Holding Company Act which previously had been enjoyed by Pittsburgh Railways Company and its underlier companies, whose properties are operated by its trustees in bankruptcy reorganization under § 77B of the Bankruptcy Act, 48 Stat. 912 (1934), as amended by 49 Stat. 664 and 49 Stat. 965 (1935), 11 U. S. C. § 207 (1940).

All of the stock of Pittsburgh Railways Company and of certain of its underlier companies is owned by the petitioner, Philadelphia Company, a registered public utility holding company. Pittsburgh Railways Company and its underlier companies, insofar as they are subsidiaries of a registered holding company, were subjected to the provisions of section 11(f) and other sections of the Holding Company Act by the withdrawal of the exemption. The action of the Commission, although couched in general terms as an amendment of Rule U-49(c), is limited in actual effect to this single situation.

On March 22, 1947, the Philadelphia Company filed with the United States Court of Appeals for the District of Columbia a petition for review under section 24(a) of the Holding Company Act and prayer and motion to stay under section 24(b) of the Act. Five days later the Commission filed a motion to dismiss and a statement of objections to the motion to stay. Held, the action of the Commission in revoking the exemption afforded Pittsburgh Railways by Rule 49(c) is reviewable. Motion for stay granted. Philadelphia Company v. SEC, App. D. C., October 8, 1947.

In reaching this decision the court gave full credence to two basic doctrines limiting judicial review of the orders of the quasi-judicial commissions. One is the primary jurisdiction doctrine firmly established by Texas & P. R. Co. v. Cotton Oil Co., 204 U. S. 426 (1906), whereby matters which call for technical knowledge in its special field must first be passed upon by the Commission. The other is the doctrine of administrative finality, whereby the range of issues open to review is limited to questions affecting constitutional power, statutory authority, or the basic prerequisites of proof. ICC v. Union P. R.R., 222 U. S. 541 (1911); ICC v. Illinois C. R.R., 215 U. S. 452 (1909). In applying these doctrines to the instant case, the court leaned heavily on Rochester Telephone

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Corp. v. United States, 307 U. S. 125 (1939), in which the Supreme Court delineated and explained the criteria for determining the reviewability of the action of administrative agencies. In the Rochester case, as in the instant case, the administrative action in question had the effect of determining status, with the result of requiring immediate obedience to previously formulated mandatory orders.

In support of its motion to dismiss, the Securities and Exchange Commission urged that its action in revoking the exemption was discretionary in character and presented no substantial question as to action in excess of statutory power; that the action was of interlocutory character; and that the action was not an "order" subject to review under Section 24(a) of the Act.

As to the presentation of a substantial question for judicial review, the Commission relied on a line of cases the theory of which is expressed in West Coast Hotel Co. v. Parrish, 300 U. S. 379, 400 (1936), as follows: "... legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.'" The court met this contention by pointing out that the complaint of the petitioner in this respect was that the revocation of the exemption applies and was intended to apply, in actuality, neither to a class nor a group but to a single reorganization.

In urging the interlocutory character of its action, the Commission cited a line of cases culminating with FPC v. Arkansas Power & Light Co., 330 U. S. 802 (1947), holding that judicial relief is not available for a threatened injury until the prescribed administrative remedy has been exhausted. On this point the court brought out the distinction that in the Arkansas Power case the action of the Federal Power Commission merely directed the power company to show cause why its accounts should not conform to certain recommendations, and fixed a hearing for that purpose; whereas in the instant case the Securities and Exchange Commission had exercised its primary jurisdiction and by its action determined the status of the reorganization involved. By this determination of status, the Commission subjected Pittsburgh Railways and the reorganization proceeding, theretofore exempted therefrom, to the impact of the Holding Company Act and to orders of the Commission carrying the same into effect. The action therefore was not a mere abstract declaration of status, but immediately necessitated obedience to previously formulated mandatory requirements. The court held that it would be a distortion of fact to characterize an order of this nature and effect as a mere stage in the administrative process.

The court was incisive in its treatment of the Commission's contention that its action was not an "order" subject to review under Section 24(a) of the Act. Citing Columbia System v. United States, 316 U. S. 407, 416 (1942), as precedent for the conclusion that neither the presence nor the absence of a
“label” on Commission action is controlling, the court formulated the following guiding principle, “If in its impact a ‘rule or regulation’ applies specifically and affects or determines the rights of a particular person or corporation, then the action of the agency in promulgating it is reviewable even though the ‘rule or regulation’ is not directed in terms to any particular person or corporation.”

In reaching its holding in the instant case, the United States Court of Appeals for the District of Columbia set up significant guideposts along the thin line between interlocutory and non-interlocutory agency actions and along the hitherto dimly marked line between agency “orders” and “rules and regulations” in cases of this nature. The decision follows an uncertain judicial trend toward a broadening of the definition of the type of administrative orders subject to review. This judicial trend is buttressed by the legislative trend in the same direction embodied in § 10 of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U. S. C. A. § 1009 (Supp. 1946); discussed in Shane. Some significance may be attached to the fact that, although the petitioner in the present case invoked the provisions of this Act, the Court chose to confine itself to the immediately pertinent Section 24(a) of the Holding Company Act. This is perhaps an indication that considerable time will elapse before a body of judicial opinion will be built up around this widely discussed feature of the new Administrative Procedure Act.

DAVID C. EBERHART, JR.

ADMINISTRATIVE LAW—The Appearance of Rules and Regulations in the Federal Register Gives Legal Notice of Their Contents Regardless of Actual Knowledge or of Hardship Resulting from Innocent Ignorance.

In March of 1945, Merrill Brothers applied to the local agent of the Federal Crop Insurance Corporation in Idaho for insurance covering 460 acres of spring wheat of which 400 acres were reseeded on winter wheat acreage. Applicants and local agent were alike ignorant that the reseeded acreage was ineligible for insurance under section 414.37(v) of Wheat Crop Insurance Regulations issued by the Corporation under section 516(b) of the Federal Crop Insurance Act, 52 Stat. 77 (1938), 7 U. S. C. § 1516(b) (1940). These regulations were duly promulgated by publication in the Federal Register in February, 1945 at volume 10, page 1586, and were incorporated in the formal application by reference. Information on the application accepted by the Federal Crop Insurance Corporation did not disclose that any part of the insured crop was reseeded.

The Merrill crop subsequently was destroyed by drought. The Corporation, after discovering that the acreage was reseeded, refused to pay the loss. Litigation was appropriately begun in one of the lower courts of Idaho and carried to the Idaho Supreme Court where full recovery by the insured
was affirmed. The case came to the United States Supreme Court on certiorari. *Held,* the appearance of rules and regulations in the Federal Register gives legal notice of their content. Accordingly the Wheat Crop Insurance Regulations were binding regardless of actual knowledge of their content or of the hardship resulting from innocent ignorance. *Federal Crop Insurance Corp. v. Merrill,* 68 Sup. Ct. 1 (1947).

In reaching this decision the Supreme Court reaffirmed several important principles of federal administrative law, and for the first time considered and approved the principle of constructive notice with regard to administrative rules and regulations published in the Federal Register.

The theory of the courts below was that the general rule of governmental immunity from the effects of estoppel was inapplicable here because the Corporation, although wholly Government owned, was engaged in a proprietary insurance business. This theory, which would have rendered the Government liable under private insurance law, was deemed untenable in the light of a strong line of cases characterized by *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 390 (1939); *Inland Waterways Corp. v. Young,* 309 U. S. 517, 523 (1940); *Cherry Cotton Mills, Inc. v. United States,* 327 U. S. 536, 539 (1946).

The Supreme Court clarified this position by stating that it is too late in the day to urge that the Government is just another private litigant. Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that the agent of the Government stays within the bounds of his authority as defined by Congress or by properly exercised rule-making power. This is so even though the agent himself is unaware of the limitations on his authority. *Utah Power & Light Co. v. United States,* 243 U. S. 389, 409 (1917); *United States v. Stewart,* 311 U. S. 60, 70 (1940).

In the *Merrill* case the limitation on the agent's authority was clearly set forth by regulation issued under proper authority and duly promulgated by publication in the Federal Register. On this point the Supreme Court stated, "Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents. 49 Stat. 502, 44 U. S. C. § 307, 44 U. S. C. A. § 307." In view of modern practice in the field of federal regulatory enactments, this statement is of far-reaching significance. The number and importance of administrative regulations have increased enormously in the present era by virtue of delegations by the Congress to the Executive Branch. Apart from criminal liabilities, it is probable that most of the requirements that hedge about the everyday affairs of the citizen are now based on such administrative pronouncements.

In 1928, in *Hampton & Co. v. United States,* 276 U. S. 394, 409 (1928), the United States Supreme Court characterized these administrative regu-

With these developments in the background, the Supreme Court in the Merrill case not only recognized the necessity for delegated legislation, but also firmly placed this administrative material on a par with statutory law within the purview of the old maxim ignorancia legis neminem excusat.

DAVID C. EBERHART, JR.
FEDERAL LEGISLATION

THE REED-BULWINKLE BILLS

The question of how and by whom interstate freight rates should be made has become a topic of public controversy again for the first time in almost fifty years.¹ Lawyers with a long memory will recall that the Supreme Court held illegal in *United States v. Trans-Missouri Freight Association*,² and *United States v. Joint Traffic Association*,³ certain combinations of railroads for the purpose of fixing rates. Since that time the making of freight rates has been the closed province of railroad management, industrial and farm traffic managers, and the Interstate Commerce Commission. The agitation connected with the passage by the Senate of the Reed Bill⁴ and the reporting of the Bulwinkle Bill⁵ by the House Interstate and Foreign Commerce Committee has again made the subject a matter of public interest.

In order to understand the provisions of these bills, a knowledge of how freight rates are presently made is necessary. Let us suppose that John Jones, a shipper of hides located at Dallas, Texas, wishes a reduction of five cents in the rate on hides to Cleveland, Ohio. His plant is served by the Frisco. Accordingly, he contacts the General Freight Agent of the Frisco. The General Freight Agent writes up the proposal and has it docketed with the Standing Rate Committee of the Southwestern Freight Bureau.⁶ The Standing Rate Committee, composed of representatives of all the southwestern carriers, fixes a time for a hearing. The “Daily Traffic Bulletin”, a private publication which circulates among shippers, publishes the proposal and the time set for hearing.

¹See Drayton, *Transportation Under Two Masters* (1946); WiPRUD, *Justice In Transportation* (1945); Legis., 34 Georgetown L. J. 479 (1946).
²166 U.S. 290 (1897).
³171 U.S. 505 (1898).
⁵H. R. 221, 80th Cong., 1st Sess. (1947).
⁶A bureau is an association of carriers operating in a certain geographical area. These are sub-divisions of the four classification territories—Official, Southern, Western and Illinois. The Southwestern Freight Association is made up of carriers operating in southern Missouri, southern Kansas, Arkansas, Oklahoma, Texas, Louisiana west of the Mississippi River, and eastern New Mexico. It also includes the gateway cities of St. Louis, Mo., Thebes, Ill., Memphis, Tenn., Vicksburg, Miss., Baton Rouge, La., New Orleans, La., et al.

For the Official territory organization in brief, see Legis., 34 Georgetown L. J. 479, 493 (1946). The geographical jurisdiction of the sub-divisions, however, is not accurately set forth. For the correct boundaries, see the Freight Traffic Red Book 53-55 (1945).
At the hearing John Jones appears and presents his reasons for the reduction in the rate. Thomas Smith, who has read the proposal in the "Daily Traffic Bulletin", and who ships hides from his plant in San Antonio, also appears with the demand that there be a proportionate reduction in his rate to Cleveland. Smith and Jones compete for the same business in Cleveland.

After the conclusion of the hearing, the Standing Rate Committee holds a private meeting. Because the new rate will apply not only via the Frisco to St. Louis, but also via the Frisco in connection with other railroads such as the Cottonbelt as alternate routes, the new rates must be checked to see that they will not produce any violations of the "long and short haul clause" of the Interstate Commerce Act. In addition to considering and granting the request of Smith of San Antonio for a proportionate rate, the rates from other cities from which hides are shipped must be analyzed in order to make sure that the rates to be established will not be discriminatory. The orders and decisions of the Interstate Commerce Commission must also be checked to see that the new rates will not conflict with any rate formula, rate relationship, or rates previously prescribed by the Interstate Commerce Commission.

The jurisdiction of the Southwestern Freight Bureau and the rails of most of the carriers who participate in it do not extend beyond Memphis and St. Louis. In order to permit the establishment of the new rates, the agreement of railroads to the east of these points must be secured so that the shipments may reach Cleveland. There also may be an agreement as to how the revenue on these shipments will be divided by the various carriers who participate in the movement. Accordingly, the proposed rates are submitted to the Southern Freight Association and the Central Freight Association for their approval.

No new hearings are held by these bodies, but the proposed rates are again thoroughly examined as to legality. The division of revenue proposed by the Southwestern Freight Bureau is reviewed and the Associations agree to the publication of the rates. The tariff publishing agent is now instructed to print them in the proper tariff and submit them to the Interstate Commerce Commission.

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9Rate is charged in cents or dollars per cwt., per gross ton, per net ton, per log, per car, etc., depending on the commodity and the rate territory.
Unless special permission is granted by the Commission, there is now a 30-day delay before the rates become effective. During this time any party may ask that they be suspended by the Commission on the grounds of illegality, or the Commission may on its own initiative suspend them. After a hearing, the Commission is empowered to either approve or condemn the new rates. If the Commission condemns the new rates, it may leave the old rates in effect, or prescribe new reasonable rates. If the proposed rates are reasonable, the Commission will permit them to go into effect.

Here it is appropriate to notice a common error which has been made repeatedly by those who are ignorant of freight tariffs and the Commission's work. They add the number of tariffs and tariff supplements received by the Commission. These are compared with the number of rate protests received and acted upon. From this, they deduce that only a small number of rate changes are under supervision or check by the Commission.

This reasoning is based on the premise that every tariff or supplement received is made up of rate changes. The great majority of reissued tariffs contain no rate changes, just as the average publication of a compilation or codification of statutes contains little or no change in the previous law. As far as supplements to existing tariffs are concerned, the great majority of these are issued to make rate adjustments ordered by the Commission. For example, in the first ten months of 1947, over 20,000 supplements were filed as a result of the Commission's decisions in Ex Parte 162, and Ex Parte 166. Most of the other supplements

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10 The author of the article, Legis., 34 Georgetown L. J. 479 (1946), falls, on page 502, into the common error that the "zone of reasonableness" concept limits the Interstate Commerce Commission's power. The Commission may at its discretion prescribe a precise rate. In actual practice, a finding by the Commission of a maximum rate has the same effect as the specific prescription of the rate, because the range of possible rate spread is extremely limited by considerations of costs and rate relationships.

11 The writer of the article, Legis., 34 Georgetown L. J. 479 (1946), makes this mistake on pages 494 and 495. He writes:

"Just how active has the Bureau of Traffic been? During 1945 alone, 112,158 tariff publications were received for filing. They contained changes in freight, freight-forwarder, express, pipe line, contract motor carrier, and contract water carrier rates; also, changes in passenger fares and freight classification ratings were included. Of this total, 517 were protested and suspension requested (0.46% of total). Of these 517 cases, 183 were suspended (35% of the requests and a mere 0.16% of the original 112,158 cases). Of all protests 26% came from governmental agencies. More than 98% of the tariff changes filed became effective without hearings. They were examined by tariff examiners for conformance to notice and printing rules, but not as to whether they were just and reasonable."

12 268 I.C.C. 577 (1947).
are occasioned by the necessity of correcting printing errors, bringing the names of stations up to date, and other changes which do not affect the rates to be charged.

This error has been emphatically pointed out by Chairman Aitchison of the Interstate Commerce Commission. He said: "Obviously, so far as rate increases are concerned, instead of 99 percent of those which appear in the tariffs filed passing into effect without prior investigation by any Government authority, speaking only of this Commission, the truth is much closer to a complete reversal of the fraction which has been given so much publicity and on which so much has been built. The increases which have not received formal and administrative consideration are negligible."14

In a more complex situation than that of the hypothetical illustration employed here, there might have been diverse interests among both shippers and carriers. Then there would have been an appeal from the General Traffic Committee to the Executive Committee,15 and from there to the Western Traffic Executive Committee. If the proposed rate was turned down by the final appeal committee, and the Frisco still thought it to its interest to have the rate established, it would secure from one of its connections a concurrence in the rate in order to permit the traffic to move from the terminus of its lines to Cleveland, and then have the rate published by the tariff agent.

An independent publication of a rate cannot be made under the existing rules of the rate bureaus until all the appeal procedure has been exhausted. Contrary to general public impression, there is no penalty for independent action except that of the necessary delay caused by the multiple consideration of the proposal.

While the above does not fully diagram the schemata of conference rate making, it will serve as a frame of reference. Before passing to a consideration of the Reed and Bulwinkle bills, the statutory background of conference rate making should be examined.

Sec. 1 (4) of the Interstate Commerce Act provides that "It shall be the duty of every common carrier . . . to establish reasonable through routes with other such carriers, and just and reasonable rates, fares,

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14269 I. C. C. 33 (1947).
15Hearings before Senate Committee on Interstate Commerce on H. R. 2536, 79th Cong., 2nd Sess. 1184 (1946).
16The Executive Committee is made up of carrier representatives who are higher executives of the carriers.
charges, and classifications applicable thereto; . . ." Sec. 1 (4) of the Act also provides " . . . in case of joint rates, fares, or charges, [it shall be the duty of the common carriers] to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers." The rate conference system is founded on these two statutory requirements of Congress. Even critics of the system concede that without association and agreement between and by the carriers, the Congressional will would be merely a pious hope.

There are other sections of the Interstate Commerce Act which make joint action by the carriers through rate conferences necessary to avoid the prohibitions they contain. These are sections 2, 3, 216 (4), 305 (e), and 404 (f) which forbid discrimination or undue or unreasonable preference or advantage to any person, company, firm, corporation, association, locality, port, port district, etc. No carrier can act alone in the fashion of a small town grocer setting up his bargain specials for the day. As the Commission said in Sumner & Co. v. Erie R.R., "The rates here in issue, like all other individual rates, are parts of an integral whole. A change in one rate frequently necessitates like changes in competitive rates in order to avoid the unjust discrimination and undue prejudice and preference which are forbidden . . . ."

The late Commissioner Eastman said: "It must be evident to any reasonable man that the carriers cannot respond to all the duties imposed by law, if each individual carrier acts in a vacuum." One carrier by reducing or increasing a local rate could produce violations of the "long and short haul clause" on the lines of all of its connections. Freight rates are a "seamless web".

The conference system of rate making, as it presently exists, has the approval of both of the federal government bodies primarily concerned with transportation. The Interstate Commerce Commission has repeatedly endorsed the objectives of the Reed and Bulwinkle bills, which are designed to safeguard the present system of joint action by common

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17 Ibid.
18 See Legis., 34 Georgetown L. J. 479, 500, Conclusion No. 2 (1946).
19 1945 L.C.C. 43, 49 (1945).
20 Hearings before Senate Committee on Interstate Commerce on S. 442, 78th Cong., 1st Sess. 231 (1943).
21 See note 7 supra.
carriers. In the last annual report by the Commission to the Congress, it was said: "In previous reports we have expressed the fear of danger that undue breadth in interpreting and applying the Sherman Antitrust Act may interfere with carrying out the National Transportation Policy declared in the preamble to the Interstate Commerce Act, which forbids 'unfair or destructive competitive practices.' We believe that this danger still exists and are therefore recommending elsewhere in this report that the Congress by appropriate legislation remove the continuing uncertainty concerning the legality of joint action by carriers and freight forwarders subject to the Interstate Commerce Act, exercised through rate bureaus and conferences."22

Mr. J. Monroe Johnson, Director, Office of Defense Transportation, stated on Jan. 21, 1947 to the Senate Interstate Commerce Committee that he considered the proposed legislation (the Reed Bill) "desirable in the public interest and necessary for the effective discharge of the duties and obligations imposed upon common carriers subject to the Interstate Commerce Act."23

Not only are the only two federal agencies charged with responsibility over the nation's transportation system in agreement that the present conference system is both necessary and in the public interest, but 34 state transportation regulatory commissions have put themselves on record that the present system must be maintained for the public good.24

The practice of the common carriers, the statute which regulates them, and the attitude of the government agencies charged with their regulation have been briefly surveyed. The attitude of the courts toward conference rate making should now be examined.

Fifty years ago the Supreme Court handed down the often cited case, United States v. Trans-Missouri Freight Association,25 in which the Court, by a five to four vote, held that the combination of carriers in the Trans-Missouri Freight Association was a violation of the Sherman Act.26

The Trans-Missouri Freight Association was of an entirely different

23 Hearings before Senate Committee on Interstate Commerce on S. 110, 80th Cong., 1st Sess. 6 (1947).
25 166 U.S. 290 (1897).
character than the present rate bureau. Its sole purpose was to prevent the reduction of freight rates. The public was not heard by the committee of carrier representatives. The only way that a rate could be reduced was by unanimous consent of all the carriers. If a carrier party to the agreement made an independent publication of a rate, the chairman of the committee could order it withdrawn, and, upon 2/3 vote of the committee, the offending carrier and its representative on the committee were subject to a monetary fine. In contrast to the present type of rate conference, the essence of the Trans-Missouri Freight Association was coercion. This difference constitutes a clear ground for holding that this case is not authority as to the legality of the present rate conference system. Although the result of the case was unquestionably correct for the particular fact situation presented, a close examination of Mr. Justice Peckham's majority opinion supports the view that the grounds on which the Trans-Missouri case was decided are not today applicable. The majority opinion rested on two premises, the reasons for which are no longer valid.

The first premise is that the Interstate Commerce Act does not exempt or authorize agreements between common carriers. As the opinion said, "The act was not directed to the securing of uniformity of rates to be charged by competing companies, nor was there any provision therein as to a maximum or minimum of rates." However true this statement may have been in 1897, it has not been true for many years.

Since 1906, the Commission has had the power to prescribe maximum rates, and since 1920, it has had the power to prescribe precise rates and minimum rates. The Congress by subsequent amendments to the Interstate Commerce Act and the Interstate Commerce Commission by its various orders have legislated away this part of Mr. Justice Peckham's opinion. As the Supreme Court itself said, alluding to the amendments to the Act, "... [they] evince an enlarged and different policy on the part of Congress."

The Interstate Commerce Commission in Docket 28300, decided

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26 United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 315 (1897).
27 See, for general review, Legis., 34 Georgetown L. J. 479, 480-492 (1946).
30 262 I.C.C. 447 (1945).
May 15, 1945, has taken the first step towards establishing uniform national rates. As the Commission said in its findings, speaking of the amendments to the Act in 1940, "... it is clear that the main purpose which Congress had in mind was to bring about a greater degree of equalization, harmony, and uniformity in the different regional or territorial rate structures of the country."32

Since 1920 the Commission has been prescribing uniform maximum rates binding on all competing carriers. All the class rates east of the Rocky Mountains and commodity rates on the more important articles in commerce have had uniform maximums prescribed hitherto in the various rate territories. These rates must be adhered to by all carriers and any rates in excess of the maximum are subject to the penalties of the interstate Commerce Act.33

The second premise on which the decision rested was the proposition that all combinations in restraint of trade without regard to reasonableness are illegal. Mr. Justice Peckham wrote, "The question is one of law in regard to the meaning and effect of the agreement itself, namely: 'Does the agreement restrain trade or commerce in any way so as to be a violation of the act?'"34 The criterion of reasonableness was held to be inapplicable in view of the "plain language of the statute".

It is not surprising that there was a vigorous dissent by four justices led by Mr. Justice (later Chief Justice) White.35 This interpretation of the Sherman Act was overruled by Standard Oil Co. of New Jersey v.

32Id. at 692.
34United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 341 (1897).
35Mr. Justice Brewer, who was one of the majority, later repudiated, in this respect, the reasoning of the Court. In a separate opinion in Northern Securities Co. v. United States, 193 U.S. 197, 360 (1904), he said: "First, let me say that while I was with the majority of the court in the decision in United States v. Freight Association, 166 U.S. 290, followed by the cases of United States v. Joint Traffic Association, 171 U.S. 505, Addyston Pipe & Steel Company v. United States, 175 U.S. 211, and Montague & Co. v. Lowry, 193 U.S. 38, decided at the present term, and while a further examination (which has been induced by the able and exhaustive arguments of counsel in the present case) has not disturbed the conviction that those cases were rightly decided, I think that in some respects the reasons given for the judgments cannot be sustained. Instead of holding that the Anti-Trust Act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was leveled at only 'unlawful restraints and monopolies'. Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld."
A fair reading of the later opinion would seem to support the proposition that a combination, which by external statutory and administrative regulation can never fix an unreasonable price, and whose prices in many cases are prescribed by law, cannot be an unreasonable and, hence, illegal combination prohibited by the Sherman Act. However, the Court has not taken this position.

Shortly after the Trans-Missouri decision, a similar rate conference was held illegal in United States v. Joint Traffic Association. Mr. Justice Peckham again spoke for the majority and Mr. Justice White for the minority.

It is interesting to note that after the establishment of the criterion of reasonableness in anti-trust cases in the Standard Oil case, the Court has followed it in anti-trust cases involving railroad consolidations. However, the criterion of reasonableness has never been applied to rate conferences by the Court, nor has the Court reexamined the bases on which the majority opinion rested in the Trans-Missouri case, although the case has been repeatedly cited with approval.

The next case in which rate conferences were considered was Keogh v. Chicago & N.W. R.R. Keogh brought a suit for triple damages. He alleged that he had been damaged by the Western Trunk Line Association, which he alleged to be an illegal combination engaged in price fixing. The decision of the case was that only the government is empowered under Section 16 of the Clayton Act to bring a suit for triple damages.

The following obiter dicta of Mr. Justice Brandeis' opinion are worthy of notice. "But under the Anti-trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under section 3, by injunction under section 4, and by forfeiture under section 6... The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government."41

In this case, the rates that Keogh complained about had been pre-

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36 United States, 224 U.S. 383 (1912).
37 171 U.S. 505 (1898).
38 See, for example, United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).
39 260 U.S. 156 (1922).
41 260 U.S. 156, 161-162 (1922).
scribed by the Interstate Commerce Commission to remove an illegal discrimination of which he had had the benefit. The mere publication of the rates by the Tariff Bureau of the Western Trunk Line Association was the sole action of the "illegal combination".

The latest case in which the conference method of rate making has been brought up is *Georgia v. Pennsylvania R.R.*[^42] The State of Georgia is bringing suit in an original proceeding before the Supreme Court to enjoin an alleged conspiracy on the part of the railroads, the rate bureaus, and the Association of American Railroads to maintain rates discriminatory to Georgia. In the preliminary decision cited *supra*, the Court by a five to four vote held that the State of Georgia as *parens patriae* might bring action for an injunction against the conspiracy, notwithstanding the fact that the rates are only subject to attack before the Interstate Commerce Commission. This decision greatly qualifies the holding of the Court in the *Keogh* case.

Several expressions indicate the Court's present attitude to rate conferences. The Court rejected the idea that Congress by greatly expanding the regulatory power of the Interstate Commerce Commission had changed the position of the carriers in regard to the Sherman Act.[^48] The Court said: "It is true that the Commission's regulation of carriers has been greatly expanded since the Sherman Act... But it is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy... None of the powers acquired by the Commission since the enactment of the Sherman Act relates to the regulation of rate fixing combinations. Twice Congress has been tendered proposals to legalize rate fixing combinations. But it has not adopted them. In view of this history we can only conclude that they have no immunity from the anti-trust laws."[^44] Standing alone, this would seem to leave the rate conference system illegal *per se* as the *Trans-Missouri* case held.

There is, however, a slight modification of the Court's previous attitude indicated in the following excerpt. The Court said, "We intimate no opinion... whether a rate fixing combination would be legal under the Interstate Commerce Act and the Sherman Act but for the features of discrimination and coercion charged here."[^45]

[^42]: 324 U.S. 439 (1945).
[^43]: See note 26 *supra*.
[^45]: *Id.* at 462.
Perhaps in this distinction will be found a means of avoiding the previous condemnation by the Court of the rate conference system. As has been stated above, coercion is not a part of the present system as it was in the Trans-Missouri Freight Association or the Joint Traffic Association.

It is not, however, the Georgia case alone, but the statements and actions of the Anti-trust Division of the Department of Justice which have made the future of the existing rate conference system a matter of concern to shippers and the transportation industry. As a result of the Court decisions in the Trans-Missouri and Joint Traffic Association cases, the rate conference system was completely changed. For forty-five years its legality was not challenged by any Attorney General. Suddenly, on Sept. 27, 1942 the Anti-trust Division began at Chicago a Grand Jury investigation of the rate conference system.

In response to the protests of shippers and the transportation industry, Congress authorized the issuance by the War Production Board of a certificate exempting violations of the Anti-trust Act from prosecution for the duration of the war, and tolling the operation of the statute of limitations. Before the Chicago Grand Jury made a presentment, the War Production Board on March 20, 1943 issued such a certificate.

Prior to the issuance of this certificate, the Department of Justice had the Rocky Mountain Motor Freight Bureau and the Middlewestern Motor Freight Bureau and their member carriers indicted under the anti-trust laws. They were brought to trial at Denver. The trial judge, on the authority of the Trans-Missouri case, excluded testimony by the Interstate Commerce Commission as to the necessity for rate bureaus. Notwithstanding, the jury, after a very few minutes deliberation brought in a verdict of acquittal. The Government then brought a civil action in the Federal District Court at Lincoln, Nebraska. There has been no decision as yet in this case.

The protests of the shipping public and the transportation industry over this attack on the long established conference system of rate making caused Senator Wheeler in 1942 to ask the Anti-trust Division to write a bill which would permit the benefits of the conference system, and yet would square with their interpretation of the Sherman Act.


*For the reaction of the Dept. of Justice, see "JUSTICE IN TRANSPORTATION" at page 91 et seq. by the then Spec. Asst. to the Attorney General, Arne C. Wiprud, who was in charge of the prosecution.*
S. 942, which Senator Wheeler introduced in 1943, was the fruit of the Anti-trust Division's labor. Hearing were held, and it was the consensus of the shippers, the Interstate Commerce Commission and the transportation industry that the bill was confused and unworkable. The hearings were discontinued and the bill was never acted upon by the Senate Interstate and Foreign Commerce Committee.

In the following Congress, Representative Bulwinkle introduced H.R. 2536, which was substantially identical with H.R. 221, which will be examined later in detail. This bill was passed by the House by a vote of 277 to 45. It was reported out by the Senate Interstate and Foreign Commerce Committee, but failed to reach a vote on the floor of the Senate because of a legislative log jam in the closing days of the session.

On Jan. 3, 1947, Senator Reed introduced S. 110 and Representative Bulwinkle introduced H.R. 221. These bills were nearly identical at the time of introduction. S. 110 was amended in committee and reported to the Senate by a vote of 12 to 1 on March 3, 1947. It was further amended on the floor and on June 18, 1947 it was passed by a vote of 60 to 27. The House Committee on Interstate and Foreign Commerce held hearings on H.R. 221 and on S. 110 as passed by the Senate. On July 25, 1947, H.R. 221 was reported to the House without the amendments included by the Senate.

Both bills have as their objective the same resolution of the conflict between what the transportation industry, the Interstate Commerce Commission, and the shipping public on the one hand, and what the Department of Justice and the courts on the other hand consider to be the scope of application of the Sherman Act to joint action by common carriers. The basic provision of both bills is that agreements for joint action by common carriers, if approved by the Interstate Commerce Commission, will be outside the operation of the Sherman Act.

Since H.R. 221 is the basic measure, it will be considered before taking up the changes made by the Senate. The measure is very short. Par.

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49This bill only exempted consultation in regard to joint rates, prescribed bureau procedure in detail, including a time limitation on the consideration by the bureau, limited the right of access to the Commission, provided for active ICC participation in bureau hearings, etc.
50For some shipper criticism see Hearings before Senate Committee on Interstate Commerce on S. 942, 78th Cong., 1st Sess. (1943) at 933, 937, 1099.
1 provides definitions. Par. 2 states that any carrier party to an agreement between two or more carriers may apply to the Interstate Commerce Commission for approval of the agreement. The Commission shall approve the agreement if it finds that it is in furtherance of the National Transportation Policy laid down by Congress in the preamble to the Interstate Commerce Act.\footnote{54 Stat. 899 (1940), 49 U.S.C. Preamble (1940).} The Commission may qualify its approval by prescribing terms and conditions in order that the agreement may conform to the National Transportation Policy.

Par. 3 provides that the Commission shall have power to inspect the records of any organization established or continued under any agreement approved by the Commission. The Commission shall also have the power to prescribe the form of the accounts, records, files, and memoranda, and to require periodical reports.

Pars. 4, 5, 6, and 8 contain limitations on the power of approval granted to the Commission in par. 2. Par. 4 provides that the Commission shall not approve any agreement between carriers of different classes such as trucks on the one hand and railroads on the other, unless the agreement is limited to matters relating to transportation under joint rates and over through routes.

Par. 5 provides that this bill does not apply to any agreement for pooling, division, consolidation, merger, purchase, lease, acquisition, or other transaction to which sec. 5 of the Act is applicable. It should be noticed parenthetically that the Interstate Commerce Act already makes such agreements exempt from the Sherman Act upon approval by the Commission based on considerations of whether they are in the public interest, of whether the fixed charges resulting from such mergers, etc. will not be excessive, and of whether the interests of the employees of the carriers will not be adversely affected.

Par. 6 provides that no agreement which establishes a procedure for any matter under joint consideration shall be approved unless the agreement provides opportunity for each party to act contrary to the determination arrived at under the procedure.

Par. 7 provides that the Commission upon complaint or upon its own initiative without complaint may investigate and determine whether any agreement previously approved by it is in conformity with the National Transportation Policy. If the Commission finds it necessary, it is empowered to terminate or modify such agreement, but the effective date
of any order terminating or modifying the approval of the agreement
shall be postponed for such period as the Commission deems necessary
to avoid undue hardship.

Par. 8 provides that no order shall be entered by the Commission un-
less all interested parties have been afforded reasonable opportunity to
be heard.

Par. 9 provides that any agreement approved by the Commission, and
any action taken under such an agreement, if not prohibited by pars. 4, 5,
or 6 is exempt from the operation of the Sherman Act.

Par. 10 provides that any action of the Commission shall be construed
as having effect solely with reference to the provisions of par. 9.

The bill passed by the Senate is a considerable amplification and modi-
fication of the bill just summarized. Par. 2 of the Senate measure pro-
vides that the agreements approved by the Commission must relate to
"the consideration, initiation, or establishment of rates, fares, charges
(including charges as between carriers), classifications, divisions, allow-
ances, time schedules, routes, the interchange of facilities, the settlement
of claims, the promotion of safety, or the promotion of adequacy, econ-
omy or efficiency of operation and service". This language, which by its
scope includes almost every conceivable type of subject matter on which
agreement might be sought, cannot be considered a practical limitation
of the word "agreement" as used in the House measure.

In the matter of standards to govern the Commission's action on pro-
posed agreements, the Senate measure adds considerably to the House
bill. S. 110, as passed, provides that in addition to conformity with the
National Transportation Policy, that before approval the Commission
must find, after public notice in the Federal Register and public hear-
ings not less than 60 days thereafter, that the object of the agreement
is appropriate for the proper performance by the carriers of service to
the public. Further findings must be made that the agreement is not
unjustly discriminatory as between shippers or geographic regions or
areas, and that the agreement will not unduly restrain competition.

Par. 4 of the Senate bill provides in addition to the requirements of
the House bill, that no bank or other financial institutions shall be a
member of an organization set up under an agreement approved by the
Commission.

Par. 6 of the Senate bill is again an expansion of the House bill. In
addition to the general language preserving the individual carrier's right
to independent action, as contained in the House bill, the Senate measure
provides that each party to the agreement shall have the right to act contrary and independently of the initial determination or any subsequent determination arrived at under the procedure set up by the agreement. This modifies the rules of the existing rate conferences which forbid independent action until all the complete appeal procedure has been followed. The Senate bill further provides that any carrier of the same class, shall be eligible to become and remain a party to any organization set up under a Commission-approved agreement upon application and payment of the charges applicable to the same class of carrier.

Par. 6 of the Senate bill also contains the following important exception. It provides that no approval of any agreement by the Commission shall remove from the purview of the anti-trust laws any restraint upon the right of independent action by any carrier by means of boycott, duress, or intimidation. This provision appears to be inconsistent with one announced purpose of the bill: to remove the subject matter of conference rate making from the Anti-trust Division of the Department of Justice. If this provision is necessary, which is questionable, logic indicates that the Interstate Commerce Commission should be granted its enforcement.

Par. 7 in the Senate bill is an expansion of the House bill. The Senate measure provides that any person, including the Attorney-General of the United States, may complain of any action taken under an agreement approved by the Commission, and the Commission shall upon such complaint or upon its own initiative determine after a hearing whether the action complained of is consistent with the standards provided in par. 2, and whether the approval of the agreement should be modified by the prescription of terms and conditions.

Par. 8 of the Senate bill adds a parenthetical explanation of "interested parties". The bill states that these include the Attorney-General of the United States and interested state regulatory commissions or other authorities.

Par. 9 of the Senate bill contains two important qualifications which do not appear in the House bill. These stem from the listing in par. 2 of the types of agreements which may be approved. Mr. Robert W. Purcell, Vice President, Law, of the Chesapeake & Ohio Railway Co. proposed them to the Senate Committee and they were adopted to remove the widely publicised objections of Mr. Robert R. Young to the

64"Class" means rail carriers as one class, motor carriers as another, water carriers, etc.
bill. The first provides that the Commission's approval of any agreement regarding the consideration, initiation, or establishment of time schedules, the interchange of facilities, the settlement of claims, the promotion of safety, or the promotion of adequacy, economy or efficiency shall not be deemed to be approval of any subsequent modification or amendment of the agreement, nor shall it be deemed to be approval of any supplemental agreement. The second provides that approval by the Commission of any agreement of the type listed in the first exception shall not be deemed approval of any action taken under the agreement.

These provisions seek to set apart those agreements relating to rate making from the many agreements as to service and interchange facilities. They are based on the realization that competition in the transportation industry has become competition in the field of service rather than rates. Whether this change is for the better or not is now academic. Pressure by the public and Congress for uniformity of rates and resulting prescription by the Interstate Commerce Commission of precise rates leaves only a slight area for competition in rates.

Par. 11, which Senator Russell introduced from the floor of the Senate, has no counterpart in the House bill. Of all the differences between the Senate and House bills, it is the most important. Par. 11 is as follows:

(11) The enactment of this section shall not—
(a) deprive the Supreme Court of jurisdiction to hear and determine the case of Georgia versus Pennsylvania Railroad Co., et al. docket No. 11 (original), October term, 1945, or any proceeding for the enforcement of the provisions of any decree entered in such suit;

(b) change any principle of substantive or procedural law otherwise applicable in the determination of such suit or proceeding, or deprive any party to such suit of any relief to which such party would be entitled but for the enactment of this section; or

(c) render lawful the performance of any past or future act which shall have been found by the Supreme Court in such suit or proceeding as it relates to the parties to such suit to be unlawful or which shall have been prohibited by the terms of any decree entered therein or any supplement thereto or any modification thereof.

The meaning of this extraordinary provision is very obscure.

The Georgia case has been briefly mentioned before. Although the bill of complaint alleged an illegal conspiracy using coercion to maintain a rate structure discriminatory to the State of Georgia, yet the course of the trial before a special master and the proposed decree submitted
indicated somewhat broader objectives. The representatives of Georgia aimed an onslaught at the conference system of ratemaking, evidently predicated on the theory that a rate conference *per se* is an illegal conspiracy. The proposed decree would so hamper the making of joint rates that it is a serious question whether the carriers would be able to fulfill their statutory obligations.

Examined in the light of the development of the *Georgia* case, par. 11, if not ambiguous, is in conflict with the first ten paragraphs of the Senate measure. If the bill of the State of Georgia was accurately construed by the Supreme Court, when they held it to "charge a conspiracy among defendants to use coercion in the fixing of rates and to discriminate against Georgia in the rates which are fixed", sub-paragraph (a) is unnecessary. One of the standards laid down in par. 2 of the Senate bill is that the Commission may approve an agreement only if it "is not unjustly discriminatory as between shippers or geographical regions or areas". Par. 6 of the Senate bill provides that no approval of any agreement by the Commission shall "be so construed as in any manner to remove from the purview of the anti-trust laws any restraint upon the right of independent action by any carrier by means of boycott, duress, or intimidation". Sub-paragraph (a) is entirely unnecessary to the achievement of the relief from the conspiracy alleged in the *Georgia* complaint. On the other hand, the first 10 paragraphs of the bill would certainly make impossible an injunction against rate conferences which might be approved by the Commission. In other words, without sub-paragraph (a), the Supreme Court would still have jurisdiction over the *Georgia* case, but it would not be able to enjoin any agreement approved by the Commission. If this power is left in the Supreme Court, the whole purpose of the bill, which is to remove such agreements from the purview of the Anti-Trust laws, will be nullified insofar as the *Georgia* case is concerned.

Sub-paragraph (b) is ambiguous. If the Senate bill is regarded as changing no preexisting "principle of law" with respect to the differences

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58 One of the objectives was undoubtedly a collateral attack on the Interstate Commerce Commission. This is paragraph 10 of the original bill filed by Georgia, which was omitted in the amended bill, "Whereas: The Interstate Commerce Commission has been and is derelict in its duty, is a party to the illegal practices herein recited and does condone, aid and abet them."

59 The proposed decree submitted to the Master asks the dissolution of the Southern Freight Association, the American Association of Railroads, etc.

in the *Georgia* case, carriers party to the Georgia suit would have one law governing them, and carriers not party would be bound by another law. If however, the principles found by the Supreme Court are to be applied to all carriers, the power of the Commission in regard to such agreements would be nullified.

Sub-paragraph (c) leads to similar contradictory results. It provides that the enactment of the Senate bill shall not render lawful the performance of any past or future act, which shall have been found by the Supreme Court in the *Georgia* case, “as it relates to parties in such suit” to be unlawful. In other words, a finding of the old law by the Court would be binding in the future, regardless of the Senate bill. If the Court should find rate conferences illegal *per se*, and the Commission subsequently should approve the rate conferences found illegal, then the rate conferences would still be illegal under this sub-paragraph. The power of the Commission and the purpose of Congress as expressed in the first 10 sections of the bill would be nullified.

To sum up, paragraph 11 of the Senate bill will either nullify the power of the Commission contrary to the general purpose of the measure, or it will result in having two different applications of the same law to the same class of subjects without any rational differentiation. This latter interpretation will make the Senate bill unconstitutional in the light of the long line of Supreme Court decisions following *Yick Wo. v. Hopkins*.

Some of the opponents of these two bills have used the most sweeping kind of language in regard to this legislation. For example, Senator Tobey said in his minority report, “It [the bill] would constitute a most dangerous precedent which could henceforth be used to justify the exemption of any or all industries from the safeguards of the anti-trust laws. The pursuit of such a program inevitably means the extinction of the free and competitive economy of the United States.” There are, however, well established precedents for this legislation.

The Shipping Act of 1916 contains a similar provision with respect to contracts between common carriers by water subject to that Act. The Civil Aeronautics Act of 1938 contains provisions almost identical with those proposed in the Reed and Bulwinkle bills. Section 412 of the Act authorizes the Civil Aeronautics Board to approve agree-
ments between air carriers, affecting air transportation, when such agree-
ments are found to be not "inconsistent with the public interest" and
not in conflict with the Act. Section 414 of the Act\textsuperscript{68} provides that the
parties to agreements so approved are relieved from the anti-trust laws
with respect to the carrying out of the agreements.

The Interstate Commerce Act itself already contains an even more
important exemption from the anti-trust laws, which has already been
briefly noted. Section 5 of the Act\textsuperscript{64} gives the Commission exclusive
power without regard to the Sherman Act to approve poolings, divisions,
consolidations, mergers, purchases, leases, and acquisitions of control.
The Reed-Bulwinkle bills can hardly be characterized as the first step
in the subversion of the Sherman Act in view of this much more im-
portant power which the Commission has had since 1920. It should be
noted that the Civil Aeronautics Board has similar powers.\textsuperscript{65}

The record compiled as to proponents and opponents of the Reed-
Bulwinkle bills presents a situation unique in American legislative his-
tory. The objectives of these bills have the support of the Interstate
Commerce Commission, the Office of Defense Transportation and 34
state regulatory commissions. The railroad labor unions have testified
in support of the bills. The United States Chamber of Commerce and
over 540 local Chambers of Commerce have testified or passed reso-
lutions supporting the legislation. Over 100 business organizations have
gone on record in support of these bills. The American Farm Bureau,
the National Grange, and over 135 other farm organizations are also on
record in support of this legislation. Over 75 organizations of shippers,
in addition to the entire transportation industry, are supporting these bills.

The opposition has been singular in several senses of the word. The
only appearances at the hearings against the bill were those of the Anti-
trust Division and Mr. Arne C. Wiprud, former Special Assistant to the
Attorney General. No shipper appeared in opposition to the legislation.\textsuperscript{66}

Some opponents of the legislation have made the objection that there
is no provision for court review of the Interstate Commerce Commis-

\textsuperscript{68} 52 Stat. 1001 (1938), 49 U. S. C. \$ 488 (1940).
\textsuperscript{64} 52 Stat. 1004 (1938), 49 U. S. C. \$ 494 (1940).
\textsuperscript{64} 54 Stat. 905 (1940), 49 U. S. C. \$ 5 (1940).
\textsuperscript{65} See note 62 supra.
\textsuperscript{66} Compare 34 Georgetown L. J. 479, 498 n. 91 (1946). See the very amusing
colloquy between Representative Hale and Mr. Boggess of the Anti-trust Division over
what is a "legitimate interest" Hearings before House Committee on Interstate Commerce
sion's decisions under this legislation. Other orders of the Commission are not specifically reviewable by the courts, nor are there any provisions for review of the decisions of the Securities Exchange Commission, the Federal Communications Commission, and many others. However, all decisions, including those of the Commission under the present legislation, are reviewable, if they are arbitrary, ultra vires, or confiscatory. To urge this seriously as an objection is to question the competence and integrity of the Interstate Commerce Commission or to reveal an archaic view of the function of the administrative agency.

The Reed-Bulwinkle bills represent the solution to the present conflict between the statutory and practical requirements of the transportation industry and the views of the Anti-trust Division as to the scope of the Sherman Act. If this legislation fails to pass, the present satisfactory system of regulation will have to be scrapped. The making of joint rates and the necessary consultation will be overshadowed by the threat of criminal prosecution. The good faith of the industry in observing the requirements of the Interstate Commerce Act will apparently be no defence. Any action, no matter how legal it may appear at the time, may give rise to a subsequent legal assault. The present situation highlights this view. If the present opinions of the Anti-trust Division are correct, their predecessors for the 50 years before 1942 were either mistaken as to the law or derelict in their duty.

This legislation will clarify on a realistic basis the legal framework of the present rate making system. Such clarification is sorely needed. The rules of the game should be definitely established before the contestants play.

GORDON R. PAYNE
NOTES

THE FOURTEENTH AMENDMENT CHALLENGED

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; ..."

U. S. Const. Amend. XIV, § 1.

This sentence from the first section of the Fourteenth Amendment has been the subject of more litigation than any other in the entire Constitution. Since its adoption in 1868 the Supreme Court of the United States by its many decisions involving this Amendment has hammered out a sound and consistent interpretation of its fundamentals. These are the "privileges or immunities" and "due process of law" clauses, for on the meaning to be given to them depends the meaning of the most important part of the entire first section. While the former phrase has been contested by minority opinions, there has been no disagreement on the basic substance of "due process of law". But today a minority of four justices of the Supreme Court led by Mr. Justice Black feels that it can no longer follow either the court's interpretation of "privileges or immunities" or the historic conception of "due process of law". This divergent tack first showed itself in Mr. Justice Black's dissenting opinion in the case of Betts v. Brady and culminated in a full scale offensive in Adamson v. California, which was handed down on June 23, 1947. The seriousness of the reversal which the minority of the court is striving to effect is much more important than appears on the surface, for besides challenging the scope and effect of the Fourteenth Amendment, it questions one of the philosophical concepts upon which the government of this country was founded. In contrast to this

2332 U. S. 46 (1947). This case involved the constitutionality of a California statute which permits comment on the failure of the accused to take the witness stand in his own defense. Basing its decision on the assumption that such a practice would in the federal courts be a violation of the Fifth Amendment, the Court held that the right of the defendant in a criminal trial not to be compelled to testify against himself, secured against the Federal Government by the Fifth Amendment, is not one of the privileges or immunities of national citizenship guaranteed by the Fourteenth Amendment, nor is it, under the circumstances of the instant case, one of the fundamental rights protected by the "due process" clause of that Amendment.
view the majority opinion of the court in the Adamson case is the basis for but another of a long line of decisions which have affirmed, without exception, the essentials of the earliest interpretations of the Fourteenth Amendment, both as to "privileges or immunities" and "due process of law". It will be well to review briefly the Court's past interpretations of these two phrases.

PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES

The Slaughter-House Cases, the first judicial test of the then newly adopted Amendment, set out clearly the meaning of the phrase "privileges or immunities of citizens of the United States". Since this phrase appeared in Article Four, Section 2, of the Constitution in respect to state citizenship and had been defined in earlier decisions, the Court, after drawing a distinction between state and national citizenship, adopted the language of Corfield v. Corwell, which defined the privileges and immunities of state citizens as those which are fundamental and inherent in all free governments. By a process of exclusion, then, the privileges and immunities of national citizenship cannot be any of those but must "... owe their existence to the Federal government, its National character, its Constitution, or its laws". This general definition has been frequently re-affirmed and has never since been questioned. As to the question whether the Bill of Rights, set out in the first ten Amendments, was intended to be embodied in the privileges and immunities clause of the Fourteenth Amendment, the Court has again looked to the past and reasoned that since it had long been settled that they were intended as a limitation on the National Government only, the responsibility for the protection of these rights against state

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816 Wall. 36 (U. S. 1873). The Amendment was ratified according to a proclamation of the Secretary of State dated July 28, 1868, by the legislatures of the required number of states.

9The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."


16 Wall. 36, 76 (U. S. 1873).

16 Wall. 36, 79 (U. S. 1873).


infringement lay on the states themselves. Therefore, these rights could not be construed as part of the privileges and immunities of national citizenship.10

While these privileges and immunities have been thus defined and limited in very general terms, the Supreme Court has made no attempt to enumerate them all specifically,11 but many particular instances have been set forth from time to time. In The Slaughter-House Cases12 several were suggested: the right of access to seat of the government, to the seaports, and to the various offices and activities located within the various states; the right to demand protection of the Federal Government on the high seas; the right to use the navigable waters of the United States; the right of assembly and the privilege of the writ of habeas corpus. Others include: the right to pass freely from state to state;13 the right to petition Congress for the redress of grievances;14 the right to vote for national officers;15 the right to be protected against violence while in the lawful custody of a federal officer;16 the right to inform United States authorities of the violation of its laws;17 the right of assembly to petition Congress or to discuss national affairs.18

DUE PROCESS OF LAW

The foregoing judicial interpretations limited at a very early date the effectiveness of the "privileges or immunities" clause to a narrow scope.19 But the practical effect of the Fourteenth Amendment was not thereby diminished. It is the "due process" clause which the Supreme

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11Colgate v. Harvey, 296 U. S. 404 (1937). While this case has been overruled by Madden v. Kentucky, 309 U. S. 83, 90 (1940), as to the specific point involved, its general discussion of the subject of "privileges and immunities" has not been criticized.

1216 Wall. 36 at 79 (U. S. 1873).

13Crandall v. Nevada, 6 Wall. 35 (U. S. 1868); Williams v. Fears, 179 U. S. 270 (1900); Colgate v. Harvey, 296 U. S. 404 (1937).

14United States v. Cruikshank, 92 U. S. 542 (1876).

15Ex parte Yarbrough, 110 U. S. 651 (1884).

16Logan v. United States, 144 U. S. 263 (1892).

17In re Quarles and Butler, 158 U. S. 532 (1895).


19For a review of the development of the "privileges or immunities" clause see Lamen, Privileges and Immunities Under the Fourteenth Amendment, 18 WASH. L. REV. 120 (1943).
Court has relied upon to extend its powers of review to any state statute or action which might be claimed as depriving the appealing citizen of "life, liberty, or property, without due process of law". To establish the general meaning of this clause the court again looked to its past decisions, for the expression appears also in the Fifth Amendment. In *Murray's Lessee v. Hoboken Land and Improvement Co.*, it was declared that "due process" has the same meaning as the "law of the land" in the *Magna Charta*. While the Court did not attempt a definition, it set down a test for determining whether the requirements of due process are met. If the Constitution has no express provision on the question at hand, recourse must be had to the "settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country". This interpretation has ever since been accepted and followed in applying the Fourteenth Amendment to questions of procedural "due process". To this have been added other expressions which have assisted in establishing the meaning where substantive "due process" has been applied. It refers to "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions". It has to do with substance rather than with form, and consists of those "certain immutable principles of justice which inhere in the very idea of free government".

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20. . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

21. *Id.* at 276.

22. *Id.* at 277.


It applies to more than proceedings in court, and such proceedings must be fair as determined by the circumstances of each case.\textsuperscript{28} The fairness is to be judged by a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental".\textsuperscript{29} It is a concept less rigid than the specific provisions of the Bill of Rights.\textsuperscript{30} Specifically, "due process", in its procedural aspects, requires adequate notice and an opportunity to be heard in defense.\textsuperscript{31}

With these general concepts of the meaning of "due process of law" in mind, the Supreme Court has gone on to hold that the meaning of the phrase is exactly the same in both the Fifth and Fourteenth Amendments.\textsuperscript{32} By the rule against surplusage in statutory interpretation, "due process" in the Fifth Amendment cannot be taken to be limited in scope to the other prohibitions of the Amendment, nor is it logical to conclude that it was intended to be contained within the express provisions of the entire Bill of Rights.\textsuperscript{33} From these views, it follows that the "due process" clause of the Fourteenth Amendment cannot be limited to the provisions of the first eight, nor does it bring them specifically into effect against the states. The first eight Amendments were intended to apply to the Federal Government, and the Fourteenth did not operate to change the original intention. The latter did nothing more than provide additional safeguards to the fundamental rights already possessed by the citizens and which, theretofore, were protected by state constitutions against state actions.\textsuperscript{34} Although the "due process" clause does protect some of the same fundamental rights as do the first eight amendments against infringement by the states, it does so not because they are contained in the Federal Bill of Rights, but because they hap-

\textsuperscript{28}Ballard v. Hunter, 204 U. S. 241 (1907).
\textsuperscript{30}Betts v. Brady, 316 U. S. 455, 462 (1942).
\textsuperscript{33}Hurtado v. California, 110 U. S. 516, 534 (1884).
\textsuperscript{34}United States v. Cruikshank, 92 U. S. 542 (1876); In re Kemmler, 136 U. S. 436 (1890); Brown v. New Jersey, 175 U. S. 172 (1899); Maxwell v. Dow, 176 U. S. 581 (1900); DeJonge v. Oregon, 299 U. S. 353 (1937).
pen to be fundamental rights embraced within the meaning of "due process of law".85

In applying its theory of "due process" to the rights listed in the first eight Amendments, the Supreme Court of the United States has declared many of them not to be fundamentally essential, although useful and desirable.36 States may dispense with the grand jury system and substitute proceedings upon information;37 and this information need not be preceded by an arrest or examination of the accused.38 No formal arraignment is required.39 In Walker v. Sauvinet40 it was held that a statute permitting verdict by the judge in civil suits in the event of a "hung jury" was valid, and the court stated by way of dictum that not all trials need be by jury. In Jordan v. Massachusetts41 the Court even went so far as to say that states were not prohibited from dispensing with jury trials altogether, but this case was decided on another point and the Court has never directly decided this question. A jury of less than twelve is permissible.42 A struck jury system and a reduction in the number of preemptory challenges does not violate "due process".43 The accused need not be present at a view by the jury.44 Appeals by the accused, rehearings, or new trials are not rights essential to "due process".45 Where by statute the state is permitted to appeal criminal cases, such a procedure is not violative of "due process" by reason of placing the accused twice in jeopardy for the same offense.46 "Habitual criminal" statutes are valid.47 On the other hand, the state may not take property without compensation,48 nor may freedom

86For a detailed review of the Supreme Court's treatment of each of the provisions of the first eight Amendments as applied by the Fourteenth Amendment see 26 GEORGETOWN L. J. 439 (1938); 31 COLUM. L. REV. 468 (1931).
87Hurtado v. California, 110 U. S. 516 (1884); Maxwell v. Dow, 176 U. S. 581 (1900).
89Frank v. Mangum, 237 U. S. 309 (1915).
902 U. S. 90, 93 (1875).
91225 U. S. 167, 176 (1912).
97Graham v. West Virginia, 224 U. S. 616 (1912).
of speech and of the press and the right to assemble peaceably be curtailed.\textsuperscript{49} A conviction obtained through the deliberate use of perjured testimony cannot be said to have been obtained by due process of law.\textsuperscript{50} In trials for capital offenses counsel must be tendered and a reasonable time must be allowed for the accused to obtain his own counsel,\textsuperscript{51} but the state need not grant counsel in every non-capital case,\textsuperscript{52} and counsel need not be forced upon the accused when he chooses to waive the right.\textsuperscript{53} But where a minor was arraigned, tried, and convicted of murder all in one day without counsel, there was not "due process".\textsuperscript{54} On the point involved in \textit{Adamson v. California}, exemption from self-incrimination is not protected by the Fourteenth Amendment,\textsuperscript{55} but a confession or testimony obtained by coercion or brutality may not be used.\textsuperscript{56}

\textbf{The Dissenting Opinion of Mr. Justice Black}

The basic interpretation of the "due process" and "privileges or immunities" clauses of the Fourteenth Amendment which was established within the decade following its adoption has been the foundation of every decision concerning those clauses since decided by the Supreme Court of the United States. None of the applications set out above varies from this concept and the \textit{Adamson} case is directly in line with the established law on the point. But in this case the Court was able to muster only a bare majority willing to go along with the established theory. The minority dissenting, not on the contention that freedom from self-incrimination is a fundamental right included within the classic meaning of "due process of law", but, more importantly, on the stand that the first eight Amendments should be carried over intact


\textsuperscript{50}Mooney v. Holohan, 294 U. S. 103 (1935); Hysler v. Florida, 316 U. S. 642 (1942).

\textsuperscript{51}Powell v. Alabama, 287 U. S. 45 (1932).

\textsuperscript{52}Betts v. Brady, 316 U. S. 455 (1942).


\textsuperscript{55}Twining v. New Jersey, 211 U. S. 78 (1908); Snyder v. Massachusetts, 291 U. S. 97 (1934).

into the Fourteenth. Not since the question first arose in *The Slaughter-House Cases* in 1873 has such a substantial group of Supreme Court justices taken this point of view. Today, two of the justices, who concurred in the dissent, agree with the majority that the Fourteenth Amendment is inclusive of more than the Bill of Rights, but the opinion of Mr. Justice Black contends that the Amendment should contain all of the first eight and other applicable express provisions of the Constitution and be limited by them. This argument rests on the claim that such was the intention of the drafters of the Fourteenth Amendment and on the fear that the present interpretation results in the dependence of those rights on the whim of the members of the Court, with the possibility of their eventual extinguishment.

While it is true that the Congressional sponsors of the Amendment intended that the “privileges and immunities” clause would impose the Federal Bill of Rights on the states, a Constitutional Amendment depends for its adoption on the ratification of three-fourths of the states. What these states felt to be the intention is not mentioned in the dissent. This point was brought out in *Maxwell v. Dow*.\(^{57}\) For many years after the adoption of the Fourteenth Amendment the Court was composed of men who must have been well aware from their own personal experiences of the issues involved at the time of its proposal and ratification. That Amendment was occasioned by the practices of the southern states during the aftermath of the Civil War, and surely the northern states, in ratifying, did not feel they were doing so in order to provide additional rights for their own citizens. Although the adoption of the Fourteenth Amendment was apparently overwhelmingly approved of by the people of the northern states, the issue was presented in such a way that it cannot be said that it was approved of on its own merits.\(^{58}\) The Amendment was engineered by the Radical Republicans, who at the time completely dominated the country politically, and who saw in it the chance for greater centralization of power in the Federal Government. Realizing that the great majority of the people still believed, to a limited extent at least, in “states rights”, they camouflaged this aspect by arousing again the fears and hatreds of the Civil War. The people were made to feel that the rebellion was about to spring up anew and that the Amendment was absolutely necessary to enable the Federal Government to keep the unrepentent southern states suppressed. Had all the

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\(^{57}\)176 U. S. 581 (1900).
\(^{58}\)Flack, *The Adoption of the Fourteenth Amendment* 68, 69, 153 (1908). See also, Mott, *Due Process of Law* 163 (1929).
purposes of the framers been made clear to the states, ratification might have failed. By the time of *The Slaughter-House Cases*, five years later, the emotions of war had died away and the Radical Republicans were no longer in power. As a result public reaction to that decision was generally favorable.

While the cases which preceded *Twining v. New Jersey* may not have held expressly that the "privileges or immunities" did not include the Bill of Rights, they cannot be read so as to leave that possibility open. The dissenting opinion does not make it clear whether it is one or both phrases which carries with it the Bill of Rights, but it can hardly be said that the framers had "due process" in mind, for the meaning of that had already been established. Furthermore, the records of the debates in Congress show that regardless of what definition the framers would have given to "due process", they definitely did not associate it with the Bill of Rights.

In pointing out the seeming inconsistencies of the past decisions on the subject, it is submitted that the dissenting opinion has confused the basic theory with its application. The Court may reverse itself, wholly or partially, as to whether "due process" is violated in a particular set of facts, but in doing so it can still adhere to the same

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59 *Flack, op. cit. supra* note 58, at 208:

"It may be properly said, however, that if the question of the ratification or rejection of the Amendment had been presented to the people by itself, the result might have been quite different."

"The question the people had to decide or to determine in the election [of 1866] was not a simple, but a complicated one. The first section, the most important of all, was largely lost sight of in the general excitement."

"It may cause surprise that the people and the States were willing to increase the power of the Central Government to the extent contemplated by the framers of the Amendment, but it does not seem so strange when we consider the circumstances. The people were made to feel and believe that the preservation of the Union was again at stake; ... Most of the people held government bonds and notes, and, to insure their payment, voted for the Amendment; others thoroughly hated the South, and, to weaken the power of that section, supported it; others still wanted to perpetuate their party and saw the opportunity to do this by incorporating the Amendment in the Constitution; while many no doubt were sincere in their devotion to the Union and were willing to do anything for its preservation, and believing the Amendment necessary for this, voted for it."

60 *See 2 Warren, The Supreme Court in United States History* c. 32 (1926).

61 211 U. S. 78 (1908).


formula for determining the meaning of that phrase. It is true, as is pointed out in detail, that the application of "due process" to statutes regulating commerce and industry has changed considerably, but in none of these cases has the basic meaning of the term been challenged. The period of these decisions, the last two decades of the nineteenth century, marked the extension of "due process" from almost purely a procedural check into the field of substantive law. While this was a new application, it was not the whim of the Court, for it had lain dormant behind every judicial interpretation of "due process" since the adoption of the Constitution. Since the adoption of the Fourteenth Amendment the membership of the Court has been unanimous in affirming its power to strike down statutes violating "substantive due process". In regard to the regulation of business or property rights, the decisions, such as that in Chicago M. & St. P. R. Co. v. Minnesota, were based on the same interpretation of "due process". The difference lay in the determination of what due process of law required in such regulations. This decision and that in Chicago B. & Q. R. Co. v. Chicago, while they expanded the application of "due process", did not contract the effectiveness of the Fourteenth Amendment in respect to the Bill of Rights as is contended by the dissent, for that aspect was not touched upon. They cannot be said to be in contradiction to The Slaughter-House Cases, for that decision was really concerned only with "privileges or immunities". Twining v. New Jersey was in direct line with the Slaughter-House decision when it held that the "privileges or immunities" clause did not compel the states to submit to the Federal Bill of Rights. In no way can the latter case, or any other case decided prior to 1908, be so interpreted as to find it leaving an opening to include the Bill of Rights as part of the privileges or immunities of national citizenship, as the dissent implies.

The Twining case is an especial target for the dissenting opinion, even to the point of distortion. When that decision stated that the application of "due process" should be "ascertained from time to time

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65 See Howe, The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment, 18 CALIF. L. REV. 583, 609-610 (1930); Swisher, The Growth of Constitutional Power in the United States 107 (1946); Grant, supra note 63, at 80.

66 Maurer, Due Process and the Supreme Court, 22 GEORGETOWN L. J. 710 (1934).

67 134 U. S. 418 (1890).

68 166 U. S. 226 (1897).
by judicial action”, it did not mean that it should be an independent determination. It meant that in preference to an attempt to enumerate everything to which the phrase might possibly apply, each incident should be adjudged separately and that such adjudication should be controlled by the principles and tests set out above. Nor has Twining v. New Jersey been undermined by later decisions. In the first place, its holding as to self-incrimination cannot be said to mean that the state may “extort” testimony from the accused in the ordinary sense of that word. The later decisions on confessions or testimony obtained by coercion or brutality may limit but do not contradict the Twining case. It is true, as is pointed out, that many later cases have held particular rights found in the Bill of Rights to be protected by the Fourteenth Amendment, but none of these decisions arrives at such a conclusion merely because these rights are also to be found in the first eight Amendments. Neither Palko v. Connecticut nor any other decision since the Twining case has maintained that the Fourteenth Amendment looks to the first eight Amendments for the rights which it protects by “due process”. The basic theory of all these cases clearly shows why the Fifth Amendment “should be absorbed in part but not in full”. For the purposes of the Fourteenth Amendment the Bill of Rights need never have existed.

For the reasons just shown it is submitted that the dissenting opinion fails to establish any inconsistency in the application of “due process” with respect to the basic meaning of the phrase. The purpose of the attempt to do so seems to be to demonstrate that the established theory results not in a fairly uniform application to particular circumstances, but in interpretations which are based on the subjective thoughts of the justices, hinged on natural law concepts, and which may change radically with changes in the membership of the Court. The line of cases having to do with either personal or property rights does not bear this out. “Due process of law” has had a long history of development in the seven centuries of its existence. While it has been relegated to a position of subservience to the legislative will in England, its substantive possibilities fell on receptive ground in this country at the time of its formation. The political theories of Rousseau and Locke involved the idea of a “social compact” with consequent limited grants

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3See Mott, op. cit. supra note 58, at 252-254.
3Id. at 593, 602.
3Id. at 90, 123, 591.
of power to the government from the people. The founders of the Constitution were, in general, followers of this philosophy. The inclusion of "due process" in the Fifth Amendment, its first appearance in the Constitution, can be said to be the work of James Madison, who contended that the restriction was needed as a check on the legislative as well as on the other branches of government. Thus "due process" at the time of the adoption of the Federal Bill of Rights was regarded as a blanket guarantee of the basic rights of individuals as distinguished from the other specific provisions of the first eight Amendments. The general definitions which have been set forth by the Court since then are not out of line with this view. The best of these would seem to be that "Due process of law refers to those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and which inhere in the very idea of free government." It must be admitted that, under such a definition, application to a specific set of circumstances must depend on a process of judicial inclusion and exclusion. But this is hardly more dependence on a subjective view than is the standard of the "reasonable man" in tort law, a concept equally difficult to set down specifically, but which is generally understood as an objective test. Changes in the application of "due process" over a long period of time are to be expected; it can readily be seen that this theoretical "reasonable man" can likewise change.

If the Court's understanding of "due process" is too vague for Mr. Justice Black, he nowhere states in his dissent just what the phrase should mean. If we are not to stray outside of the body of the Constitution to establish the meanings of its provisions, there is no way to determine the present meaning of "due process", for without the foundation of its significance as it existed at the time of its inclusion in the Fifth Amendment, the phrase would be stripped of all its vitality. The so-called "due process - natural law" theory attacked in the dissent is a misnomer, for "due process of law" is not necessarily based on natural law concepts any more than is the "reasonable man" doctrine mentioned in the preceding paragraph. The natural law basis which Mr. Justice Iredell objected to in his concurring opinion in Calder v. Bull was not connected to "due process". In fact, the courts at an early period turned from natural law theories to "due process" as a basis

75Id. at 155, 156, 159, 160.
76Cases cited supra notes 25, 27.
77See dissenting opinion, 332 U. S. at 90, 91.
78Id. at 91, footnote 18.
for their decisions in such cases.77 "Due process of law" has undergone many changes of application throughout its long existence, but these changes have not separated it from the theory of the common law which the colonies carried with them at the time of their separation from England.78

CONCLUSION

Behind the dissenting opinion in Adamson v. California lies the desire to root out any trace of natural law concepts from Constitutional interpretation. But if "due process" as it now stands is to become distasteful to the Court, it must also find distasteful the political philosophy of James Madison who, as has already been pointed out, was largely responsible for the inclusion of "due process" in the Fifth Amendment, and intended that it should operate as a check on the Government as a whole in furtherance of the theory of checks and balances. The strongest argument of the dissent lies in the legislative background of the "privileges or immunities" clause. Had the opposite view been taken by the Court at the time The Slaughter-House Cases were decided, five years after the adoption of the Fourteenth Amendment, such a stand might not have been unreasonable in spite of the textual flaw in the wording of that clause,79 but with three quarters of a century gone by and nothing but affirming decisions on the question the importance of the legislative intent has been considerably diminished, even assuming that the intent of the ratifying states was identical. Why the added safeguard of the imposition of the Federal Bill of Rights upon the states is now a necessity is not shown. At one time all personal rights seem to have been protected adequately from state infringement by the states themselves without the need being shown for the added protection of the Federal Government. Until the development of the conditions which required the adoption of the Fourteenth Amendment, the states were considered able to carry out this function without need of assistance.80 The second argument, that against the

77See Howe, supra note 65, at 592, 596, 601.
78Id. at 609-610. See Moree, op. cit. supra note 58, at 253-254, 604:
"In the meantime, however, it is important to remember that this provision is primarily a guarantee of legality itself, legality not of the formal or superficial kind, but of the fundamental, inherent form which is based upon tested principles of constitutional government. That there has been a constant tendency to widen the channel of this protection is one of the great features of its development."
791 Cranch 137, 175, 176 (U. S. 1803).
80See 332 U. S. at 90.
established concept of "due process", is much weaker but infinitely more dangerous in its implications. It is one thing to say that due process of law has been denied; quite another to challenge its whole meaning. Had the dissent been based on the premise that the right to be protected against self-incrimination is a right so fundamental that a deprivation of it would be a deprivation of "due process", it would have been of no unusual significance. Even had the majority of the Court taken this view very little established law would have been upset. The second alternative would have been to base the dissent on the "privileges or immunities" aspect by itself. Such a stand, if expressed by the Court, would tear down a fairly important section of established Constitutional interpretation and would immediately render illegal parts of the procedural codes of every state in the Union, but it would in no sense approach the magnitude of a denial of the concept of "due process of law" as it is now known.  

The view of the dissenting opinion, were it to become the opinion of the Court, would have startling results. It would throw the states into confusion and halt their administration of justice until their procedural codes could be altered to conform to that of the federal courts, or until the long process of Constitutional amendment could be carried out. But, what is far more important, the foundations of "due process of law", centuries in building, would be cut away, leaving the phrase in a vacuum.

JOHN E. GREENBACKER

LIMITATIONS ON THE USE OF FORCE IN REPOSSESSION OF CHATTELS SOLD UNDER CONDITIONAL SALES CONTRACTS

When a conditional sales vendee defaults on his contract and the vendor decides to reclaim the goods, the question of how to recover the chattel with the least possible expense and trouble is of

[Supra note 63 at 66.]
[The constitutions of forty-seven states contain the protective phrase, "due process of law", or its equivalent. MOTT, op. cit. supra note 58, at 24.

Not less than twenty-five states have abandoned the requirement of a grand jury wholly or in part. In such states as California, Montana, and Washington, it is seldom used even for capital crimes. No state now requires a jury of twelve for all cases involving a claim above twenty dollars.]
primary importance. The particular problem dealt with here involves the liabilities of such vendors arising out of the use of force in retaking the chattel when the vendee does not expressly and willingly give up the article.

The object of conditional sales contracts is to give the beneficial interest in the chattel to the buyer only so far as it is not inconsistent with the security of the seller who is protected by retaining the title until all conditions are met; the basis of the seller's security is this title and the contractual right to recover upon default. It is an established common law rule that a title holder who consents to give up possession of his chattel to another cannot use any force against the bailee to retake it. Nor may he take the chattel against the will of the bailee. The same principle prevents such owner from entering upon another's land to retake his goods without permission of the landowner. Conditional sales contracts are strictly construed in light of this rule and before the seller will have the right to retake over the objections of the purchaser or landowner he must obtain prior consent by a clause in the contract.

Since the usual contract contains a clause giving the seller the right to retake the goods upon default of payment, the vendor's problem arises when upon default the vendee objects to his retaking the chattel. Four questions are treated here: (1) Does the vendor have any right to retake the goods under a repossession clause without resorting to legal process? (2) If he has such rights, will he be a trespasser if he enters upon the premises of his vendee to remove the article? (3) Will he be

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1 The entrance of banks into the field of automobile financing to the extent that old-line finance companies such as Commercial Investment Trust are being compelled to seek other pastures is discussed in Fortune, September, 1947, p. 87 and the question raised is whether bankers understand the problems of automobile financing, especially those involved in the repossession of an automobile from a buyer in default.
2 Williston, Sales § 579 (2d ed. 1924).
3 Prosser, Torts 145 (1st ed. 1941).
4 Ibid.
5 Id. at 147.
liable if he damages the vendee's premises in retaking the goods when such damage is unavoidable? (4) If the purchaser physically tries to prevent the repossession may the vendor overpower him?

The vendor's right to retake goods under a repossession clause without resorting to legal process depends upon the legal status of such a clause in the jurisdiction. A clear understanding of the answer to this first question will, in most cases, answer the remaining three. Despite the contractual condition, one view of the conditional sales contract holds that the vendor retains no legal right to take back the goods upon default without aid of legal process; therefore, a seller is liable for conversion if he does not resort to legal process or if he does not have the express consent of the one in possession at the time of the retaking. Some courts reach this conclusion because of express statutory prohibitions of conditional sale contracts, while others give these contracts the legal effect of chattel mortgages. A third group reaches the same result by considering that since title is in the vendor merely for the purpose of security, this title is such a frail thing that it will allow a retaking only with the express consent of the buyer at the time of retaking or a legal action to regain possession. Commercial Credit Co. v. Spence illustrates this view. There the vendor was held liable to his vendee for repossessing an automobile from a parking lot.

A second view of the nature of this contract is the majority holding and the one adopted by the Uniform Conditional Sales Act. Under this law the seller has the right to repossess the goods without legal process and is not liable for conversion of nor trespass to chattels since the property right in the legal title and the consent given in the contract are sufficient to give the seller the immediate right to possession upon default. As a modification of this holding, the reasonable exercise of

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7 Thomas v. Philip Werlein, Limited, 181 La. 104, 158 So. 635 (1935). This case reveals that under such statutes legal title passes to the purchaser regardless of the conditions in the contracts.


10 185 Miss. 293, 184 So. 439 (1938).

11 See Everberg, Conditional Sales Contracts, Credit and Financial Management, Jan., 1946, for a survey of the status of this contract in each state.

12 Singer Sewing Mach. Co. v. Hayes, 22 Ala. App. 250, 114 So. 420 (1927); Walker
the right is made a condition precedent to the seller's repossessing, but this approach fails to distinguish between the rights of the seller arising from the contract and his duty not to invade the general rights of the buyer which exist apart from that contract. The buyer has an individual right to the privacy of his premises and he also is protected by law from an assault; therefore, if the seller is held liable when he uses unreasonable methods of repossession his culpability should rest upon the invasion of a general right of the buyer rather than upon the basis that, by his conduct, he forfeited his right to retake. This distinction is significant from the standpoint of damages since under the majority view the buyer would get only the damages resulting from the unreasonable acts of the vendor, while under the holding of Commercial Credit v. Spence, supra, he would recover additional compensation for the unlawful taking of the goods.

The majority view seems to recognize the real intent of the parties to a conditional sales contract and it preserves the economic function of this type of sale. If the seller must resort to legal process in order to recover his goods upon default of the purchaser, the added expense of such litigation will constitute another factor in the increase of the price of goods to the consumer. The minority group would eliminate the evils arising from unconscionable acts of the vendor, e.g., removing the only stove from his vendee's cabin in the middle of winter. The harsh effect of a right is not always good reason for its elimination. Consideration of the remaining three questions will show how an oppressive vendor can be restrained without destroying the freedom of contract.

The second problem raises the question as to the liability of a vendor to his vendee for trespass to land if he enters to repossess a chattel without specific permission at that time. This question arises only in


those jurisdictions giving effect to the real intention of the parties. In *Justus v. Universal Credit Co.*, the court reasons that the right to seize carries with it necessary implication the right to do whatever is reasonably necessary to make the seizure, including the right to enter peaceably on the premises. In *Walker Furniture Co. v. Dyson*, the court held that a repossession clause authorizing the vendor to enter the premises of the vendee and take possession of and remove the goods mentioned in the contract upon a breach of the terms thereof constituted an irrevocable license coupled with an interest. This represents the majority view which holds that the vendor is not liable for trespass to land when he enters to remove his goods, but this license is construed strictly in accordance with the express terms of the contract and what the courts consider as implied terms; therefore, if the vendor exceeds the scope of his license he will be liable in a trespass action. The limitations placed upon this license by the courts fall into two groups:

(1) The entry must be at a reasonable time and in a reasonable manner. A surreptitious entry or one made in the absence of the buyer is unreasonable. A removal which may cause physical injury to someone is also unreasonable, e.g., removing the only bed of a buyer when she is ill.

(2) The entry must not be under such conditions that a breach of peace will result or be threatened. What constitutes a breach of peace is a question resting solely for its answer on the facts of each case as interpreted by the court and a properly instructed jury. Consider the

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14 S. C. 487, 1 S. E.2d 508 (1939).


16 Whenever one has an interest, acquired by grant or otherwise, in something upon another’s land and consent, either express or implied, is given by the landowner to the chattel owner to go on and remove it, this is a license coupled with an interest which usually has the same characteristics as an easement without the same formalities of creation and is irrevocable. 3 *Tiffany, Real Property* § 835 (3rd ed. 1939).


21 31 Mich. L. Rev. 987 (1933); 19 Minn. L. Rev. 602 (1935).
definition laid down in *Soulios v. Mills*: 22 "Breach of peace is a violation of public order . . . public tranquility, by any act or conduct inciting to violence. . . . If what is done is unjustifiable, tending with sufficient direction to break the peace, no more is required." In that case the court held the removing of staples from a padlocked door to be a breach of peace. Other courts hold that breaking into a garage 23 or removing an automobile against the wishes of the wife of the vendee and using mildly abusive language in her presence 24 are enough to threaten a breach of peace; but in *Kaufman v. Kansas Power and Light Co.* 25 where the seller entered an open back door without invitation and stayed against the verbal objections of the family, the court said this was not enough to constitute or threaten a breach of peace. The right of the vendor to enter and remove his chattel exists by virtue of an express clause in the contract and must be exercised strictly within the bounds of the license granted or he will be liable for trespass. 26 As a practical matter this means that no force may be used in entering, but this rule does give a seller some leeway for self-help in cases of default.

In considering the third problem, "What is the liability of the conditional sales vendor when he unavoidably causes injury to other property of the vendee?", it must be remembered that, as in the preceding situation, the vendor must first have the right of repossession. The rationale of *Justus v. Universal Credit Co.* 27 answers this question as it did in *Jones v. Greenspon’s Son Pipe Co.* 28 Here the conditional sales vendor had to blast loose his oil well casing from the concrete in which it was embedded. Although this ruined a small producing well, the vendor was held to be justified because he could not remove the casing in any other way. The parties knew this at the time of the sale, and a seller has the right to use whatever force is reasonably necessary in order to remove his chattel. Liability of a vendor for excessive damage depends upon whether the court adopts the view of *Soulios v. Mills Novelty Co.* 29

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24 189 S. C. 487, 1 S. E.2d 508 (1939).
(a condition precedent to the right of retaking is a reasonable exercise of it), or the sounder approach of Westerman v. Oregon Automobile Credit Corp.\(^{30}\) under which the vendor would be liable only for injury in excess of what was necessary to recapture the chattel.

The remaining problem as to whether or not the vendor may use any force against the person of the vendee when the latter wrongfully resists the repossession is answered by the overwhelming majority of courts in the negative.\(^{31}\) A succinct and clear expression of the majority rule is given in Westerman v. Oregon Automobile Credit Corp..\(^{32}\) "If the mortgagor or conditional buyer resists and places his body in a position which obstructs the mortgagee or vendor so that in order to take the chattel he must necessarily apply force, however slight, to the person, then he must desist and resort to legal process".\(^{33}\) Nor may he use any force against a third person to whom the buyer has transferred possession.\(^{34}\) The basis of this rule is that to allow use of any force against the buyer invites brawls and sanctions settlement of differences by force. It is consistent with the common law rule that force may not be used to recapture chattels peacefully and rightfully acquired by another.\(^{35}\)

There are two cases which do not recognize this "public policy" rule but reason that if the vendor has a right then the vendee has a corresponding duty to recognize such legal interest; if he does not, then seller may overcome, short of serious injury, the resistance offered.\(^{36}\) Accordingly the vendor is liable in civil assault only when he uses excessive force. This rule has not been applied in recent years and it is doubtful whether it would be employed. Since proof of excessive force rests upon witnesses to the event, it would be a simple matter for the repossessing vendor to marshal his witnesses beforehand, while the pur-

\(^{30}\)168 Ore. 216, 122 P.2d 435 (1942).


\(^{33}\)This rule previously had been laid down in Lamb v. Woodry, 154 Ore. 30, 58 P.2d 1257 (1936). See Note, 105 A. L. R. 914 (1936).

\(^{34}\)Drury v. Hervey, 126 Mass. 519 (1879).

\(^{35}\)PROSSER, TORTS 145 (1st ed. 1941).

chaser having no knowledge of the time of the act would very likely have no one to support his testimony. Such law undoubtedly fosters high-handed and oppressive methods of repossession.

Some contracts attempting to eliminate these problems provide that the vendor may use force to retake. The courts will not extend freedom of contract this far. These clauses are either declared void\(^\text{37}\) or are interpreted to mean that the parties did not intend that unreasonable means would be used.\(^\text{38}\) One author warns that a clause granting the seller the right to use force probably would be introduced as evidence of the trading policy of the seller to show his anticipation of violence.\(^\text{39}\)

From the consideration of these problems it is clear that the answer to the question, "May a conditional sales vendor use force in repossessing chattels?", depends upon the meaning given to the word "force". If violence or breach of peace is meant, then the answer is "No". But if the question asks merely whether the seller may retake his goods without the specific consent of the buyer at the time of repossession, then the answer is in the affirmative in most states. The borderline is reached when the buyer raises verbal objections. When this happens a wise vendor will resort to legal process.

THOMAS RICHARD LIEBERT

CONTRIBUTORY NEGLIGENCE OF CHILDREN

JOHN JONES, a careful and prudent driver, unavoidably runs into and injures Jimmy Smith when the latter suddenly dashes across the road. Jimmy is an intelligent boy in spite of his mere six and one-half years, already in the third grade, and on the Safety Patrol at school. The police find that the brakes on Jones' car are just below the required standard. By local ordinance this means he was \textit{per se} negligent, even though, as a matter of fact, he could not have avoided the accident with the best of brakes. Whether Mr. Jones may prove contributory negligence on the part of the boy is a question upon which the courts are in much conflict.

Contributory negligence, a defense set up in a negligent tort action, consists of the concurrent negligent act of the plaintiff, which with the negligent act of the defendant, is the real, proximate cause of the injury,

\(^{39}\) Bolling, \textit{Hire-Purchase Trading} 101 (1937).
for which damages are sought.\(^1\) Proof of contributory negligence will generally defeat the action. Ordinarily the standard of conduct required of the plaintiff is the same as that required of the defendant, namely, that of a reasonable and prudent man under the circumstances. This is a workable and just solution in cases involving intelligent adults, where relative rights and duties are fairly well balanced. Great difficulty arises when one of the parties, the plaintiff, is an infant. Obviously, it would be a most unreasonable and unreal attitude to expect the child to abide by the same standard as the experienced adult. To be sure no state has such a standard. In *Linthicum v. Truitt* it is said:

"It is a well established rule of law that the conduct of children in the matter of contributory negligence should not be governed by the same rule that governs adults."\(^2\)

Once the objective standard of the reasonable and prudent man is put aside, much confusion arises with regard to the determination of contributory negligence of children. Widely divergent and irreconcilable views are taken by leading state courts throughout the United States, particularly as to infants below seven years.\(^3\)

**CONCLUSIVE PRESUMPTION**

One line of cases, which definitely rejects any subjective standard for infants below seven, simply excludes them from any liability for their actions. These courts have judicially established a conclusive presumption that a child of these tender years is incapable of any negligence. The courts have followed the analogy of the common-law rule that one under the age of seven cannot be guilty of a felony, since he is conclusively presumed to be incapable of committing a crime.\(^4\) The opinions expressly state this origin of the rule.

"The rule of the common law, that a child under seven years of age is conclusively presumed incapable of committing crime, has been adopted in this State as the test for determining his capacity to be guilty of contributory negligence."\(^5\)


\(^2\) Boyce 338, 346, 80 Atl. 245, 249 (Del. 1911).

\(^3\) See Note, 107 A.L.R. 8 et seq. (1937), for an exhaustive list of cases.

\(^4\) Allen v. United States, 150 U.S. 551 (1893).

Illinois has been the leading exponent of the age test, and its courts have consistently closed their eyes to the circumstances of the cases, including the capacity and development of the child. A significant minority of states have followed the lead of Illinois and adopted the same standard.

A typical case is that of *Johnson v. Abbott's Alderney Dairies*, in which a six year old child ran into the street in front of a truck. Had the driver been alert he could have stopped in time to avoid hitting the boy. On the other hand the boy could have easily seen the truck. The court refused to consider how well versed the boy was in the dangers attendant to such a heedless dash into the street or whether he had been cautioned and instructed in safety measures. The court ruled that, "Because of the boy's age, there can be no charge of negligence against him." In *Ruka v. Zierer*, the court said that a five year old boy was conclusively presumed incapable of contributory negligence; however it was not willing to rely solely upon this rule; basing its decision also on preoccupation in play as a legitimate and sufficient circumstance to relieve the boy of negligence even if he were legally capable of contributory negligence.

A few cases have modified the presumption by removing its conclusive effect. In *Arivabeno v. Nuse* the court ruled that:

"Although the law presumes that a child not over six years of age has not contributed by his or her negligence to the happening of the accident, the presumption is not conclusive and may be rebutted by proof to the contrary. The presence of proof would make the case one for the jury."

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(1908); Chitwood v. Chitwood, 159 S. C. 109, 156 S. E. 179 (1930); other cases are collected in L.R.A. 1917 F. 10.


*295 Pa. 548, 145 Atl. 605 (1929).*

*Id. at 549, 145 Atl. 605.*

*195 Wis. 285, 218 N. W. 358 (1928).*

Of course, this places the burden of proof upon the defendant. It is an interesting sidelight on the unsettled condition of the law to note that Louisiana and South Carolina decisions support both the conclusive and rebuttable presumptions of incapacity of children younger than seven years.11

**FACT FOR THE JURY**

The other line of cases rejects presumptions of any kind, making it a question of fact for the jury whether the infant could be and actually was guilty of contributory negligence.12 In the majority of states age is not the deciding factor. They agree with the dictum in *Boyer v. Northern P. Coal Co.* that, "... age, when compared with natural intelligence and past experience, may have very little influence in determining the ability of a minor to appreciate danger."13

The majority rule is plainly stated in an instruction to the jury in *Cecchi v. Lindsay*, a case involving a child of six injured by an automobile:

"While it is their duty to exercise ordinary care to avoid the injuries of which they complain, ordinary care for them is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under like circumstances. It is for you to say whether under all the circumstances, this infant plaintiff exercised reasonable care."14

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11*Notes* 421

8 La. App. 143 (1928); Citizens' St. R. Co. v. Stoddard, 10 Ind. App. 278, 37 N.E. 723 (1894); Westerfield v. Levis, 43 La. App. 63, 9 So. 52 (1891); Pavlika v. Giglio, 5 N.J. Misc. 590, 137 Atl. 528 (1927); Stone v. Florence, 94 S.C. 375, 78 S.E. 23 (1913).


1427 Wash. 707, 712, 68 Pac. 348, 349 (1902).

1524 Del. 185, 190, 75 Atl. 376, 378 (1910).
In Schmidt v. Riess, the highest court of Wisconsin approved an instruction to the jury to the effect that the plaintiff, a child, was bound to foresee what a child of her age, experience and intelligence ordinarily could be expected to foresee under similar circumstances. Thus, in applying the rule, the courts have required particular consideration of the child's knowledge, capacity, mental growth and experience. The heart of the rule is that the jury is to consider whether the child acted like a child of his age, capacity, knowledge, development and experience would ordinarily act under similar circumstances and not whether or not he acted as an ordinary and prudent child of the same age. That knowledge and experience are no slight factors is strongly indicated in the hypothetical illustrations proposed in Birmingham & Atlantic R Co. v. Mattison:

"One child may understand and appreciate one danger and not another. Another child of the same age as the first, may understand the danger the first does not, and be insensible to the danger of which the first was aware. A child raised in a city may be perfectly capable of understanding and avoiding the danger of street cars, railroads, and crowded streets, but insensible to the dangers of a mowing or threshing machine, a foot adz, or a scythe blade, etc.; while a child of the same age and average intelligence, raised on the farm, would fully comprehend and understand the dangers of the latter class, but be wholly unconscious or ignorant of those of the former."

All the courts agree that there is a minimum age below which an infant cannot be culpably liable for his actions. But those which follow the majority rule insist that this minimum age cannot be set by any standard, but varies with each child and the circumstances of each case. Thus, in Batchelor v. Degnan Realty & Terminal Improvement Co., a five-year-old boy was injured by a railroad train which suddenly backed upon him as he was proceeding across the tracks. The court thought the circumstances of an unusual nature, in that inexperience and immaturity led him to believe the train would only go forward. The child was held as a matter of law to be incapable of contributory negligence under the circumstances. The court was careful to say, however, that the age at which a child is so young and immature that no rule of care can be applied to it is not fixed in years but is variable and generally a question for the jury. In Barrett v. Harman, it was said:

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186 Wis. 574, 581, 203 N.W. 362, 364 (1925).
"There is no precise age at which as a matter of law a child is to be held accountable for his actions to the same extent as one of full age, and the question as to the capacity of a child at a particular time to exercise care to avoid a particular danger is one of fact for the jury."\textsuperscript{18}

The ruling in the \textit{Batchelor} case may seem to be extreme and inconsistent with the prevailing rule in New York that contributory negligence is a question of fact. However, it simply illustrates the great flexibility of a rule which can be adapted to any circumstance and the almost unlimited discretionary power allowed to trial judges, who after all, are in the best position to judge the alertness and intelligence of the child. The highest court of California in \textit{Gackstetter v. Market Street R. Co.}, affirming such a decision by a trial judge, said:

"The court instructed that the plaintiff was too young to be chargeable with negligence under the circumstances shown. The submission to the jury of the question was discretionary, and we cannot say that the evidence was such that the instruction constituted an abuse of discretion."\textsuperscript{19}

In the case of \textit{Parra v. Cleaver}\textsuperscript{20} defendant backed his laundry truck from the plaintiff's yard. He cut his wheels sharply to get into the narrow street and negligently ran over little 16-month-old Jose Parra who had run up to the side of the truck. The court decided the child had not been guilty of contributory negligence, not because of his extreme youth, but because "... there was no evidence indicating that he had sufficient mind or understanding ... and ... the record is barren of any evidence pointing to contributory negligence on his part. ..." The highest court in Maryland decided that a three-year-old child could be guilty of contributory negligence in running in front of a street car in plain sight and that it was a question for the jury.\textsuperscript{21} New York has left the question of the infant's capacity to the jury with proper instructions in the cases of children as young as two and one-half years.\textsuperscript{22} In the latest of these cases, the burden was placed on the defendant to prove the

\begin{footnotes}
\footnote{15 Cal. App. 283, 286, 1 P. 2d 458, 459 (1931).}
\footnote{110 Cal. App. 168, 171, 294 Pac. 6, 7 (1930).}
\footnote{United R. & Electric Co. v. Carneal, 110 Md. 211, 72 Atl. 771 (1909).}
\end{footnotes}
contributory negligence of the child. In Massachusetts, on the other hand, in a case decided in the same year involving a three and one-half year old child, the burden was placed upon the plaintiff to prove that the child was not negligent.23

A trend away from the strict rule of a conclusive presumption seems apparent from a study of the cases. Iowa and West Virginia have shown a tendency to retreat from the rule of presumption. West Virginia in a case involving a three year old child, held that the child was not capable of negligence in going across a busy street without looking for traffic, but intimated that there could be circumstances under which the same child might be guilty of contributory negligence.24 Iowa has referred to a five year old child as one "... of such tender age that there is almost a conclusive presumption of the law that he was incapable of being guilty of negligence."25

THE RULE IN THE DISTRICT OF COLUMBIA

Recently the question became important in two cases in the District of Columbia. The first was Capital Transit Company v. Gamble, where a five year old girl ran into the street in the path of a streetcar. Although the case was decided against the plaintiff because she failed to prove the negligence of defendant and the question of contributory negligence did not arise, the court gratuitously stated that "... we understand the rule to be that the question of the ability of a child of five to be guilty of contributory negligence depends on the child and the degree of intelligence it is shown to have possessed."26

The second case, National City Development Co. v. McFerran,27 involved injury to a five year old boy caused by a fire negligently left unattended by the defendant on property where he was building certain houses. The court relied chiefly on the dictum in the Gamble case, supported by several earlier decisions in the District of Columbia.

The earliest case, Washington and Georgetown R. Co. v. Gladmon, in-

25Johnson v. Selindh, 221 Iowa 378, 381, 265 N.W. 622, 623 (1936). There was a conclusive presumption of the law that a child under six years of age was incapable of contributory negligence only a year before the Johnson case was decided, in the case of Darr v. Porte. 220 Iowa 751. 263 N.W. 240 (1935).
volving a child of seven, went to the Supreme Court of the United States, which decided:

"... Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than one of seven. ... The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case."\textsuperscript{28}

\textit{Metropolitan R. v. Falvey},\textsuperscript{29} involved a four year old child. The rule in the \textit{Gladmon} case was quoted and applied as the prevailing rule in the District of Columbia.

\textbf{Conclusions}

We may conclude that there is a sharp conflict between the states on this question, resulting in two distinct rules of law:

1. A considerable number of jurisdictions follow the analogy of the criminal law and hold that the child is conclusively presumed incapable of contributory negligence.

2. The majority of states hold that the capacity of the child and whether he has acted as a child of the same age, intelligence and experience would ordinarily act are questions for the jury. This is the rule in the District of Columbia.

The exponents of the conclusive presumption rule claim for it simplicity and certainty. They point out that an adult’s negligent act, in the light of his ability to foresee the probable negligence of the child, amounts to nothing less than a wanton disregard for the safety of the child. However, the analogy to the criminal law is far from convincing. Capacity to commit crime involves the use of discretion in order to understand the nature and illegality of the particular act. This is a far cry from capacity to care for one’s personal safety.\textsuperscript{30} But the chief objection is the arbitrary nature of the rule. A small child of keen mentality may violate in the most flagrant manner rules that he understands and still collect damages resulting partially from his own act.

If proper instruction is given the majority rule seems the most advantageous for just results. Whereas it relieves the general public from blanket responsibility for all careless acts of children, it still makes al-

\textsuperscript{28}15 Wall. 401, 408 (U.S. 1872).
\textsuperscript{29}5 App. D. C. 176 (1895).
allowance for the actual development and experience of the child.\textsuperscript{31} The judge, as the cases point out, is allowed almost unlimited discretion in deciding whether the question of the child's mental ability should be a question of fact for the jury. Present day circumstances allow children at a very tender age the opportunity to observe and understand the necessity of exercising some care for their safety. Schools, movies, the radio and traffic conditions are such circumstances. It is unthinkable that many of these children are not responsible persons well able to recognize some duty incumbent upon them to avoid danger.

\textbf{RICHARD J. PEER}

\textsuperscript{31}Davis v. Bailey, 162 Okla. 86, 19 P. 2d 147 (1933) (six year old, 3rd grade in school, lived always in city); Taylor v. Robertson, 12 Tenn. App. 320, (1930) (precocious child).
RECENT DECISIONS

BILLS AND NOTES—Banks Cashing Checks for "Impostor" Held Not Liable to Federal Government on Their Endorsement Guarantee Where the United States Treasury Has Issued the Checks to an Impostor on a Fraudulent Application to the Veteran's Administration.

Representing herself as Beulah Mitchell Gibbs, the widow of a serviceman, one Bertha Smith made a fraudulent application to the Veteran's Administration and pursuant thereto, she was issued several checks. The Continental-American Bank and Trust Company and the Mercantile National Bank at Dallas cashed these checks for the impostor and received payment thereon from the drawer through normal banking channels. The government sought to recover the amount of these checks from the banks on their endorsement guarantees. Held, under the "Impostor Rule" the federal government cannot recover the amount of these checks from the banks which cashed them. Continental-American Bank & Trust Co. et al. v. United States, 161 F.2d 935 (C. C. A. 5th 1947).

The theory of the "impostor rule" is based on the intent of the drawer to make an instrument payable to the person physically before him. His intent to deal with that person is controlling; the intent to deal with the person impersonated being disregarded. As it was said by the court in a leading case on the point, "... because in such a case the intention with which the drawer issued the check has been carried out." Land Title and Trust Co. v. Northwestern National Bank, 196 Pa. 230, 46 Atl. 420 (1900). See also, Emporia National Bank v. Shotwell, 35 Kan. 360, 11 Pac. 141 (1886); Robertson v. Coleman, 141 Mass. 231, 4 N. E. 619 (1886); Heavey v. Commercial National Bank, 27 Utah 222, 75 Pac. 727 (1904). Incident to this line of reasoning it has been generally held that communication by mail develops no distinction between an impersonation effectuated by that medium and one carried out in the presence of the victim. Boatsman v. Stockmen's National Bank, 56 Colo. 495, 138 Pac. 764 (1914); Metzger v. Franklin Bank, 119 Ind. 359, 21 N. E. 973 (1889); Maloney v. Clark, 6 Kan. 82 (1870); Hofman v. American Exchange Bank, 2 Neb. (unoff.) 217, 96 N. W. 112 (1901).

Cases which have recognized the existence of the "impostor rule", but have refused to apply it, have considered the person making the instrument so payable to have a double intent. One intent is to make the instrument payable to the person before him, or in the cases of correspondence, to the one representing himself as another; and second, his intent is to make the instrument payable to the person whom the impostor purports to be. As has been noted, the majority of jurisdictions recognize the first intent as paramount. Montgomery Garage Co. v. Manufacturers' Liability Ins. Co., 94 N. J. L. 152, 109 Atl. 296 (1920). A few courts have considered application of the second

There is a departure from the “impostor rule” in situations involving commercial paper delivered to an imposter upon his representation, and in the belief that he is an agent of the person named as payee. As between the drawer, drawee and a holder in due course, the loss is incurred by the latter two parties. *Russell v. First National Bank*, 2 Ala. App. 342, 56 So. 868 (1911); *Murphy v. Metropolitan National Bank*, 191 Mass. 159, 77 N. E. 693 (1906). The actual intent proposition has no applicability here. The reason for the difference is that the person making the instrument so payable did not regard the individual to whom he delivered the check as the payee, but merely as the payee’s agent. *McCormack v. Central State Bank*, 203 Iowa 833, 211 N. W. 542 (1927); *Houser v. National Bank*, 27 Pa. Super. 613 (1905).

The “impostor rule” was invoked at least by implication by the federal court in *United States v. National Exchange Bank*, 45 Fed. 163 (C. C. E. D. Wis. 1891). That case decided that a bank which has paid a check on a forged endorsement is not liable to the drawer thereon since the person who committed the forgery involved was identified to the bank by one who believed him to be the payee and was in fact the person to whom the drawer had delivered the instrument and whom he believed was the payee. However, the “impostor rule” was not recognized in several later instances involving the federal government although on the facts of each case it appears that it might well have been. The government was held not to have the duty of knowing all of its pensioners, and checks obtained from it by fraud were considered forgeries and therefore as passing no title to the bank cashing them. The government was allowed to recover on the warranty of endorsement of the bank. *United States v. National Exchange Bank*, 214 U. S. 302 (1909). Then in 1913 an agent of the government with authority to write checks was held not to have authority to make them payable to fictitious payees. In so doing he was acting without authority and in fraud of the government, his principal. A strict duty was placed on the bank to know the person presenting the check for payment with the risk of loss on themselves if the person representing himself as the payee was not that person. *United States v. National Bank of Commerce*, 205 Fed. 433 (C. C. A. 9th 1913). The effect of that decision would seem to make application of the “impostor rule” impossible in cases involving the federal government because regardless of the actual intent of the agent of the government making the instrument so payable, the bank cashing the check had absolute liability if there was a mistake or an antecedent fraudulent impersonation which successfully misled the government’s agent.

As late as 1931 a federal court allowed the drawer of a check, a private concern, to recover from the paying bank where the company issuing the
checks was negligent in so issuing them on the misrepresentations of a forger. The drawee bank was held not to have acquired title to the instruments. National Metropolitan Bank v. Realty, Appraisal and Title Co., 47 F.2d 982 (App. D. C. 1931). Recovery by the federal government was denied in two subsequent cases on facts approximating those necessary to invoke the "impostor rule". In one the ground of the decision was the laches of the government in asserting its claim. United States v. First National Bank and Trust Co. of Oklahoma, 17 F. Supp. 611 (W. D. Okla. 1936). The basis of the second case was estoppel; the government being held unable to challenge the genuineness of the signature of an impersonator's endorsement where the Veteran's Bureau, although informed of a veteran's death, issued a check for a loan on the veteran's adjusted service certificate to an impostor. Security First National Bank v. United States, 103 F.2d 188 (C. C. A. 9th 1939).

That the federal government is bound by the same rules as private persons, when it becomes a party to commercial paper was resolved by the Supreme Court in Clearfield Trust Co. v. United States, 318 U. S. 363 (1943). See United States v. Cooke, 25 Fed. Cas. 618, No. 14, 855 (E. D. Pa. 1871). And it was admitted that the "impostor rule" would be applicable to cases involving the federal government when the proper factual situation was encountered. United States v. First National Bank, 131 F.2d 985 (C. C. A. 10th 1942). And by implication in National Metropolitan Bank v. United States, 323 U. S. 454 (1945), where Mr. Justice Black said at page 459: "We do not say that there may not be some circumstances, not now before us, under which the government might be precluded from recovery because of conduct of a drawer prior to a guaranty of endorsement."

It is apparent that the holding of the instant case is declaratory of the majority view of the state courts. Cases involving the federal government which have reached other conclusions have for the most part ignored the "impostor rule" and held banks to have paid on commercial paper issued by the federal government at their own risk. United States v. National Bank of Commerce, supra. Or they have considered the instruments in question as forgeries. See United States v. National Exchange Bank, 214 U. S. 302 (1909).

With the fortifying resolution of the Clearfield case, supra, the probability of the future application of the "impostor rule" to cases involving the federal government can readily be expected, as courts will not be so reluctant to hold the government responsible where its agent has caused commercial paper to be issued to a person impersonating the bona fide payee. In the final analysis the "impostor rule" is, after all, the one most consonant with fairness and equal justice among litigants.

DONALD L. E. RITGER
CIVIL PROCEDURE—Relief from Automatic Waiver of Jury Trial Depends on The Sound Discretion of the Court and Refusal to Grant a Belated Demand for Jury Trial Held Not Restricted to Cases Where the Opposing Party Is Prejudiced.

Kass, the landlord, brought action against Baskin, the tenant, for the possession of real property. Baskin was ordered to appear on March 25, 1946. Baskin's father called an attorney, told him Baskin was out of town, and requested that the attorney secure a continuance. A court rule gave a litigant at the time set for appearance the alternative of demanding a jury trial or of requesting an extension of time within which such demand could be made. The attorney availed himself of neither of these alternatives; he merely secured a continuance of the case. Fortified with additional counsel, the attorney again appeared four days later, filed an answer together with a belated demand for a jury trial. The trial judge denied the belated demand and heard the case without a jury, finding for the landlord. The tenant appealed, assigning as his main ground the principle that where an opposing party is not prejudiced by a jury trial, the court must grant a belated demand for jury trial as a matter of right. The Municipal Court of Appeals of the District of Columbia agreed and reversed the action of the trial judge, whereupon the landlord appealed to the U. S. Court of Appeals of the District of Columbia. This court, in turn, reversed and affirmed the action of the trial judge in denying the belated demand. Held, Relief from automatic waiver of a jury trial is a matter within the sound discretion of the court and a belated demand for jury trial cannot be made as a matter of right in cases where the opposing party is not prejudiced thereby. Kass v. Baskin, App. D. C., Nov. 17, 1947.

It is, perhaps, commonplace to state that the trend in civil cases today is towards a trial of fact issues by the court instead of by the jury. The ancient right of trial by jury has been so procedurally narrowed in some fifteen code states and in Rule 38(b) of the Federal Rules of Civil Procedure, that a decided preference can be said to exist in favor of trial without jury rather than in favor of trial by jury. See 16 U. S. Sup. Ct. Digest 282, (note citing 15 state statutes); Note 29 GEORGETOWN L. J. 99 (1940). The means used to achieve this preference is the doctrine of automatic waiver of jury trial.

Automatic waiver gives preference to trial by the court of fact issues in civil cases. It considers inaction, or failure to demand a jury trial as evidence in favor of that preference. Demand is a condition precedent to the right. Kennedy v. David, 109 F.2d 676 (App. D. C. 1940); Staritz v. Title Guaranty and Trust Co., 254 App. Div. 573, 2 N. Y. S.2d 661 (2nd Dept. 1938); Thompson v. Anderson, 107 Utah 331, 153 P.2d 665 (1944). Automatic waiver requires an affirmative act to secure a jury trial and is contradis-
tungished from voluntary waiver which requires an affirmative act to waive jury trial. Moore's Federal Practise § 38.03-4 (1938); James, Trial by Jury and the New Federal Rule of Procedure 45 Yale L. J. 1022 (1936). If an attorney fails to make a timely demand for a jury trial he is considered to have waived his right thereto. Krussman v. Omaha Woodmen Life Ins. Co., 2 F. R. D. 3 (D. Idaho 1941).

It is quite important for the attorney to preserve the right when desirable. This is particularly true in cases where jury trial is superior, tactically, to an adjudication of the facts by the court; and also where, as in the instant case, the inherent delay in jury trials as compared with non-jury actions, operates in favor of the demanding party. Thus a tenant by demanding a jury trial is allowed to remain in possession of the premises for a longer period of time while the dispute is being litigated. Accordingly as a general rule, attorneys perfunctorily demand a jury trial in almost all cases, even though the validity of the demand is only faintly discernible. These spurious demands hinder the disposition of a case and, of course, provide grounds for appeal if the demand be wrongfully denied. The frequency of these demands is so widespread that one state, Wisconsin, has already abrogated its automatic waiver rule, In re Doar, 248 Wis. 113, 21 N. W.2d 1 (1945); and a like automatic waiver provision in Federal Rule 38(b) has been fairly and severely criticized. McCaskill, Jury Demands in the New Federal Procedure, 88 U. of Pa. L. Rev. 315 (1940).

If a perfunctory demand is not made and an attorney inadvertently waives his right to jury trial by a failure to make timely demand, nothing remains for him to do but make a belated demand, stipulating the reasons why it should be granted. Cyclopaedia of Federal Procedure § 330 (2d ed. 1943). The court in acting on the motion considers all elements pertinent to the interests of both parties and of the court and may or may not grant the belated demand. The general rule is that the granting of a belated demand is within the sound discretion of the court. S. S. Kresge Co. v. Holland, 158 F.2d 495 (C. C. A. 6th 1946); Kennedy v. David, 109 F.2d 676 (App. D. C. 1940); Peterson v. So. Pac. Co., 31 F. Supp. 29 (S. D. Cal. 1940); Gunther v. H. W. Gossard Co., 27 F. Supp. 995 (S. D. N. Y. 1939). Nor should relief be granted except, perhaps, in cases of excusable neglect or extraordinary circumstances. William Goldman Theatres v. Kirkpatrick, 154 F.2d 66 (C. C. A. 3rd 1946); Foch Estates Inc. v. McDonald, 1 F. R. D. 506, (E. D. N. Y. 1940). Mere neglect or oversight of counsel is not sufficient grounds for relief. Krussman case, supra. To hold otherwise would have the effect of making the rule requiring demand a mere nullity. State of Delaware v. Mass. Bonding and Ins. Co., 6 Fed. Rules Serv. 39b.2, Case 4 (D. Del. 1942). Compliance with rule 38(b) should be automatic. Bander v. Breslauer, 7 F. R. D. 480 (S. D. N. Y. 1947). From the foregoing cases it would seem that as a matter of policy courts use their discretionary power of granting
a belated demand sparingly, if at all. And from this conclusion it would also seem to follow that appellate courts are loathe to characterize denial of demand as an "abuse of discretion" and overrule the action of the trial court. That this is sound reasoning is obvious, since the rule to be efficacious must be quite inflexible. Otherwise trial courts, already plagued by frequent, spurious, perfunctory demands would also be subjected, still further, to belated demands for jury trial in the residue of cases. A line must be drawn somewhere. It may very well be drawn here.

In the instant case the U. S. Court of Appeals for the District of Columbia has considerably clarified the status of the belated demand in its jurisdiction. This has been done mainly by the rejection of the isolated principle that a belated demand for jury trial must be granted as a matter of right where the opposing party is not prejudiced. This "prejudice" principle, so-called, is not widely nor generally applied in modern cases dealing with the granting of a belated demand, and was possibly the result of a desire for rapprochement between the old, and still majority, procedural preference for jury trial and the new automatic waiver provisions. Petri v. Bank, 84 Tex. 153, 19 S. W. 379 (1892). At any rate the overwhelming number of modern cases reject this "prejudice" principle and properly apply the rule that the granting of a belated demand is within the sound discretion of the court.

The instant decision also accords with substantial justice in cases of this type. As has been shown, perfunctory demands, are oftentimes interposed only for the purpose of delay, the demanding party having no real defense on the merits. Because of the constitutional guarantee of the right of trial by jury, courts are powerless to prevent the procedural right of jury trial from delaying the assertion of a substantive right. If courts were to grant belated demands when they are ready to proceed with trial, still greater delay would occur to the further injustice of the opposing party. Such a situation would be manifestly intolerable. Having waived his procedural rights a party should not be heard to complain.

STANLEY V. LITIZZETTE

CONSTITUTIONAL LAW—A County or Municipality Cannot Create a Crime.

A Wisconsin statute authorized local governmental authorities to enact ordinances regulating traffic of all kinds on any highway and to impose as punishment for violations of such ordinances the same penalties set forth in the state statute. The County of Winnebago enacted an ordinance declaring drunken driving to be a "misdemeanor" and imposing fine or imprisonment, or both, as the penalty for violation thereof. The ordinance was in all respects in conformity with the state statute prohibiting the same act. One Franklin
McDonald was charged with violation of the ordinance. The Municipal Court ordered a jury trial, and the district attorney of Winnebago County petitioned the Circuit Court of Winnebago County for a writ of prohibition to prevent enforcement of the order of the Municipal Court. Petition was denied and the relator appealed. The Supreme Court of Wisconsin disregarded the question of jury trial and held: the state statute was invalid insofar as it attempted to give local governmental authorities the power to treat violations of an ordinance as a misdemeanor punishable by imprisonment other than imprisonment necessary to enforce payment of a fine. State ex rel. Keeje v. Schmiege, 28 N. W. 2d 345 (Wis. 1947).

The following syllogism is explanatory of the court's reasoning in the principal case: (1) only the sovereign can create a crime; (2) a county or municipality is not a sovereign; (3) therefore, a county or municipality cannot create a crime.

There is authority for the major premise of the syllogism, i.e., only a sovereign can create a crime. Reed v. Carrigan, 190 Ind. 29, 129 N. E. 8 (1920); O'Haver v. Montgomery, 120 Tenn. 448, 111 S. W. 449 (1908). Municipal corporations can however pass ordinances carrying penalties for violations thereof. McInerney v. Denver, 17 Colo. 302, 29 Pac. 516 (1892); City of Burlington v. Stockwell, 56 Kan. 208, 42 Pac. 826 (1895); City of Helena v. Kent, 32 Mont. 279, 80 Pac. 258 (1905). A crime is defined as follows: "Any act or omission prohibited by public law for the protection of the public and made punishable by the state in a judicial proceeding in its own name." Cyclopedic Law Dictionary. See 1 Clark & Marshall, Crimes, § 1. Literally speaking, a misdemeanor is a crime. Stoltman v. Lake, 124 Wis. 462, 102 N. W. 920 (1905); 4 Bl. Comm. 5. However, a broader definition of misdemeanor is especially applicable in reference to county and municipal ordinances as pointed out in O'Haver v. Montgomery, supra, where it was stated by the court that "the word 'misdemeanor', as employed in statutes conferring power upon municipalities, is not wholly synonymous with the same term as used at common law, or in general statutes defining offenses against the state of a grade less than felony, but has a more restricted meaning, being limited to offenses against the smaller local government." Further authority supports the contention that violations of county and municipal ordinances are civil, and not criminal, and give rise to civil actions. Natal v. Louisiana, 139 U. S. 621 (1891); Ex Parte Sloan, 47 Nev. 109, 217 Pac. 233 (1923). Some jurisdictions hold that violations of ordinances give rise, in form, to quasi-criminal actions. Jackson v. City of Mobile, 30 So. 2d 40 (Ala. 1947); Sylvester Coal Co. v. St. Louis, 132 Mo. 323, 32 S. W. 649 (1895); State v. Rouch, 47 Ohio St. 478, 25 N. E. 59 (1890). When considered to be quasi-criminal actions they are subject to the same rules that govern civil appeals. Jackson v. City of Mobile, supra.

If this discussion were to end here, the conclusion would be inescapable
that the court in deciding *State ex rel. Keege v. Schmiege, supra*, construed the term “misdemeanor” in its narrow technical sense and thus greatly hampered the future enactment of police ordinances by counties and municipalities in Wisconsin. But such is not the case since the court’s principal reason for deciding as it did was based on the fact that the statute in question authorized imprisonment in the first instance as punishment for violation of the county ordinance and not merely imprisonment to enforce payment of a fine, and therefore actually created a crime. This facet of the principal case is discussed *infra*.

The minor premise of the syllogism, *i.e.*, a county is not a sovereign, is indisputable. A sovereign is “a person, body of men, or state, vested with sovereign authority.” *Webster’s Collegiate Dictionary, Abridged* (5th ed. 1945). “Sovereign authority” means supreme political power. *Webster’s Collegiate Dictionary, Abridged, supra*. A county is a civil division of a state. *Hunt v. Mohave County*, 18 Ariz. 480, 162 Pac. 600 (1917). A “county” is, according to the common-law connotation of the word, a public corporation “created by government for political purposes, and having subordinate and local powers of legislation.” *Cyclopedic Law Dictionary*. “With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy.” *Hamilton County Commissioners v. Mighels*, 7 Ohio St. 110 (1857). Counties and municipalities have only those powers expressly granted to them by the state. *Carr v. City of Conyers*, 84 Ga. 287, 10 S. E. 630 (1889); *Haywood v. Mayor*, 12 Ga. 404 (1852). They may also have those additional powers that may reasonably be implied from the powers expressly granted or implied from a general welfare provision or other general grant of power either in their charters or in state statutes. *Henderson v. Heyward*, 109 Ga. 373, 34 S. E. 590 (1899); *Ex Parte Sloan, supra*. The authorities agree that the state is the creator of counties and municipalities and is the source of all powers exercised by these lesser governmental authorities. Accordingly, a county is not a sovereign.

The syllogistic conclusion in the principal case, *i.e.*, a county cannot create a crime, has not been controverted. But from the foregoing exposition we may adduce the general rule that counties and municipalities have the power, sometimes express and sometimes implied but always delegated and not inherent, to create “misdemeanors” which, in the broad sense of that term, do not constitute crimes.

The reasoning of the court in the principal case was that imprisonment, other than imprisonment to enforce payment of a fine, could be imposed only as a punishment for a crime. This premise has its foundation in Sec. 2, Art. 1 of the Constitution of the State of Wisconsin. This constitutional provision is, in wording, similar to the 13th Amendment to the Constitution of the United States. The only state laws that have been held void under the 13th Amendment have involved statutes of some of the Southern States authorizing
peonage. *Clyatt v. United States*, 197 U. S. 207 (1905); *Hodges v. United States*, 203 U. S. 1 (1906); *Bailey v. Alabama*, 219 U. S. 219 (1911); *United States v. Reynolds*, 235 U. S. 133 (1914). It is not unusual to find the substance of the 13th Amendment incorporated in the state constitutions. See 16 C. J. S. 589, § 203; GA. CONST. ART. I, § 1, ¶ XVII. There is no doubt that the state may validly delegate to its counties and municipalities the power to imprison violators of ordinances in order to enforce payment of fines. *People v. Hanrahan*, 75 Mich. 611, 42 N. W. 1124 (1889). But in most jurisdictions such power to imprison must be expressly authorized by the state. *O'Haver v. Montgomery*, *supra*. The general reluctance of the state courts toward allowing the power to punish to be implied by lesser governmental authorities is exemplified in *City of Chariton v. Barber*, 54 Iowa 360, 6 N. W. 528 (1880), where it was held that the power expressly conferred by the state to suppress and restrain a nuisance did not include the power to penalize for violation of a city ordinance directed at the elimination of the nuisance. That the state has the authority to delegate to a county or municipality the power to imprison in order to enforce payment of a fine is recognized even in the principal case. *State ex rel. Keeje v. Schmegie*, *supra*. However, the primary question remains, i.e., can the state validly delegate to a lesser governmental authority the power to impose, as punishment for violation of an ordinance, imprisonment other than imprisonment to enforce payment of a fine? “The power to imprison for violation of an ordinance . . . must be expressly conferred by the legislature. . . . The power must be clear before it can be held to exist or be used. . . . Such powers, however, are frequently devolved upon municipal corporations in this country.” 2 *ABBOTT, MUNICIPAL CORPORATIONS*, § 553 at 1367-68 (1st ed. 1906). It was held in *State v. Lee*, 29 Minn. 445, 13 N. W. 913 (1882), that a conviction under a city ordinance which allowed as punishment the imposition of a fine and imprisonment, or either, did not bar a later criminal action by the state. This case states the general rule that punishment by both the county or municipality and the state does not constitute double jeopardy. *Accord: Sylvester Coal Co. v. St. Louis*, *supra*. In *Phillips v. City of Atlanta*, 87 Ga. 62, 13 S. E. 201 (1890), there was involved a city ordinance the punishment provisions of which subjected one “to be fined in a sum not exceeding one hundred dollars and costs, or imprisonment not exceeding thirty days, or both, in the discretion of the court. . . .” The ordinance was held valid. It was held in *McInerney v. City of Denver*, *supra*, that imprisonment in the first instance was punishment for violation of a municipal ordinance does not raise the infraction to the status of a crime. In *Brieswick v. City of Brunswick*, 51 Ga. 639 (1873), it was held that an ordinance imposing punishment in the first instance was valid since the state had expressly authorized the municipality to so punish but the court further held that the municipality could not imprison in order to enforce payment of a fine since this latter power had not been expressly conferred by the state
upon the municipality. In *Loeb v. Jennings*, 133 Ga. 796, 67 S. E. 101 (1910), it was held that imprisonment in the first instance was a valid punishment for violation of a municipal ordinance and further explicitly held that such punishment did not contravene the prohibition of the Georgia Constitution against “involuntary servitude save as punishment for a crime.” *Ga. Const.*, Art. 1, § 1, Par. XVII. Nor, in *Loeb v. Jennings*, *supra*, was a jury trial necessary. *Accord:* *Ex Parte Montgomery*, 64 Ala. 463 (1879).

In essence, what the Supreme Court of Wisconsin said in *State ex rel Keeffe v. Schmiege*, *supra*, was: Any misdemeanor punishable by imprisonment in the first instance is a crime. This is another way of saying that the punishment should fit the offense. The violation of a municipal ordinance being in nature a civil wrong, *Natal v. Louisiana*, *supra*, or, in some jurisdictions, quasi-criminal and subject to the same rules that govern civil appeals, *Jackson v. City of Mobile*, *supra*, it should follow that the punishment inflicted for the wrong should be of a less serious nature than the punishment allowed to be inflicted for a crime against the state. The Constitution of the State of Wisconsin clearly forbids involuntary servitude other than as punishment for a crime. The logic of the conclusion is irresistible, *i.e.*, that a person proceeded against for a civil wrong in a civil action should not suffer criminal punishment if defeated. No case has been found to have gone so far as has *State ex rel. Keeffe v. Schmiege*, *supra*, in saying that if direct imprisonment is to be imposed, it must be done under the law of the sovereign with all the substantive and procedural safeguards of a criminal proceeding.

EDWARD E. OPPENHEIM

CONSTITUTIONAL LAW—Failure of State Court to Offer to Supply Counsel to Defendants in Criminal Action Not in Itself a Violation of Due Process.

Nelson Foster and George Payne were sentenced to prison in February, 1935, after they had entered a plea of guilty to charges of burglary and larceny. The day the indictment was made, the accused were arraigned, their pleas of guilty were accepted and they were sentenced. At no time were they offered or did they receive assistance of counsel. The “Minutes from the Judge’s Documents” showed that the two were furnished a copy of the indictment, a list of jurors, a list of the People’s witnesses, and they were advised of “their rights of trial and consequences of a guilty plea”.

Eleven years later—in February, 1946—the two brought original proceedings in the Illinois Supreme Court by writ of error to test the validity of their imprisonment. Relief was denied. 394 Ill. 194, 68 N. E.2d 252 (19—). The case was brought by certiorari to the United States Supreme Court on the ground that the record in the case failed to show a “compliance with the Fourteenth Amendment” insofar as the due process clause of that amendment
requires an accused to have the benefit of counsel. *Held,* that as the common
law record showed that the defendant, even though not represented by counsel,
were advised of their rights and the consequences of a guilty plea, and were
not denied a fair hearing, there was no lack of due process. *Foster v. People

The Federal Constitution is explicit in the right of the accused in all federal
criminal prosecutions to have the assistance of counsel for his defense, U. S.
CONST. AMEND. VI. And so the courts have zealously held, even prescribing
that counsel must be furnished to an indigent defendant prosecuted in a
federal court, *Johnson v. Zerbst,* 304 U. S. 458 (1937); see *Betts v. Brady,*
316 U. S. 455 (1942).

The accused's right to counsel in federal courts has thus been assured by
the Supreme Court's strict interpretation of this clause in the Constitution.
But the question whether an accused has the right of counsel in a state criminal
prosecution has been another matter. The Supreme Court has found such a
fundamental right within the conception of the due process clause of the Four-
teenth Amendment in certain particular cases: *Powell v. Alabama,* 287 U. S.
45 (1932); *Smith v. O'Grady,* 312 U. S. 329 (1941); *Williams v. Kaiser,* 323
U. S. 472 (1945); *Tomkins v. Missouri,* 323 U. S. 485 (1945); *House v. Mayo,*
324 U. S. 42 (1945); *White v. Ragen,* 324 U. S. 760 (1945); *Rice v. Olson,*
324 U. S. 786 (1945).

The right of an accused in a state criminal prosecution to have the aid of
counsel was first spelled out by the Supreme Court in *Powell v. Alabama,* *supra.*
In this case (better known as the Scottsboro case) the Supreme Court held
that the trial court's failure to give defendants reasonable time and opportunity
to secure counsel, and its failure to make an effective appointment of counsel
to assist defendants in preparation for, and conduct of, their trial, was a denial
of due process of law under the Fourteenth Amendment.

A searching examination by the Court showed that most of the legislative
bodies of the thirteen original states in adopting constitutions and enacting
statutes had repudiated the English common law rule denying an accused the
right of counsel. Thus the Supreme Court concluded, the states had made
the right of the accused to counsel a fundamental part of a fair and impartial
hearing.

The majority in *Powell v. Alabama,* *supra,* went on to say (at 68): "The
right to be heard would, in many cases, be of little avail if it did not compre-
prehend the right to be heard by counsel. Even the intelligent and educated
layman has small and sometimes no skill in the science of law. . . ." The
Court plainly felt that the accused in state criminal prosecutions needed the
advice of counsel to be assured of a fair hearing.

In *Betts v. Brady,* *supra,* the Court held that the appointment of counsel
to an accused who does not request counsel in a state criminal prosecution
is not under all circumstances a right essential to a fair hearing under the
due process clause of the Fourteenth Amendment and concluded by declaring (at 471): "On the contrary, the matter has generally been deemed one of legislative policy."

In the instant case, it was held that the common law record showed there had been a compliance of due process and that the record created a conclusive presumption that there was no denial of a fair hearing. The opinion declared that the duty of the Court does not go beyond safeguarding rights essential to a fair hearing by the states, Jackman v. Rosenbaum Co., 260 U. S. 22, 31 (1923).

The Court also stated that the lack of counsel is not in itself denial of due process. When failure to assign counsel is coupled with other unfairness (Powell v. Alabama, supra; Smith v. O'Grady, supra; Williams v. Kaiser, supra; Tomkins v. Missouri, supra) and failure to explain to the accused his rights and the consequences of a guilty plea (DeMeerleer v. Michigan, 329 U. S. 663 (1947)) there is a deprivation of "rights essential to a fair hearing", rights guaranteed by the due process clause of the Fourteenth Amendment.

The majority opinion was concerned that any decision but this would "open wide the prison doors of the land". This conclusion was discounted by the minority. The minority opinions also attacked the majority's position that the Supreme Court could not lift the veil of the record, and expressed the viewpoint that it was its right to examine the actual facts, as well as the common law record, to determine whether the accused had a fair hearing.

The case narrows down the right of an accused in a state prosecution to appeal to the Supreme Court on the ground that he was not represented by counsel at his trial. Since Powell v. Alabama—excepting Beits v. Brady—the Court had held that the right of an accused in a state criminal prosecution to counsel was one of the essentials of a fair hearing required by the Federal Constitution. Foster v. Illinois, supra, holds that the denial of assistance of counsel alone is not a denial of a fair hearing but that such denial is only one of the circumstances to be taken into consideration in determining whether the accused in the state action had the fair hearing guaranteed by the due process clause of the Fourteenth Amendment.

JAMES R. TOULOUSE

CONTRACTS—An Antenuptial Contract Made in Consideration of Marriage Cannot Be Enforced by Wife after a Divorce Has Been Granted to Husband for Misconduct of Wife Subsequent to Marriage.

Action by the executor of the husband for a declaratory judgment that an antenuptial contract be declared void, on the ground of failure of consideration. William S. Burkhart and the defendant Leonora Burkhart were married and
divorced and later remarried. Before each marriage they entered into an antenuptial contract. This action concerns the second contract dated October 1, 1926. The contract provided for certain payments to the wife from the estate of the husband after his death. These provisions were in consideration of the remarriage. Thirteen years after the remarriage the husband was granted a divorce for the wife's transgression. Two years later he died. Held, that the misconduct of the wife subsequent to the marriage constituted failure of consideration, and the antenuptial contract is void. *Southern Ohio Sav. Bank and Trust Co. v. Burkhart*, 74 N. E.2d 67 (Ohio 1947).

It is universally conceded that marriage is a good and valuable consideration to support an antenuptial contract. But authorities are not in agreement, whether misconduct by the wife, subsequent to the marriage would constitute failure of consideration and nullify the contract.

The older view adopted by many English courts in their earlier decisions and followed by some authorities in this country is, that the consideration for an antenuptial contract will not fail because of the subsequent misconduct of the wife. These authorities hold that, in the absence of a provision to the contrary in the agreement, the consideration by the wife is sufficient if the act or ceremony of marriage takes place, whether she has performed her duties and obligations as a wife or not. In the English case of *Sidney v. Sidney*, 3 P. Wms. 269, 276, 24 Eng. Rep. 1060, 1063 (1734), in which the wife had eloped with an adulterer, the court said: "But the articles being, that the husband shall settle such and such lands in certainty on his wife the plaintiff, for her jointure, this is pretty much in the nature of an actual, vested jointure; in regard to what is covenanted for a good consideration to be done is considered in equity in most respects as done." In another case, where the wife had deserted her husband and had gone to a foreign country, the husband was not excused from paying annuities under a marriage settlement agreement. *Moore v. Moore*, 1 Atk. 272, 26 Eng. Rep. 174 (1737). Further, a wife did not forfeit her rights under an antenuptial agreement even if she lived separately from her husband and in adultery. "But it is said, this Court will never interfere in favour of a woman who has committed adultery, to enforce any right against her husband. That is not so. This Court does interfere for the purpose of enforcing the performance of marriage articles; though the husband may have proved that his wife is living separate from him in a state of adultery." *Seagrave v. Seagrave*, 13 Ves. 439, 443, 33 Eng. Rep. 358, 360 (1807). This rule is followed in a few cases in the United States. *Barnes v. Barnes*, 110 Cal. 418, 42 Pac. 904 (1895); *Jackson v. Jackson*, 222 Ill. 46, 78 N. E. 19 (1906); *Chase v. Phillips*, 153 Mass. 17, 26 N. E. 136 (1891). The most recent case supporting this view is a Maryland case in 1926. A husband had obtained an *a vinculo* divorce and sought to cease payments to his wife in accordance with an antenuptial contract. The court in denying him relief held, "... the general rule, deductible from the great weight of authority, is that a marriage settlement, which was
valid in its formation and which was not fraudulently induced in contemplation of the subsequent marital misconduct, is not abrogated by the divorce of the parties for marital misconduct arising after marriage, unless the language of the instrument or contract contains an express provision against the conduct in question." Crise v. Smith, 150 Md. 322, 327. 133 Atl. 110. 112 (1926).

A Minnesota case distinguishes between promises to pay which have matured and the promise of future payments. A wife deserted her husband and sued for payments under an antenuptial agreement which had matured. The court held that the husband was required to pay. "There is a wide difference between a decree in equity for the specific performance of an antenuptial promise of future payments and a judgment at law for money earned and long past due." Sparrow v. Sparrow, 172 Minn. 91, 93, 214 N. W. 791, 792 (1927).

Other American courts hold a contrary view. These cases hold the correct rule to be that misconduct subsequent to marriage does constitute failure of consideration and a wife cannot enforce an antenuptial contract if she has refused to perform her obligations in not remaining as the spouse of her husband. In an Iowa case in 1882, a wife deserted her husband after only seven weeks of marriage, then sought to enforce an antenuptial contract. "The antenuptial contract was based upon the contemplated marriage, whereby the plaintiff became bound to discharge the duties of a wife. Surely, such a contract cannot be enforced by the wife who, after the marriage, abandons her husband without lawful cause. The consideration of the instrument is the marriage contract; if it be broken and violated, the antenuptial contract cannot be enforced." York v. Fener, 59 Iowa 487, 13 N. W. 630 (1882). In the case of New Jersey Title Guarantee and Trust Co. v. Parker, 85 N. J. Eq. 557, 563, 96 Atl. 574, 577 (1916), an antenuptial contract provided that the plaintiff was to receive certain securities on becoming the wife of the testator. It was held that the agreement contemplated that she was to remain his wife. "It was incumbent upon her to show, in order to entitle her to the benefit of the provisions of the antenuptial agreement, that she had in good faith performed her part of the marital obligations arising out of the marriage, or was prevented from so doing by the testator's act." The question was again raised in Iowa in 1923. The wife abandoned her husband without cause. They had been married for five years but had cohabited as husband and wife a total of only one hundred and five days of that time. The wife brought suit for divorce. but the divorce was granted to the husband on a cross petition. In denying enforcement of an antenuptial agreement the court said: "The appellee in this case is in the position of one seeking to enforce specific performance of a contract; and in order for her to do so, it is incumbent upon her to establish performance of the contract on her part or to prove legal and sufficient reasons for her failure so to do. . . . She undertook to become a wife to him in all of the duties which that relation requires, and that she should remain such during
his life and receive the benefits of the antenuptial contract after his death as his widow." *Veeder v. Veeder*, 195 Iowa 587, 595, 192 N. W. 409, 412 (1923).

A basis of explanation of these two rules may lie in the fact that the term "marriage" is used in two different senses. First, as the act or ceremony by which the parties become husband and wife. Second, as the status or relation which exists between husband and wife. If the term "marriage" as used in antenuptial agreements means merely the act, then the consideration is complete immediately after the ceremony, and subsequent misconduct would not make the antenuptial agreement void. On the other hand, if the word "marriage" refers to the status which exists between husband and wife, then the consideration continues to pass as long as the relation exists, and misconduct subsequent to the marriage would cause consideration to fail, and the guilty spouse could not enforce the contract.

Although the majority of the cases in point favor the older English view, the few cases, including the instant one, holding the contrary rule are more recent and seem to indicate the trend. It is interesting to note that this case extends this minority rule beyond the cases on which it relies. In *York v. Ferner*, *supra*, the wife deserted after only seven weeks, while in *Veeder v. Veeder, supra*, the wife deserted her husband after five years. In the present case the marriage lasted thirteen years.

BERNARD J. RUSSELL

CORPORATIONS—In a Stockholders' Derivative Action May the Liability of a Director Be Established by Proving a Consent Decree in a Federal Anti-trust Action in Which the Illegality of the Director's Acts Was Established?

A stockholders' derivative action was brought on behalf of the Standard Oil Company of New Jersey and certain of its wholly owned subsidiaries, hereinafter collectively designated as "Standard", against the individuals who were its directors when the acts complained of occurred. The complaint alleges that in furtherance of a conspiracy with I. G. Farbenindustrie Aktiengesellschaft, hereinafter called "I. G.", a German corporation, the parties entered into cartel agreements whereby they agreed generally to refrain from competition with each other in the manufacture and sale of oil and chemical products in the markets of the world; to acquire control of all patents and processes relating to synthetic rubber and other products and to eliminate competition by other oil and chemical companies in the manufacture and sale of such products throughout the world. Plaintiffs further allege that the conspiracy and the cartel agreements entered into pursuant thereto violate the Federal Anti-trust Laws and that between the years 1929 and 1942, in every instance where the interests of Standard came into conflict with those of I. G., defendants acted for the
benefit of I. G. and against the interest of Standard, so that Standard paid out certain sums of money and suffered the loss of profits for which losses the defendants are liable. Defendants made a motion to dismiss the complaint on the ground that the alleged agreements did not contravene the Federal Anti-trust Laws and that the facts alleged in the complaint did not state a cause of action which could be prosecuted in a state court because (1) the state court had no jurisdiction to determine whether the acts complained of violated the Federal Anti-trust Laws, and (2) absent a finding by the court that the acts complained of were illegal, the director’s acts were matters purely of business judgment, not subject to attacks by dissenting stockholders or to judicial review. Held, motion denied, on the ground that the complaint sufficiently charged the directors with fraud and with failure to exercise due care in the administration of their trust and hence stated a cause of action of which the state court had jurisdiction, disregarding allegations that the directors’ acts were also in violation of the Federal Anti-trust Laws, which allegations the court held irrelevant. Clayon v. Farish, 73 N. Y. S. 2d 727 (1947).

The complaint alleged that the defendants continued the acts complained of until the United States Government obtained a consent decree adjudging the cartel agreements to be unlawful under the Federal Anti-trust Laws and enjoined these defendants and others from the further performance of any of their provisions. Standard Oil Co. (New Jersey) et al. v. Markham, 64 F. Supp. 656 (S. D. N. Y. 1945). Although the court in the present case held that the allegations of the illegality of the cartel agreement were irrelevant and the remaining allegations were sufficient to state a cause of action for the wrongs done to Standard by the defendants, nevertheless, the effect to be given the federal decree by the state court on the trial of the present action is of more than passing interest. First, it must be decided whether the injunction in the form of a consent decree between the Government on the one hand, and the corporation and the directors individually on the other hand, will estop the directors from asserting the legality of their acts when challenged by the stockholders in a derivative action.

A consent decree is an agreement of the parties to an action, under the court’s sanction, as to what the decision shall be. The Ansaldio San Giorgio I, 73 F. 2d 40 (C. C. A. 2d 1934). As it is a judgment or decree of the parties rather than of the court, it cannot be set aside or altered without their consent. Carpenter v. Carpenier, 213 N. C. 36, 195 S. E. 5 (1938), and unless all the parties to it are made parties to an original bill in the nature of a bill of review. United States v. Northern Pacific R.R., 134 Fed. 715 (C. C. A. 8th 1905). A Government motion to vacate a consent decree theretofore entered into, upon the allegation that the circumstances had so changed that it no longer served the public interest has been denied. U. S. v. R. C. A., 46 F. Supp. 654 (D. C. Del. 1942), and an appeal dismissed, 318 U. S. 796 (1943). There the court held that such a decree is not a mere authentication or recording of an agree-
ment but is a "judicial act" binding on the government as well as the defendants, and that any such modification must be consistent with the purpose of the original decrees and calculated to effectuate and not thwart their basic purpose.

The defendant directors may seek support in General Aniline & Film Corp. v. Bayer Co., 64 N. Y. S. 2d 492 (Sup. Ct. 1946); 56 Yale L. J. 396 (1947). There in the New York Supreme Court in an action by General Aniline, a former affiliate of I. G. Farben, to collect sums overdue for staying out of the Cuban market, the plaintiff successfully moved to strike the defense that performance was impossible because a 1941 federal court consent decree had enjoined defendant, a New York corporation, from further adherence to the agreement. The court reasoned that as General Aniline was not a party to the consent decree adjudicating the illegality of the contract, it could not be precluded from litigating the legality of the contract.

However, all the defendants in the instant case were made parties to the consent decree, unlike the Bayer case. It is difficult, therefore, to imagine how the directors of a corporation may escape liability for the damages suffered by the corporation as a result of their own illegal acts and agreements when they were made parties to the decree adjudicating the illegality. It is not likely that the courts would allow such a miscarriage of justice as would result if the directors responsible for the damages were allowed to disclaim liability on the ground that the stockholders in this derivative action were third parties to the consent decree, and, by the doctrine of the Bayer case, supra, unable to assert the consent decree against the directors. Certainly there is such privity between the directors, and the stockholders acting in the interest of their corporation in a derivative action as to come within the provision of the case of Utah Power & Light Co. v. U. S., 42 F. 2d 304 (1930). In that case the court held that a consent decree has the same force as any other judgment and is binding on the parties and their privies.

The remaining argument of the directors in the present case is that, even if their actions were illegal, they fell within the business judgment rule. The standard of care imposed on a director in order that he may avoid liability has been declared to be the care, skill and diligence which the ordinary prudent man would exercise in similar circumstances. Hunt v. Auferheide, 330 Pa. 362, 199 Atl. 345 (1938); Fell v. Pitts, 263 Pa. 314, 106 Atl. 574 (1919). In each case the test is whether the directors exercised their unbiased judgment in determining that the corporate action will promote the corporate interests. Chelrob Inc. v. Barrett, 293 N. Y. 442, 57 N. E. 2d 825 (1944). The fairness of the transaction is not to be measured by hindsight but in the light of the circumstances at the time of the transaction, Turner v. American Metal Co., 268 App. Div. 239, 50 N.Y.S.2d 800 (1st Dept. 1944), and unless there is positive statutory enactment to the contrary, the directors of a business corporation are not liable for errors of judgment provided they act honestly.

Conceding that the business judgment rule permits the directors to escape liability where they come within its provisions, plaintiffs in the instant case contend that an illegal act is never good business and thus is outside the saving provisions of the business judgment rule.

Ordinarily, if a director acts without corrupt motive and in good faith, he will not be liable for mere mistake or error of judgment, either of law or of fact, 3 Fletcher, Cyclopedia of Corporations, 1039 (1947), but if he knowingly exceeds his authority or the authority of the corporation, he is liable, without regard to the exercise of reasonable care, id. at 1023. In short, the director must have known when he performed the acts that they were ultra vires and illegal. Cooper et al. v. Hill, 94 Fed. 582 (C. C. A. 8th 1899); 3 Fletcher, Cyclopedia of Corporations 1025 (1947); 2 Thompson, Corporations 1402 (3d ed. 1927).

It is apparent that illegality of itself does not in all cases take the act out of the business judgment rule. The degree of illegality also must be considered in applying the rule. Whether directors are personally liable for committing acts which are ultra vires or prohibited by statute depends upon the nature of the prohibited act; whether the statute is plain and unambiguous, and whether it contains a limitation or restriction on the powers of the corporation or the powers or duties of the directors themselves. Simon v. Socony Vacuum Oil Co., Inc., 38 N.Y.S.2d 270 (1942). A corporate act becomes illegal when it violates an expressed statute or is contrary to public policy as agreements against good morals, agreements in restraint of trade, etc., or when it is malum in se or malum prohibitum. Staacke v. Routledge, 111 Tex. 489, 241 S.W. 994 (1922), modifying judgment (Tex. Civ. App.), 175 S.W. 444 (1915).

There is nothing in the record to indicate that the advice of counsel was sought by the directors in the instant case even though the cartel agreements and the acts pursuant thereto were plainly in restraint of competition and hence violative of the Federal Anti-trust Laws. This in itself would indicate the bad faith and negligence of the directors even though the negligence of the directors is a question of fact to be determined under all the circumstances of each particular case, Briggs v. Spaulding, 141 U.S. 132 (1891). It is a well settled doctrine that if there is any doubt in the minds of the directors as to the law in regard to their duties, they may be guilty of negligence if they fail to obtain competent legal advice, because in the management of their own private affairs they would ordinarily seek such advice. Gerdes v. Reynolds, 28 N.Y.S.2d 622 (Sup. Ct. 1941); Litwin v. Allen, 25 N.Y.S.2d 667 (Sup. Ct. 1940); Uffelman v. Boillon, 19 Tenn. App. 1, 82 S.W.2d 545 (1935); Vance v. Phoenix Ins. Co., 4 Lea 385 (Tenn. 1880). While directors are not necessarily guilty of negligence merely because they act without advice of counsel, the
Directors of the Farish case, *supra*, would not be assured of nonliability even if they had secured expert counsel. Advice of counsel is not always a defense, as where the advice is obviously repugnant to the plain facts of the case. *New Haven Trust Co. v. Doherty*, 75 Conn. 555, 54 Atl. 209 (1903).

The majority of courts agree that while there is no presumption of unfairness or bad faith unless the facts of the particular case are such as to naturally raise such a presumption, yet once the presumption is raised, the burden of proof is on the director seeking to uphold the transaction not only to prove the good faith of it but also to show its inherent fairness to the corporation and those interested therein. *Pepper v. Litton*, 308 U.S. 295 (1939); *Boggs v. Fleming*, 66 F.2d 839 (C. C. A. 4th 1933).

ROBERT R. HANNUM

COURTS MARTIAL—A Court Martial Lacks Jurisdiction to Try an Offender after the Offender Receives an Honorable Discharge, Regardless of the Fact That He Subsequently Re-enlists.

A habeas corpus proceeding was brought in the District Court for the Eastern District of New York on behalf of Harold E. Hirshberg, a chief signalman in the U. S. Navy. He sought to set aside a conviction by a naval court martial on the ground that the court martial lacked jurisdiction. Hirshberg enlisted in the Navy on March 24, 1936, and continued in the service during re-enlistment. In May 1942, he was captured in the Philippine Islands by the Japanese and made a prisoner of war. At the end of the war he was released from the prison camp, and he was returned to the United States. He received an honorable discharge at midnight on March 26, 1946, and re-enlisted in the Navy on the afternoon of March 27, 1946. After the re-enlistment, he was arrested and convicted on the charge of mistreating his shipmates while they were prisoners of the Japanese. The offenses were alleged to have occurred between November 10, 1942, and March 1, 1944, which was a part of the term of his prior enlistment. Held: The court lost jurisdiction by the petitioner's receiving an honorable discharge, and the military court, by re-enlistment of petitioner, could not re-acquire jurisdiction and try him for offenses allegedly occurring before the discharge. *Hirshberg v. Malanaphy*, Misc. No. 1193, E. D. N. Y., Sept. 26, 1947.

This case is interesting because (1) it is the first case in which there has been an adjudication in a civil court of the contention of military authorities that jurisdiction for an offense which occurred during a previous enlistment re-attached upon re-enlistment (previous cases dealt only with situations in which the military court attempted to claim jurisdiction over a discharged man, then a civilian); (2) it is the first time that an enlisted man who was convicted upon re-enlistment for an offense which occurred during a previous
enlistment, has challenged the jurisdiction of the military court in the civil courts, (previous cases have dealt only with challenges by officers); and (3) it clearly re-emphasizes the significance that civil courts attach to an honorable discharge, and the lack of jurisdiction of courts-martial after a man has received his honorable discharge.

The general rule is that an honorable discharge is a formal and final judgment on a man's entire previous military record, United States v. Kelly, 15 Wall. 34 (U. S. 1872), and that jurisdiction ceases on discharge or other separation (officers are not discharged) as to offenses committed during that term of enlistment or service. Officers, after they are separated from the service, are not subject to the jurisdiction of military courts-martial, 5 Ops. Att'y. Gen. 55 (1848); and 24 Ops. Att'y. Gen. 570 (1903). Neither an officer nor an enlisted man can be recalled to active duty for the sole purpose of court martial proceedings. In re Durant, S. D. W. Va., September 4, 1947; U. S. ex rel. Viscardi v. MacDonald, 265 Fed. 695 (E. D. N. Y. 1920); U. S. ex rel. Santantonio v. Warden of Naval Prison, 265 Fed. 787 (E. D. N. Y. 1919).

Unless a person pleads guilty, jurisdiction cannot be obtained by consent of parties, 22 Ops. Att'y. Gen. 137 (1898); and Vanderheyden v. Young 11 Johns. 150 (N. Y. 1814). For a restatement of the above general rule as to jurisdiction of military courts martial, see Naval Courts and Boards, § 334, p. 192; and Manual for Court Martial, U. S. Army 1928, corrected to 1943, § 10, p. 8.

To the above general rule there are some exceptions:

(1) Article 14 of the Articles for the Government of the Navy, 34 U. S. C. § 1200 (1940), and article 94 of the Articles of War, 10 U. S. C. § 1566 (1940), provide among other things the following:

"If any person being guilty of any of the offenses described in this article while in the naval service, receives his discharge . . . he shall continue to be liable to be arrested and held for trial and sentence by a court martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed." A. G. N., art. 14; see A. W., art. 94.

These articles set out such offenses as the presentation of false claims, obtaining and aiding to obtain the payment of any false claim against the United States, perjury, forgery, delivering less property than the receipt calls for, giving receipt without knowing truth of, stealing or wrongfully selling property of the United States, or any other fraud against the United States. Persons charged with offenses provided in these articles may be arrested and tried by a military court-martial after their discharge or dismissal, providing the limitation upon prosecution has not run. In re Bogart, 3 Fed. Cas. 796, No. 1596 (C. C. Cal. 1873); U. S. v. MacDonald, 265 Fed. 695 (D. C. N. Y. 1920).

(2) A person under sentence of a court-martial remains subject to the jurisdiction of military court for offenses committed while confined, even
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if previous sentence resulted in his discharge. Kahn v. Anderson, 41 U. S. 224, 225; 16 Ops. Att’y. Gen. 292 (1879); Ex parte Wildman, 29 Fed. Cas. 1232, No. 17,653 a. (D. C. Kan. 1876); In re Craig, 70 Fed. 969 (C. C. D. Kan. 1895); Mosher v. Hunter, 143 F.2d 745 (C. C. A. 9th 1944). Trial conviction, and sentence by a court-martial can be pleaded as double jeopardy in a civil criminal action for the same offense even though the sentence was never carried out and the man has severed all connection with the service. Coleman v. Tennessee, 97 U. S. 509 (1878). If a man is arrested before discharge, he can be tried and sentenced after expiration of enlistment. Barrett v. Hopkins, 7 Fed. 312 (C. C. D. Kan. 1881). And once jurisdiction attaches, it cannot be divested by subsequent events. Stanton Carter v. McCaughry, 183 U. S. 365 (1902).

(3) If a man is held in service beyond the expiration of his term of enlistment, and he requested to be discharged both prior to and subsequent to the date of termination of enlistment, he is not subject to the military courts for an offense committed subsequent to the date of the expiration of his enlistment. MM-Woomer, Lester A. /A17-20 (420217) A, June 3, 1942, C. M. O. 1-1942, p. 189. Accord: File MM-Baker, Kenneth E./A17-21 (281121) Nov. 21, 1928, C. M. O. 11-1928, p. 11. Compare: File 26251-5447, Dec. 8, 1911; File 26251-17942:2 May 5, 1919, C. M. O. 186-1919, p. 44. But the jurisdiction of naval authorities is not affected by the expiration of enlistment before initiating proceedings. Ex parte Clark, 271 Fed. 533, (D. C. N. Y. 1921); 13 Ops. Att’y. Gen. 462 (1871); 14 Ops. Att’y. Gen. 266 (1873); 15 Ops. Att’y. Gen. 152 (1876); and 16 Ops. Att’y. Gen. 170 (1878). But the civil court in U. S. v. Travers, 28 Fed. Cas. 204 No. 16,537 (C. C. Mass. 1814), held that a man remaining in the barracks after he was refused a discharge on termination of his enlistment, is subject to the rules of the establishment.

(4) Where a person obtains his discharge by fraud, the discharge may be revoked and the person arrested and returned to military control. 28 Ops. Att’y. Gen. 170 (1910). An enrolled member of the naval reserve may not be arrested and tried after discharge. U. S. v. Warden or Keeper of Naval Prison, Brooklyn, 265 Fed. 787 (D. C. N. Y. 1919); U. S. v. MacDonald, supra. No right accrues to discipline a person for any act during a void enlistment. However, an enlistment of a minor is good as to the minor, but voidable as to his parents. In re Morrissey, 137 U. S. 157 (1890). But the parents cannot save a minor from punishment if he commits a crime against the laws of the United States. He must answer and satisfy the charges placed against him before he can be discharged, United States v. Reaves, 126 Fed. 127 (C. C. A. 5th 1903); In re Scott, 144 Fed. 79 (C. C. A. 9th 1906); Dillingham v. Booker et al., 163 Fed. 696 (C. C. A. 4th 1908); Ex parte Rock, 171 Fed. 240 (C. C. N. D. Ohio 1909). A minor, who has enlisted without consent of his parents, may be punished for breach of discipline prior
to his release, United States ex rel Hendricks v. Pendleton, 167 Fed. 690 (C. C. E. D. Pa. 1909). But even if the person deserts in time of war and subsequently reenlists and the discharge given this person at the end of this enlistment was executed in ignorance of the fact that he had previously enlisted and deserted, and that the lack of knowledge of the true facts by the military authorities was the result of the deliberate and intended acts of the accused by his false statement in his second enlistment, the military court has no jurisdiction to try him for his desertion. MM-Birmingham, Robert Allen/A17-20, 10 May 1946; MM-Tunstall, Johnnie B./A17-20, 17 July 1946.

(5) If an officer deserts and his name is not carried on the official register, the jurisdiction of the court martial is not lost. Ex parte Smith 47 F.2d 257 (D. C. Me. 1931). Where prosecution was commenced over a year after the President dropped the accused's name from the rolls in accordance with article 36 of the Articles for the Government of the Navy, for unauthorized absence of three months or more, it was held that the accused became a civilian and entitled to appeal to civil courts for relief from arrest and trial by a military court. Ex parte Wilson 33 F.2d 214 (E. D. Va. 1929). An officer, who had charges preferred against him for disobedience of orders (but no court martial was ordered to investigate the charges) and who subsequently was discharged from the service by the President for another reason, was not held liable for trial on the charge of disobedience upon being restored to service as two years had elapsed since the first offense occurred. 9 Ops. Att'y. Gen. 181 (1858).

(6) The last exception is where an officer in the reserves transfers to the regulars. In Ex parte Joly, 290 Fed. 858, (S. D. N. Y. 1922), the only judicial authority previous to the civil court's ruling in the Hirshberg case, the petitioner was charged with various offenses between February and July 1920. On September 23, 1920, he was honorably discharged. On September 24, 1920, he was duly commissioned as a Major in the regular U. S. Army. He was charged with violation of articles 94 and 95 of the Articles of War. Article 95 stated:

"Art. 95. Conduct Unbecoming an Officer and Gentleman.

* * *

"Any officer or cadet who is convicted of conduct unbecoming an officer and gentleman shall be dismissed from the service."

On the subject of the jurisdiction of the court martial, which was challenged by the petitioner, the District Court wrote:

"Surely for its own protection, there must be power to dismiss from the military service an officer or cadet whenever 'conduct unbecoming an officer or gentleman' is discovered, no matter when it happened."

This is evidently the basis on which the naval authorities established juris-
diction in the instant case, the conduct of Hirshberg being deemed particularly reprehensible.

Two naval publications assume that jurisdiction attaches upon re-enlistment. On page 40 of Naval Justice (ed. 1945), "a textbook on the subject of naval law and also for use as a practical manual in the administration of naval discipline", appears the following:

"However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court-martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court-martial after separation from the service is specifically authorized by statute. Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court-martial of offenses committed in previous enlistment, although such offenses were not provided for in Article 14 A. G. N."

In Laws Relating to the Navy Annotated, "prepared in the Office of the Judge Advocate General of the Navy for the purpose of making available to personnel of the Naval Establishment such basic legal materials as may be required in the solution of problems arising in the performance of their ordinary duties," there appears at page 440 the following paragraph from an opinion by Attorney General A. Mitchell Palmer:

"In view of the specific provision in paragraph 11 of article 14, of the uniform ruling of the Army and Navy authorities, and of the rulings of my predecessor, I feel that my duty does not permit me to state my opinion otherwise than that a person discharged from the naval service before proceedings are instituted against him for violations of the Articles Governing the Navy, excepting article 14, can not thereafter be brought to trial before a court-martial for such violations, though committed while he was in the service. In view, however, of the unsatisfactory state of authorities and of the grave objections on principle to this conclusion, I see no reason why you should not assert the jurisdiction in a proper case in order to obtain, if possible, an authoritative judicial determination of the question. (31 Ops. Att'y. Gen. 521, 529 (1919). See also: File 28550-511:3, Oct. 15, 1919, C. M. O. 296-1919, p. 13: File 26251-25789, Dec. 3, 1920, C. M. O. 151-1920, p. 10.)"

Following that paragraph in Laws Relating to the Navy Annotated appears the following:

"An enlisted man was discharged from the naval service by reason of expiration of enlistment on Dec. 28, 1937; he reenlisted on Dec. 29, 1937; and he was tried by court-martial on May 5, 1938, for an offense alleged to have been committed on Nov. 25, 1937. Held, that the court had jurisdiction over the person of the accused and the offense with which he was charged as the accused was subject to naval law at the time of commission of the alleged offense, and also at the time of trial. (File MM-Ocheltree, Jennings F./A17-20 (380505), Sept. 6, 1938, C. M. O. 7-1938, p. 42. Compare: File 26251-29077,

Only two cases have reached contrary results to that in the instant case: one a court-martial case, C. M. O. 12-1921, and the other a civil court case, In re Joly, supra.

C. M. O. 1-1926, p. 9 is a case with facts which closely resemble the instant case. In addition the following cases have similar sets of facts: C. M. O. 12-1929, p. 7; C. M. O. 12-1921, p. 11; C. M. O. 6-1926, p. 11. The conviction in these cases was set aside by the reviewing naval authorities for the reason that the court-martial lacked jurisdiction. It was stated that except in cases of violation of article 14 of the Articles for the Government of the Navy, there is no authority of law conferring jurisdiction on a court-martial to try an enlisted man for an offense committed in a prior enlistment from which he had been honorably discharged, even though he had subsequently re-enlisted in the naval service and was serving under such re-enlistment at the time the jurisdiction of the court was asserted.

It is to be noted that Hirshberg was not arrested and convicted for any offense listed in article 14, nor for any of the other exceptions set forth above. He was convicted of offenses listed in article 8, and article 8 contains no saving clause, as does article 14, to allow arrest and conviction subsequent to discharge.

The civil court in the instant case placed great emphasis on the contract of enlistment signed by petitioner on March 27, 1946. It found that the contract could not be interpreted, even by implication, so as to extend the prior contract of enlistment.

Further, the civil court attached great weight to the court-martial orders for the reason that administrative decisions, when promulgated in conformity with the statutes under which they have been made are as effective as statutes. However, the cases referred to in the court martial orders of the Navy, except C. M. O. 7-1938, supra, do not lend support to the asserted jurisdiction of the court before which the petitioner was tried. It is to be noted that the great weight of authority in the said court martial orders is contrary in principle and conclusion from C. M. O. 7-1938. Even though that order is the latest in date, it cannot in reason be considered as a sufficient precedent for the jurisdictional authority asserted by the court martial because it does not expressly reverse, or modify, or vitiate the reasoning in, the earlier C. M. O.'s.

The sole judicial precedent contrary to the Hirshberg decision appears in the case of In re Joly, supra. The general language therein is unsupported by any reference to judicial authority or statute. Furthermore, as the civil court in the present case clearly pointed out, the Joly case, supra, could not be considered as a precedent by reason of the construction which must be given article 8 in contrast with article 14 for the Government of the Navy.

THOMAS J. SHANNON
CRIMINAL CONSPIRACY—Erroneous Instructions, Allowing a Finding of
Overt Act in Criminal Conspiracy from Inadmissible Evidence, Are Not
Harmless, Despite Proof of a Different Overt Act.

Negro and Bruchon were indicted jointly for conspiracy to violate the
Federal narcotic laws and separately for substantive offenses. Negro confessed
his part in both the conspiracy and the substantive offense and was found
guilty of both as was his co-conspirator Bruchon, although the confession of
Negro was inadmissible as to the latter. In his appeal, Bruchon pleaded error
in that the judge instructed the jury that they might rest a finding of the
occurrence of the act of conspiracy as to both on the confession of Negro,
inadmissible as to his co-conspirator Bruchon. The Government argued that
such error was harmless since another overt act, not alleged in the indictment,
was proved. Held, erroneous instructions, allowing a finding of an overt act
in a criminal conspiracy from the confession of one defendant, inadmissible
as to the other, is not harmless error, even when another overt act of the
conspiracy, not alleged in the indictment, has been proved. United States v.
Negro and Bruchon, 164 F.2d 168 (C. C. A. 2d 1947).

The harmless error doctrine arises from section 269 of the Federal Judiciary
Code. This provides that the court, on a hearing of any appeal, certiorari, or
motion for a new trial shall give judgment after an examination of the entire
record “without regard to technical errors, defects, or exceptions which do
not affect the substantial rights of the parties.” 40 STAT. 1181 (1919), 28
U. S. C. 391 (1940). This was a modification of an earlier law, 36 STAT. 1163
(1911), which ended the rigid application of the rule that error being shown,
prejudice must be presumed. By the modification, the rule became that “if,
on an examination of the entire record, substantial prejudice does not appear,
the error must be regarded as harmless.” Berger v. United States, 295 U. S.
78, 82 (1935); Haywood v. United States, 268 Fed. 795 (C. C. A. 7th 1920);

Here the court held that it would be “ignoring flagrantly” this harmless
error doctrine if it found the erroneous instructions harmless. The substantive
rights of the defendant were adversely affected. If it is impossible to say,
with fair assurance, “that the judgment was not substantially swayed by the
error, it is impossible to conclude that substantial rights were not affected.”

Indeed, any erroneous ruling as to the substantive rights of a party is a
basis for reversal, as is any confusion caused in the minds of the jury by
equivocal, ambiguous, or clearly erroneous instructions. Bihn v. United States,
328 U. S. 633 (1946); Bollenbach v. United States, 326 U. S. 607 (1946);
Weiler v. United States, 323 U. S. 606 (1945); Bruno v. United States, 308
U. S. 287 (1939); Berger v. United States, supra. Hence the case was re-
versed and remanded for a new trial as to the defendant Bruchon.
Of greater interest is the dictum of the opinion given, since the issues would inevitably arise in the new trial granted by the decision. This is that "the substitution of proof of an unalleged overt act does not constitute a fatal variance" in a trial for criminal conspiracy. *United States v. Negro and Bruchon*, supra at 172. This conclusion rests on the premise that the overt act is not the principal part of the crime of conspiracy.

At common law a conspiracy is complete without the performance of an overt act in consummation of the crime, *Hogan v. O'Neil*, 255 U. S. 52 (1921); *United States v. Olmstead*, 5 F.2d 712 (W. D. Wash. 1925). Rather the combination is the essence of the crime and is complete in itself, with or without an overt act. *Hogan v. O'Neil*, supra; *United States v. Olmstead*, supra; *Walker v. United States*, 93 F.2d 383 (C. C. A. 8th 1937); *Marino v. United States*, 91 F.2d 691 (C. C. A. 9th 1937).

Statutory changes, however, have broadened this common law definition so that an overt act is necessary to complete the crime after the combination is made. This is the federal rule, for by section 37 of the United States Criminal Code the penalty applies only when there has been both the conspiracy to commit an offense and "any act to effect the object of the conspiracy." 35 STAT. 1096 (1909), 18 U. S. C. 88 (1940).

The courts have held that the gravamen of the offense is still the conspiracy. "Although by the statute something more than the common law definition of a conspiracy is necessary to complete the offense, to wit, some act done to effect the object of the conspiracy, it remains true that the combination of minds in an unlawful purpose is the foundation of the offense. . . ." *United States v. Hirsch*, 100 U. S. 33, 34 (1879); *United States v. Britton*, 108 U. S. 199 (1883); *Pettibone v. United States*, 148 U. S. 197 (1893); *Asgill v. United States*, 60 F.2d 780 (C. C. A. 4th 1932); *Meyers v. United States*, 36 F.2d 859 (C. C. A. 3d 1929); *United States v. Olmstead*, supra. Although conspiracy is the crime, the overt act is still necessary to complete the offense. The reason for requiring proof of an overt act is (1) to establish the continued existence of the agreement, *Safarik v. United States*, 62 F.2d 892 (C. C. A. 9th 1932), and (2) to afford a *locus poenitentiae* so that one or more of the conspirators may withdraw before the execution of the plan, *United States v. Britton*, supra; *Dealy v. United States*, 152 U. S. 539 (1894); *Hyde v. Shine*, 199 U. S. 62 (1905); *Hyde v. United States*, 225 U. S. 347 (1912); *United States v. Olmstead*, supra. Generally the overt act has been held as "something apart from the mere conspiracy, being 'an act to effect this object of the conspiracy.'" *Joplin Mercantile Co. v. United States*, 236 U. S. 531, 536 (1915); *Marino v. United States*, supra; *Braverman v. United States*, 317 U. S. 49 (1942). This is the general rule, although the rule is not unanimous. *Hyde v. United States*, supra.

The conclusion that the act alleged need not be proved where another unalleged overt act has been proved is supported by some earlier decisions and
also by the Federal Rules of Criminal Procedure. While at common law it was not necessary either to allege or to prove the overt act in a conspiracy, in cases controlled by statute proof of the overt act in addition to the conspiracy is essential to a valid conviction. *Weinstein v. United States*, 11 F.2d 505 (C. C. A. 1st 1926); *United States v. Will*, 36 F.2d 855 (C. C. A. 3d 1929). The proof must correspond with and support the material allegations of the indictment. *Berger v. United States*, 295 U. S. 78 (1935).

Variances have been allowed in numerous cases, however, providing the difference between the allegation and the proof does not substantially injure or prejudice the defendant. *Blumenthal v. United States*, 88 F.2d 522 (C. C. A. 8th 1937); *Levine v. United States*, 79 F.2d 364 (C. C. A. 9th 1935); *Leuco v. United States*, 74 F.2d 66 (C. C. A. 3d 1934). The state need not prove all the allegations relating to the means employed, *Langley v. United States*, 8 F.2d 815 (C. C. A. 6th 1925); nor all the acts charged, for one will suffice, *Bruno v. United States*, 67 F. 2d 416 (C. C. A. 9th 1933); *Short v. United States*, 91 F.2d 614 (C. C. A. 4th 1937); and overt acts not charged may be proved in the trial, *United States v. Downing*, 51 F.2d 1030 (C. C. A. 2d 1931); *Meyers v. United States*, supra at 861; *Doyle v. United States*, 33 F.2d 265 (C. C. A. 8th 1929); *Friedman et al. v. United States*, 260 Fed. 388 (C. C. A. 6th 1919).

Yet with these opinions, two cases hold that the overt act alleged in the indictment must be proved. "Where more than one overt act is charged, the prosecution need not prove all of them; but it is fundamental that some overt act alleged must be proved." *Fredericks v. United States*, 292 Fed. 856, 857 (C. C. A. 9th 1923); *United States v Ault*, 263 Fed. 800 (W. D. Wash. 1920).

The conflict between the cases is reconciled by the interpretation of the Federal Rules of Criminal Procedure. The court here said that it was largely aided in its conclusion by these rules. Rule 7 (c) reads:

"The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . It need not contain any matter not necessary to such statements. Allegations made in one count may be incorporated by reference in another count. . . . The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

In view of this rule as applied to the facts of the case, and specifically overruling *Fredericks v. United States*, supra, the court concluded: ". . . we think the substitution of proof of an unalleged for an alleged overt act does not constitute a fatal variance. At most, such a variance justifies a request for continuance because of surprise." *United States v. Negro and Bruchon*, supra at 173.

FREDERICK C. LECOMTE
CRIMINAL LAW—"Willful" Refusal by a Witness Before a Congressional Investigating Committee to Produce Records Means an Intentional Refusal.

Benjamin F. Fields was subpoenaed to appear before a committee of the House of Representatives investigating the disposition of surplus war property. He appeared and was sworn as a witness. A certain quantity of bronze screen wire had been purchased by Fields and his associates and then resold to an Oklahoma company at an unusual profit. Questions were asked pertaining to this transaction. Among the papers the witness turned over to the committee was a typewritten memorandum outlining the distribution of the gross profit received from the particular transaction. Fields was asked the identity of two "John Does" listed as sharing in the profits. He replied by explaining that additional records were needed before he could answer the question and requested leave to be allowed to produce them. A total of five delays were granted to enable him to get these additional records. Finally, Fields told the committee, "I have given you all I have." For the failure to produce these records, Fields was indicted for contempt of Congress, tried, and convicted as one who "willfully makes default," under the statute expressly authorizing punishment for contempt of Congressional committees, 52 Stat. 942 (1938), 2 U.S.C. § 192 (1940). Held, in affirming conviction, that the word "willfully" as used in this statute does not have to imply an evil or bad purpose and that the defendant's good faith has no real bearing on the issue of willfullness. Fields v. United States, 164 F. 2d 97 (App. D. C. 1947), cert. denied, 68 Sup. Ct. 355 (1948).

The meaning of the word "willfully" as used in this statute has never been given definitive treatment either by the Congress or the Supreme Court. Legislatures often fail to define terms used in their statutes, and it is the duty of the courts to ascribe meanings to words susceptible of more than one definition. Very often, when the interpretation of a statute is doubtful, the history of its enactment will be resorted to and used as the basis from which an interpretation can be fashioned. Caminetti v. United States, 242 U.S. 470 (1917); Binns v. United States, 194 U.S. 486 (1904).

But the courts have generally been unable to rely on the legislative history in order to determine the meaning of "willful". Instead, they are forced to give it a separate construction for each statute in which it is used and according to the context in which Congress used it. Cf. Spies v. United States, 317 U.S. 492, 497 (1923), where it was said: "Willful . . . has . . . many meanings, its construction often being influenced by its context." In United States v. Murdock, 290 U.S. 389, 394 (1933), it was held that the word "often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental." This ruling related to a situation where the defendant had refused to answer questions of Internal Revenue agents on the ground that the answers might incriminate him. The Supreme Court, in upholding the reversal of conviction, said that, though the defendant was not legally justified in so doing,
the "willfully" part of the section necessarily means that there must be evidentiary proof that it was done with a bad purpose. The statute in question was a misdemeanor not involving moral turpitude. The court said, further, in that case, "When used in a criminal statute, it (willful) generally means an act done with a bad purpose." United States v. Murdock, supra. This definition was approved in Screws v. United States, 325 U.S. 91 (1945). Here at 101, the court continued, "In that event something more is required than the doing of the act proscribed by the statute. An evil motive to accomplish that which the statute condemns becomes a constitutional element of the crime."

The meaning of the word "willful", as used in this particular statute, is still unsettled. The first recent case of significance involving the violation of this statute was Sinclair v. United States, 279 U.S. 263 (1929). In that case, though obeying the summons, Harry F. Sinclair refused to answer any questions propounded him by members of the Senate Committee on Public Lands and Surveys. His refusal was based, not on self-incrimination, but on the theory that court proceedings had been initiated in which he was a defendant and that he should not be required to answer questions that would involve his defense. The court ruled that there was no relation between the Senate investigation and Sinclair's private affairs and, more important, held that Sinclair's lack of evil intent was immaterial. "The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt." Sinclair v. United States, supra at 299. Nine years later, the Court of Appeals of the District of Columbia ruled accordingly in a similar situation. In Townsend v. United States, 95 F. 2d 352 (App. D. C. 1938), the defendant, Dr. Townsend, was called to appear and testify before a special House of Representatives committee designated to make an inquiry into plans for old-age pensions. He appeared and did testify, but, while still a witness before the committee, "willfully did make default" by leaving the District of Columbia. In reviewing the general meanings of the word "willfully" the court discussed the meaning mentioned in the Murdock case, supra, namely, "done with a bad purpose," and pointed out that "even though it applied that meaning to the peculiar facts of that case, it is clear that the court did not intend to limit the application of the word 'willful' in all cases to 'acts done with a bad purpose.' The meaning of the word depends in large measure upon the nature of the criminal act and the facts of the particular case. It is only in very few criminal cases that 'willful' means 'done with a bad purpose.' Generally, it means 'no more than that the person charged with the duty knows what he is doing.' It does not mean that, in addition, he must suppose that he is breaking the law." Townsend v. United States, supra at 229.

In the instant case, appellants based their contentions largely upon the language of the Murdock case and insisted that the word "willful" when used in a criminal statute necessarily meant that there must be deliberate intent to do evil or perpetrate fraud in defiance of existing law. Following their con-
tention, mere refusal to disclose requested information to a congressional committee would not be "willful" providing there were existent at the time a halo of good faith about the witness. Further, the ultimate issue in every similar situation would be for the jury to discern the motives of the witness in refusing to answer the question—a difficult if not impossible task. Here, in discarding such a notion, the court points out that "the apparent objective of the statute involved here would be largely defeated if, as appellant contends, a person could appear before a Congressional investigating committee and by professing willingness to comply with its requests for information escape the penalty for subsequent default." Field v. United States, supra, at 100.

In this decision, the court consolidates the language quoted from the Townsend case with that enunciated by the trial judge: "The reason or the purpose of failure to comply or refusal to comply is immaterial, so long as the refusal was deliberate and intentional and was not mere inadvertence or an accident." Fields v. United States, supra.

The adoption by this court of this construction of the meaning of the word "willful" sets up a standard of observance for the first time in the District of Columbia. This is particularly important when it is considered that the great majority of contempt of Congress trials are held in the District of Columbia. In upholding this broad definition "willfully", the court has already resolved a conflict between Federal District Judges in the District of Columbia. In United States v. Rumley, Crim. Doc. No. 74306, heard on October 9, 1945 and United States v. Kamp, Crim. Doc. No. 74647, heard on December 11, 1946, both judges had instructed the juries that the defense of good faith and honest, reasonable belief was a good one, and that "willfully" meant an act done with an evil or bad purpose. For complete discussion of these two cases, see Note, The Problem of Willful Default Before A Congressional Committee, 35 Georgetown L. J. 527 (1947). This conflicted with the instructions to the jury by Judge Holtzoff in the Fields case, which were upheld by the Court of Appeals. Certainly, the literal or narrow interpretation of the word "willful" would greatly restrict the effectiveness of the work of Congressional committees by removing, in effect, its penal persuasive power. Hence, an effort is made, which, if sanctioned by the Supreme Court, will resolve conflicting views imputed to the word "willful" into one concept, broad in scope, and workable by judge and jury alike.
DAMAGES—Principles of General Contract Law Apply to Construction and
Enforceability of Liquidated Damages Provision in Government Contract
in the Absence of Different Congressional Standards.

In 1942, pursuant to the purchasing program under the Lend-Lease Act of
March 11, 1941, the United States entered into a contract with petitioner for
the sale and delivery of powdered eggs. The contract specified May 18, 1942
as the first day of a ten-day period within which the Government would accept
delivery, the particular day being at the Government's option. It was ex-
pressly provided that the Government should be entitled to liquidated damages
for delay in delivery and for failure of petitioner to have the eggs inspected
and ready for delivery on the date specified, May 18, 1942. The Government
did not call for delivery until May 26, whereupon delivery was made promptly.
However, it was later discovered that the eggs had not been inspected until
May 22. The Government treated the late inspection as a default and deducted
from the contract price the sum fixed as "liquidated damages" in the contract.
Petitioner failed in the lower court to recover the sum so withheld. Held, the
provision of "liquidated damages" for failure of inspection was in fact an
unenforceable penalty rather than a reasonable forecast of just compensation
for damages caused by breach, since no damages could be suffered where
delivery—the main object of the contract—was prompt. Priebé & Sons v.

While the early law courts enforced penalties in contracts as a matter of
course, Watts v. Camors, 115 U. S. 353 (1885); Story, Eq. Jur., § 1311,
equity was accustomed to afford relief in those cases where the purpose of
the penalty was to secure performance of a principal obligation, Watts v.
Camors, supra; Story, supra, § 1311. The extension of the equitable doctrine
to actions at law limited an award to the obligee to compensation for actual
damages proved. Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 642
(1902). Later there arose a form of contract whereby the parties anticipated
and agreed upon a certain amount of damages to be accepted upon breach as
full compensation for whatever injuries might be sustained. McAlester v.
Williams, 77 Okla. 65, 186 Pac. 461 (1919). Out of this has grown the dis-
inction between a penalty and liquidated damages, creating the difficult judicial
task of determining whether an agreed sum to be paid upon breach of a con-
dition is in fact a penalty or liquidated damages. Sun Printing & Publishing
Ass'n v. Moore, supra. In general, the distinction between the two is that the
penalty seeks to assure performance of the contract, a type of in terrorem
threat held over the promisor to deter him from breaking his promise, while
the essence of liquidated damages is a genuine covenanted pre-estimate of
damages which will result from failure to perform. Shields v. Early, 132 Miss.
282, 95 So. 839 (1923); Williston, Contracts § 769 (rev. ed. 1938). The
question is one of law for the court, and in construing the contract it should

If the anticipated damages be uncertain in nature or amount or difficult of ascertainment and the fixed amount is fair, the courts will not declare such provision to be a penalty, *Wise v. United States*, supra; *Sun Printing & Publishing Ass'n v. Moore*, supra; *United States v. United Engineering Co.*, 234 U. S. 236 (1914); *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*, (1915) A. C. 79; *Clydebank Engineering & Shipbuilding Co. v. Castaneda*, supra, and the fact that no actual damages are suffered as a consequence of the breach is not necessarily fatal. *United States v. Bethlehem Steel Co.*, supra; *Ellicott Machine Co. v. United States*, 43 Ct. Cl. 232 (1908); *Byron Jackson Co. v. United States*, 35 F. Supp. 665 (S. D. Cal. 1940); *Ludlow Valve Mfg. Co. v. Chicago*, 181 Ill. App. 388 (1913). On the other hand, a stipulation which shows plainly that the amount fixed is without reasonable relationship to any probable damages from a breach will not be enforced. *Kothe v. R. C. Taylor Trust*, 280 U. S. 224 (1930). While the general rule has been that the courts in case of doubt are inclined to regard the provision as a penalty, *In re Gelino's*, supra; *Harris v. Miller*, 11 Fed. 118 (C. C. Ore. 1880); *Pacific Hardware & Steel Co. v. United States*, 48 Ct. Cl. 399 (1913), there is an increasing tendency to let the parties make their own contracts and to construe such provisions as other contract clauses, by giving effect to the intentions of the parties. *Wise v. United States*, supra; *United States v. Bethlehem Steel Co.*, supra; *Sun Printing & Publishing Ass'n v. Moore*, supra; *Fidelity and Deposit Co. of Maryland v. Walker*, 75 F.2d 115 (C. C. A. 5th 1935); *Boston Iron & Metal Co. v. United States*, 55 F.2d 126 (C. C. A. 4th 1932).

Though the "... pendulum is swinging in the other direction . . . of the enforceability of such clauses . . .", *United States v. Bethlehem Steel Co.*, supra at 119, the Court in the instant case, by refusing to enforce the provision,
even though admittedly made at arms length, indicated clearly that the swing has not yet been completed. "The question always is, what did the parties intend by the language used? When such intention is ascertained it is ordinarily the duty of the court to carry it out." United States v. Bethlehem Steel Co., *supra* at 119. In examining the contract to ascertain the intention of the parties in the instant case, the Court found that the provision was a mere spur to performance because no damages could result from the inspection breach when delivery itself was prompt, the only situation in which the provision could apply. This circumstance tended to negative the notion that the parties really intended to provide a measure of compensation. The "tough-minded" view that the courts, to the end of encouraging freedom of contract and discouraging litigation, should discard rules of interpretation and enforce such provisions if made at arms length and without fraud, Brightman, *Liquidated Damages*, 25 Col. L. Rev. 277 (1925), has not been advanced by the instant opinion.

Whether such a provision must be treated differently when the Government is one of the contracting parties was discussed by the dissenting opinions in the instant case. The courts have held in the past that in construing government contracts the United States must be treated like all other contractors. When problems of interpretation of such contracts arise, the private law of contracts should govern. United States v. Standard Rice Co., 323 U. S. 106 (1944); Hollerbach v. United States, 233 U. S. 165 (1914); United States v. Bethlehem Steel Corp., 315 U. S. 289 (1942). A particular kind of Government contract, commercial paper, has been held to be governed by federal rather than local law and in the absence of applicable act of Congress to require the fashioning of controlling rules by the federal courts. National Metropolitan Bank v. United States, 323 U. S. 454 (1945); United States v. Alleghany County, 322 U. S. 174 (1944); Clearfield Trust Co. v. United States, 318 U. S. 363 (1943). This seeming exception to the rule of *Erie R.R. Co. v. Tompkins*, 304 U. S. 64 (1938), is explained by the nature of the subject matter. The Government in disbursing its funds and paying its debts performs a constitutional function. However, when the federal law under authority of which a contract is made fails to provide for the imposition of penalties what rule should guide the Court in interpreting and enforcing such a provision found in the contract? The Court has referred to the "traditional principle of leaving purchasing necessary to the operation of our Government to administration by the executive branch of the government, with adequate range of discretion free from vexatious and dilatory restraints . . .", *Perkins v. Lukens Steel*, 310 U. S. 113, 127 (1940). One of the dissents in the instant case sees the application of general contract law to a government contract as such a restraint and as an attempt to remake the contract. The view that the courts "should not overrule any clearly expressed intention on the ground that judges know the business of the people better than the people know it them-
selves", *Wallis v. Smith*, 21 Ch. D. 243, 266 (1882), is one that has found many supporters in recent years but has not yet been used by the Court to permit the executive branch to be the judge of its own action. In the instant case the Court refused to infer authority to impose penalties. "It is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and administrative function to make additions to those which Congress has placed behind a statute." *Steuart & Bro. v. Bowles*, 322 U. S. 398, 405 (1944).

Whether the extraordinary circumstances of wartime which surrounded the making of some contracts justifies the Court in departing from the ordinary rules of interpretation, as was urged by the second dissenting opinion in the instant case, is a matter about which fair-minded men may well differ. In the calm following the storm the need for extraordinary measures may not seem so compelling as during the time of stress. In the instant case the majority preferred to follow *United States v. Bethlehem Steel Co.*, *supra*, in applying the ordinary rules of interpretation without regard to the extraordinary conditions existing in a war period.

RICHARD L. WALSH

EQUITY—Buyer Was Entitled to Specific Performance of a Contract for the Sale of a New Automobile Where He Was Without an Adequate Remedy at Law Due to the Fact that New Automobiles Were Difficult to Obtain.

Plaintiff entered into a written contract with the defendant, Conart Motor Sales, to purchase a new car. The contract provided: (1) The car was to be a Plymouth Club Coupe; (2) The price: "list price at time of delivery"; (3) The buyer was to have a choice of color. This contract was made on August 29, 1945 and the defendant refused to perform unless the plaintiff would trade in a used car. When the petition was filed more than one year later, the defendant had not delivered the car and since that time has absolutely refused to perform his contract of sale. *Held*: There being no adequate remedy at law because new cars were not readily available on the open market, plaintiff was entitled to specific performance. *De Moss v. Conart Motor Sales Inc.*, 72 N. E.2d 158 (Ohio 1947).

This case is definitely a departure from the generally accepted doctrine that equity will not decree specific performance of contracts involving personalty except in very unusual cases.

Originally, the factor to be considered in petitions for specific performance of contracts for the sale of personal property was the inadequacy of a remedy at law due to the unusual features of the contract or the peculiar nature of the property involved. This theory had its beginning in equity proceedings for
the recovery of possession of heirlooms. It was held by the Lord Chancellor that a bill for the recovery of possession of an heirloom was properly before the equity court since the law courts afforded no adequate remedy in damages because of the *pretium affectionis* which could not be measured in money. *Nutbrown v. Thornton*, 10 Ves. Jun. 159 (1804). See: *Duke of Somerset v. Cookson*, 3 P. Wms. 390 (1735); *Pusey v. Pusey*, 1 Vern. 273 (1684). It is generally held that the same rule applies to specific performance of contracts for the sale of chattels. *American Smelting and Ref. Co. v. Bunker Hill and Sullivan Co.*, 248 Fed. 172 (Ore. 1917); *Adams v. Messinger*, 147 Mass. 185, 17 N. E. 491 (1888).

More recently, in *Campbell v. Stiles*, 300 Ky. 745, 190 S. W.2d 347 (1945), the court points out the rule that specific performance is not available as a remedy for the breach of contracts for personality: "... There is excepted, however, from this rule that species of property which has a sentimental, peculiar, or unique value such as heirlooms, family portraits, furniture, or curios for the obvious reason that in those instances, the deprivation is not compensable in damages. ..." And in the case of *Spoor Thompson Machine Co. v. Bennett Film Laboratory*, 105 N. J. Eq. 108, 147 Atl. 202 (1929), the court states: "... a court of Equity may compel delivery of a specific chattel ... where damages would be an inadequate redress for the injury ... as in the cases of heirlooms and other articles incapable of being replaced, which are prized for their associations rather than for intrinsic value. ..." Specific performance has also been allowed where the unusual features of the contract make it clear that because of the distinct singularity of its form, damages at law are inadequate. Where, after having made all the preparations for the canning season, a tomato cannery showed that it faced bankruptcy because the grower would not perform his contract, the court held that ordinary chattels had become unique and the damages were inestimable; the tomato crop being ascertainable and tomatoes not being available elsewhere because of a local monopoly. Thus there was no adequate remedy at law, and specific performance was decreed. *Curtice Bros. v. Catts*, 72 N. J. Eq. 831, 66 Atl. 935 (1907). Specific performance will not be decreed in such a case unless supervision by the court is practical in case of default.

The doctrine of specific performance has taken on a new aspect with the adoption by the various states of the Uniform Sales Act, § 68 of which provides: "Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically without giving the seller the option or retaining the goods on payment of damages." (Italics supplied.)

This particular statute has not, as a rule, been construed liberally, and the requirement that there be no adequate remedy at law is still in full effect. Only a few courts have relied upon or discussed the Uniform Sales Act § 68,
supra, as the foundation of equity jurisdiction to decree specific performance for the sale of chattels. Among these are Illinois, Michigan, Maryland, Ohio, and New York. (See note in 27 Geo. L. J. 793; and also 1946 Wis. L. Rev. 461.)

Equity courts have decreed specific performance of contracts for the sale of ascertained copper and brass fittings unobtainable on the open market, Oreland Equipment Co. v. Copco Steel and Engineering Co., 310 Mich. 6, 16 N. W. 2d 646 (1944); gasoline and oil products unobtainable elsewhere, Atlantic Ref. Co. v. Kelly, 107 N. J. Eq. 27, 151 Atl. 600 (1930); natural gas, Empire Natural Gas Co. v. Southwest Pipeline Co., 25 F.2d 742 (N. D. Okla. 1928); special elevator doors unavailable elsewhere, Dahlstrom Metallic Door Co. v. Evatt Construction Co., 256 Mass. 404, 152 N. E. 715 (1926); a specific steamship, Menier v. Donald et al., 165 N. Y. Supp. 50 (Sup. Ct. 1917).

In actions for the specific performance of contracts for the sale of new automobiles, where the Uniform Sales Act § 68, supra, is in force, the test is not "uniqueness" but rather whether or not the chattel is specific and ascertained. This doctrine is brought out most effectively in Eastern Rolling Mill Co. v. Michlovitz, 157 Md. 51, 145 Atl. 378 (1929). In this case an installment contract called for the delivery of sellers output of a particular type of steel scrap. The opinion declared that the steel scrap was of a distinctive form and of a known quantity and quality and had become specific property by reason of its manufacture in special manner, at a certain plant, by a designated manufacturer, and for a single purchaser. The scrap was held to be ascertained goods by force of its fulfillment of the description of the chattel sold and through its complete identification with the subject matter. It will be observed that the court went to great length in this opinion to lay down the rule that the contract for chattels involved must be definite, complete, and exacting in all its terms and details; failing that, specific performance will be denied.

One of the first cases involving automobiles (a used car) was Gallagher v. Studebaker Corp., 236 Mich. 195, 210 N. W. 233 (1926). Specific performance was denied by the Michigan court because there was no sentimental value and there seemed to be an adequate remedy at law. Recent New York cases have held that specific performance under the Uniform Sales Act was not available to buyers with contracts for the delivery of new automobiles, the contracts being held to be for unascertained goods. Cohen v. Rosenstock Motors, 65 N. Y. S.2d 481 (Sup. Ct. 1946); "one new car, Plymouth 1946, color: open". Kalski v. Grole Motors Inc., 69 N. Y. S.2d 645 (Sup. Ct. 1946); "a new 1947 Studebaker Champion automobile, two or four door". Daub v. Henry Caplan Inc., 70 N. Y. S.2d 837 (Sup. Ct. 1946); "new care, when available" (supposedly either a Plymouth or a Chrysler).

It will be noted that the instant case describes the automobile with no great degree of certainty, although the description is more particular than in most of the like cases.
The New Jersey Court of Equity, without expressly setting out the Uniform Sales Act, refused specific performance of a contract for the delivery of a "1946 Chrysler Sedan 8 Cylinder auto, delivery as soon as a shipment is received from the manufacturer". The court pointed out that the complainant did not show that the automobile had a special value or any unique characteristics to put it in the category of a unique chattel; and further that the alleged agreement was indefinite, neither the date of delivery, the terms, nor the price were included within it. "... Specific performance will not be decreed unless the contract be certain in all its particulars. ... While automobiles may be difficult to procure under the economic or industrial conditions of the present day, they are not in the category of unique chattels." *Kirsch v. Zubalsky*, 139 N. J. Eq. 22, 49 A.2d 773 (1946).

The instant case clearly does not stand the test. It certainly cannot be rationalized in the light of the time honored equity doctrine of "uniqueness". That theory approaches the point of absurdity if applied to automobiles; for while an aggrieved petitioner may, perhaps, be able to show a sentimental attachment for family heirlooms, his attachment for a new automobile which he has never seen is obviously groundless in the eyes of the law.

The sole remaining ground upon which specific performance could be decreed is § 68 of the Uniform Sales Act, *supra*. The description of the automobile and the construction of the contract in the instant case are such that not only is the chattel unascertained but the contract is wanting for definite terms.

Although there has been a trend towards more freedom in the use of specific performance in contracts for the sale of personality, the equity court should hesitate in pushing this concept too far. This decision does not seem to be in accordance with the better reasoned cases.

**JAMES B. MULDOON**

EVIDENCE—Confession of Defendant While in Illegal Custody Held Admissible, if Confession Is Voluntary. Illegal Detention Is Only One Factor To Be Taken into Account in Determining Whether Confession Is Voluntary or Involuntary.

The defendant, Horace U. Boone, was taken into custody by the police about nine o'clock Saturday morning, September 28, 1946, approximately three hours after the commission of the robbery of which he was accused. After being booked at one precinct, he was removed to another to keep him from talking with other prisoners charged with the same offense. At eleven o'clock he was placed in a line-up and was identified as the one who committed the crime by the night clerk of the hotel which was robbed. He was then questioned intermittently during the afternoon; but it does not appear from the evidence that
The questioning was prolonged, or that he was threatened in any manner. Between nine and eleven o'clock Saturday evening, Boone sent for the arresting officer and confessed. On the following day, he surrendered the proceeds of the robbery which he had concealed in his shoe. Boone was not arraigned until Tuesday, October 1st. The trial court admitted the confession, a conviction was obtained and the defendant appealed; the only assignment of error being the admission of the confession in evidence. The United States Court of Appeals for the District of Columbia affirmed the lower court's decision in a short opinion by Groner, C. J. which held, that "unlawful detention, without more, does not require rejection of a confession otherwise admissible." *Horace U. Boone v. U. S.*, 164 F.2d 102, (App. D. C. 1947).

Before the decision in *McNabb v. U. S.*, 318 U. S. 332 (1942), this decision would not have elicited much comment; for, before that time, it had seldom been proposed that illegal detention for the purpose of extracting evidence would render a confession obtained through such detention inadmissible. Such a position was upheld in *Ackroyd's & Warburton's Case*, 168 Eng. Rep. 954 (1824), but that English decision was rejected by the full bench in the same year in *Sylvestor Thornton's Case*, 168 Eng. Rep. 955 (1824). Since then, the unquestioned rule in state courts (and in federal courts until the *McNabb* decision, *supra*) has been that the only criteria of the admissibility of confessions is whether they are voluntary or involuntary.

In the *McNabb* case, a federal officer of the Alcoholic Tax Unit was shot and killed while attempting to break up an illicit liquor trade run by the McNabb's in the Tennessee mountains. The officer died without revealing who had shot him. Freeman and Raymond McNabb, two of the petitioners, were arrested early on Thursday morning shortly after the shooting and were held for two days without arraignment, during which time they were submitted to continuous questioning. The third petitioner, Benjamin McNabb, surrendered voluntarily on Friday morning and he was detained and questioned for five or six hours. Confessions were obtained from all three of the petitioners on Friday; and, after more questioning to straighten out their stories, they were finally arraigned on Saturday morning. The confessions so obtained were concededly the basis of the government's case; and, in setting aside the convictions based thereon, the Supreme Court laid down the rule which was broadly construed as excluding from evidence all confessions, voluntary or involuntary, if the accused was illegally detained before arraignment, and also that such illegal detention should be considered as the factor inducing the confession. This was in line with the modern federal tendency to exclude illegally obtained evidence whatever the source. *Boyd v. U. S.*, 116 U. S. 616 (1886) (exclusion of evidence gained through illegal search and seizure); *Nardone v. U. S.*, 302 U. S. 379 (1937); *Goldstein v. U. S.*, 316 U. S. 114 (1941) (through wire-tapping).

The Court of Appeals distinguished the *Boone* case from the *McNabb* case and from its own decision in the case of *Akowskey v. U. S.*, 158 F.2d 649 (App.
D. C. 1946) solely on the grounds that in this case there was not enough evidence to uphold the contention that there was prolonged questioning of the accused. As authority for this distinction it cited the case of U. S. v. Mitchell, 322 U. S. 65 (1944). The Mitchell case, however, does not appear to uphold this view.

In that case, the defendant, Mitchell, was arrested on the charge of housebreaking and larceny. Promptly after arriving at the police station and before arraignment, he admitted his guilt and consented to the officers' recovering stolen property from his home. After his confession, he was detained for eight days before he was arraigned before a committing magistrate. The defence relied on the McNabb case, supra, to exclude the confession from evidence because of the illegal detention. The United States Court of Appeals for the District of Columbia upheld this view but was reversed by the Supreme Court which held, that when the accused made a confession voluntarily immediately after he was arrested, subsequent illegal detention would not retroactively affect the admissibility of the confession, and that under the circumstances since the illegal detention was not the inducement for the confession, the confession was admissible. In the instant case, the confession was not made immediately after arrest. In fact, it was not made for from twelve to fourteen hours after the arrest; and the accused did not surrender the money until the following day. Surely, at the time of the confession in this case the accused was being illegally detained since the police had adequate time in which to arraign him. In the Mitchell case, the illegal detention was subsequent to the confession and that was the basis on which the majority distinguished it from the McNabb case which they professed to follow.

Justice Reed, it is true, in his separate concurring opinion says: "Detention without commitment is only one factor for consideration in reaching a conclusion as to whether or not a confession is voluntary." Mitchell v. U. S., supra at 71. However, Justice Reed dissented in the McNabb case and his concurring opinion is not to be taken as the majority opinion in the Mitchell case. His position has at all times been that the rule should remain unchanged in the federal courts as it has in the state courts. This is contrary to the view of the Supreme Court, but is the same view, in effect, at least, which is reflected in the Court of Appeals' decision in Boone v. U. S., supra.

The McNabb case has been looked upon as an attempt to control "third degree" methods used by the police and to discourage such practices by refusing to allow in evidence confessions obtained thereby. It was criticized widely as going too far in the direction of sacrificing protection of the public against crime in order to safeguard individual rights. Cf. 56 Harv. L. Rev. 1008 (1943); 42 Mich. L. Rev. 679 (1944); 105 Wis. L. Rev. (1945); 18 Tenn. L. Rev. 212 (1944).

A bill was introduced in the 78th Congress which is known as the Hobbs Bill (H. R. 3690, 78th Congress; H. R. 4, 80th Congress), the purpose of which
was to abolish the rule established in the *McNabb* case. The history of this bill, which is now being considered in a subcommittee of the Senate Judiciary Committee, is ample evidence that there was some good reason for excluding confessions made during illegal detention. While the bill had many proponents, its opponents have been numerous enough and strong enough to keep it from becoming law throughout the 78th, the 79th, and the first session of the 80th Congress. The main objection to the Hobbs Bill was voiced by the Committee on the Bill of Rights of the American Bar Association in a letter to the Chairman of the House Judiciary Committee. Though not in complete agreement with the *McNabb* case, they thought the Hobbs bill would overthrow the rule without providing adequate assurance that the prompt production statutes would be enforced to provide protection of the accused against third degree police methods.

The same voices which were raised in opposition to the rule in the *McNabb* case were strong enough, however, to keep the proposed Rule 5(b) of the new Federal Rules of Criminal Procedure from being adopted. In the preliminary drafts, this rule provided that if the accused were held in custody in violation of Rule 5(a), which provides for his arraignment "without unnecessary delay", no statement made by him in response to an interrogation by an officer should be admissible in evidence against him. *Cf. 22 Tex. L. Rev. 37, 45* (1943-44). This provision, however, does not appear at all in the Rules which went into effect Mar. 21, 1946. Rule 5(a) is substantially the same provision as appears in 28 Stat. 416 (1894), 18 U. S. C. § 595 (1940) and which was construed by the Supreme Court in the *McNabb* case. It is to be presumed that the Court will give the same construction to its new rule of procedure as it gave to the statute. Therefore, the federal courts are still bound by the *McNabb* decision and are as confused as ever in their interpretation of the rule there laid down.

Perhaps the best method of ending the confusion is the adoption of some such legislation as the Hobbs Bill. If such legislation is adopted, however, in order to cure the ill without killing the patient, some companion legislation should be adopted which will effectively curb the reprehensible and illegal detention of accused persons without arraignment. It was the misuse and abuse of police power which led to the decision of the *McNabb* case. If that decision is to have any effect before it is swept aside by such judicial construction as that of the Court of Appeals in *Boone v. U. S.*, *supra*, then remedial legislation with adequate provisions for enforcement is needed.

PAUL M. STEFFY

Six R. S. 4915 suits arising from four interference proceedings in the Patent Office were consolidated for trial in the district court. The invention in the eleven counts involved related to a pressure lubricant composition comprising an ordinary lubricating oil and a chlorinated additive. The Patent Office divided awards of priority as to the several counts among the three parties involved. At the trial, the issues of patentability over a reference patent disclosing a similar lubricant composition, and of patentable distinction between the counts were raised in addition to the issue of priority. The district court made no findings of its own as to patentability and patentable distinction. As no substantial evidence had been introduced, the court declined to disturb the finding of the Patent Office that the counts were patentable over the prior art and patentably distinct from each other. The award of priority as to one count was reversed and the others affirmed. On appeal to the Court of Appeals for the District of Columbia, *held*, that the court, in an *inter partes* R. S. 4915 suit, must determine disputed questions of patentability over the prior art and of patentable distinction between the counts, and that its conclusions must be supported either by findings in the district court or by express findings shown in the Patent Office record rather than by inferences from general Patent Office rules. *Knutson v. Galsworthy*, 164 F.2d 497 (App. D. C. 1947); 74 U. S. P. Q. 324 (App. D. C. 1947).

This case illustrates the logical extension of the equity powers of the court to a new situation. The rule that no decree of an equity court in an R. S. 4915 suit, Rev. Stat. § 4915 (1875), as amended, 53 Stat. 1212 (1939), 35 U. S. C. § 63 (1940), should authorize the issuance of a patent to either party to an interference proceeding unless invention over the prior art is present was established by the Supreme Court in *Hill v. Wooster*, 132 U. S. 693 (1890). In that case an R. S. 4915 suit was brought solely to determine the question of priority between the parties, but the Court held that since under R. S. 4915 an adjudication in favor of applicant would authorize the Commissioner of Patents to issue a patent, neither the circuit court nor the Supreme Court could overlook the question of patentability of the invention covered by the counts, even though the parties were apparently willing to assume that the invention was patentable. The power of the court in an R. S. 4915 suit to inquire into patentability before deciding the question of priority has since been unquestioned, the only cleavage being as to whether that order of inquiry is mandatory or discretionary. Thus, in *Mishawaka Rubber Co. v. Paine Co.*, 139 F.2d 603 (C. C. A. 6th 1943), it was held proper to consider patentability before priority in an *inter partes* R. S. 4915 suit, although courts may choose on particular facts to base a decision on priority. On the other hand, in
Radke Patents Corp. v. Coe, 122 F.2d 937 (App. D. C. 1941), it was held that the question of invention was necessarily considered before that of priority, since if the subject which the parties sought to protect was not an invention, it made no difference which party prevailed on the question of priority. Also see Triplet v. Line Materials Co., 133 F.2d 533 (C. C. A. 7th 1943); Root Springer Scraper Co. v. Willett Mfg. Co., 84 F.2d 42 (C. C. A. 6th 1936); and 2 Walker, Patents 945 et seq. (Deller's ed. 1937).

Where more than one count is involved in an R. S. 4915 suit, and patentability over the prior art is found, the determination of the court necessarily extends to the question of patentable distinction between the counts, since the patent statute, Rev. Stat. § 4886 (1875), as amended, 35 U. S. C. § 31 (1940), provides that the person who has invented the new art, composition, etc., may obtain a patent therefor, thereby confining patentability to that one person. Stated in terms of an inter partes R. S. 4915 suit, the court must determine whether the counts involve only one invention and are therefore patentable to only one of the parties, or whether they involve several inventions so as to be patentable to a plurality of parties. Thus, in Dosenbach v. Webster, 278 Fed. 397 (App. D. C. 1922), in an inter partes suit as to priority, the court reasoned that the invention involved was the same as that involved in a companion interference case (278 Fed. 395) in which priority had been awarded to Webster, and that to award priority to Dosenbach would be inconsistent therewith. In Browne v. Harrison, 26 F.2d 1006 (App. D. C. 1928), in a similar suit, the court found that three counts awarded to one party as to priority were non-inventive over counts awarded to his opponent, and reversed as to said three counts, awarding all counts to said opponent.

It is thus apparent that the broad powers of the court of equity in an inter partes R. S. 4915 suit to determine the questions of patentability and of patentable distinction in addition to that of priority are well established. The question remains as to the weight given the Patent Office rulings being reviewed. In the leading case of Morgan v. Daniels, 153 U. S. 120 (1894), it was held that when a question between contending parties as to priority is decided in the Patent Office, the decision there made must be accepted as controlling upon that question of fact in any subsequent suit between the same parties, unless the contrary is established by testimony which, in character and amount, carries thorough conviction. Thus, while a suit in equity under R. S. 4915 is de novo and new and additional evidence not presented before the Patent Office may be received, Hoover Co. v. Coe, 325 U. S. 79, 83 (1945); American Steel and Wire Co. v. Coe, 105 F.2d 17, 19 (App. D. C. 1939); Gold v. Newton, 254 Fed. 824 (C. C. A. 2d 1918), unless withheld in bad faith from the Patent Office, Schilling v. Schmitzer-Cummins Co., 142 F.2d 82 (App. D. C. 1944); Barrett Co. v. Koppers Co., 22 F.2d 395 (C. C. A. 3d 1927); Clark v. Resinous Products Co., 75 U. S. P. Q. 172 (E. D. Pa. 1947), the findings of the Patent Office are presumptively correct and will be followed
unless the evidence qualifies under the exception set forth in Morgan v. Daniels, supra; Nichols v. Minnesota Mining Co., 109 F.2d 162, 166 (C. C. A. 4th 1940). But Morgan v. Daniels, supra, did not hold that in an R. S. 4915 suit, the court is required to affirm a Patent Office finding as to a question of fact when based upon undisclosed sources of information not available to the court or to the parties; some basis for the Patent Office finding must appear in evidence in such sense that it can become subject to review, Sinko Tool Co. v. Automatic Devices Corp., 157 F.2d 974 (C. C. A. 2d 1946). Nor, a fortiori, would affirmance appear to be required where, as in the instant case, the Patent Office did not make any express findings of fact as to the disputed features of patentability over a particular prior art reference or of patentable distinction between the counts. In the absence of such findings, the court in the instant case refused to make inferences from the Rules of Practice, United States Patent Office (1947). These rules, e.g. Rule 95, place upon the primary examiners the duty of determining that there is common patentable subject matter in the applications of the respective parties before an interference is declared, and that the issue is patentable to the respective parties subject to the determination of the question of priority. They obviously do not serve as a basis for inferring that the examiner in setting up an interference meant to find any count patentably distinct from a count in a different interference or to find patentability over an unmentioned reference. On this point, it is pertinent to note that in the Commissioner's Notice of April 18, 1919, Wolcott, Manual of Patent Office Procedure 147 (9th ed. 1947), the primary examiners are instructed to suggest only counts which are necessary to determine the question of priority and which differ sufficiently to sustain separate patents but, where serious doubt exists as to patentable distinction, to include the doubtful claims.

This case emphasizes the differences between a suit in equity under R. S. 4915, and a summary appeal under Rev. Stat. § 4911 (1875), as amended, 35 U. S. C. § 59a (1940). The case of Oksen Holt v. Boyd, 104 F.2d 378 (C. C. P. A. 1939), arose from a strikingly similar situation involving four closely related interference proceedings having a common record. Appellant there alleged that the Patent Office Board of Appeals erred in not following the established rule of law that where the real invention in separate interferences between two parties is the same, the award of priority in those interferences must be to the same party. The court held that in an inter partes R. S. 4911 appeal questions involving patentability of the issue presented in the counts will not be considered, Stern v. Schroeder, 36 F.2d 515 (C. C. P. A. 1929), that counts are presumed to be patentable to each of the parties depending upon priority, Trumbull v. Kirschbraun, 67 F.2d 974 (C. C. P. A. 1933), and that patentability is a question for the Patent Office to determine in the ex parte consideration of the involved applications, Hendrickson v. Ronning, 76 F.2d 137 (C. C. P. A. 1935). It should be noted, however, that
the cases stated by the court to involve facts on all fours with that at bar are in fact distinguishable therefrom and from the case here reported.

In the instant case, Knutson v. Gallsworthy, supra at 506, the court stated that if the proceedings had involved all the counts and parties in one interference, some inferences in respect to patentability and patentable distinction from the circumstances and rules might be proper. While in such a case inferences as to patentability might be proper, it is believed that inferences as to patentable distinction should not be drawn in view of the specific instructions to the primary examiners of the Patent Office, Commissioner’s Notice, supra, to include counts of doubtful patentable distinction.

The court’s thorough analysis and discussion of the facts and law involved in this case poses the question as to why it chose to remand the case to the trial court for further findings instead of rendering its own decision on the issues involved as it did in the Radtke case, supra. In that case the court, upon the question of patentability, considered scientific references not in the record and not referred to in the briefs, and in rendering its decision, reversed and remanded with instructions to dismiss the complaint. The court in the instant case, Knutson v. Gallsworthy, supra at 501, does in fact distinguish the Radtke case. It is possible that a contributing factor may be found in a dissenting opinion in the Radtke case contending that the court should not decide the question of patentability on the basis of its own examination of data not in the record, without first affording opportunity to the parties to be heard in respect to it and an opportunity to supply additional relevant data.

SAMPSON B. LEAVITT

PATENTS—The Rights to Recover Patent Royalties, to License, and to Transfer Rights in a Patent Are Property Interests Which May Be Recovered from the Alien Property Custodian.

In 1929 there was a transaction between I. G. Farbenindustrie and Standard Oil of New Jersey and certain subsidiaries whereby a new jointly owned corporation, S.I.G., was created. By its charter S.I.G. was prohibited from engaging in manufacturing operations of any kind. I.G. assigned to S.I.G. the legal title to one group of patents (Class A), but only exclusive licensing rights for a second group (Class B). S.I.G. was to exploit both groups of patents by issuing licenses, but not by using the inventions, and was to divide the revenue so that roughly 1/5 went to I.G. and 4/5 to the “Jersey Group”. For this transaction involving I.G. inventions Standard gave I.G. as consideration over 35 million dollars in stock and cash. In September, 1939, Standard Oil purchased I.G.’s entire stockholding in S.I.G.

On March 25, 1942, the Alien Property Custodian vested “all right, title and interest of” I.G., not of others, in the Class A and Class B S.I.G. patents.
A Supplemental Order by the Alien Property Custodian on May 24, 1944, stated that the original Vesting Order had in fact and law vested in the Custodian all the legal and equitable interest in the Class A and Class B S.I.G. patents.

The “Jersey Group”, including S.I.G., commenced their action under Section 9(a) of the Trading with the Enemy Act, 40 STAT. 419 (1917), as amended, 50 U. S. C. App. § 9(a) (1940), to recover their alleged property. Under the district court’s decree the Jersey group recovered the legal title to and certain equitable interests in the Class A patents and certain equitable interests in the Class B patents. *Standard Oil v. Markham*, 64 F. Supp. 656 (S. D. N. Y. 1945). Both parties appealed. Held, that the decree should be modified; the principal modification being that the plaintiffs’ recovery in both the Class A and Class B S.I.G. patents should be limited to the licensing and royalty rights and accrued royalties attaching thereto. The plaintiffs’ appeal was not sustained. *Standard Oil Co. v. Clark*, 163 F.2d 917 (C. C. A. 2d 1947).

This case contains a number of issues of interest in corporation, anti-trust and patent law, and in connection with the powers of the Alien Property Custodian. The present article is restricted to a discussion of two only of these issues: (1) was the power given to S.I.G. to issue licenses such a property right in itself as to be recoverable from the APC, or was it a mere “executory contract” as contended by APC, and (2) did the purported assignment of the Class A patents by I.G. to S.I.G. actually pass legal title to the patents, in view of the restrictions in S.I.G.’s charter and in collateral agreements that S.I.G. was not itself to use the inventions?

On the first of these issues, the trial and appellate courts were in agreement that the rights to issue licenses, to recover royalties and to transfer patent rights are some of the many elements of enjoyment making up title and that whether considered as of title, equitable servitude in property, or contractual right, the licensing rights would be protected against the holder of legal title to the patents or against third parties with notice, *New York Phonograph Co. v. Edison*, 136 Fed. 600, 606 (C. C. S. D. N. Y. 1905), or against the holder’s trustee in bankruptcy. *In re Waterson, Berlin & Snyder Co.*, 48 F.2d 704 (C. C. A. 2d 1931).

It has long been settled that a patent right is incorporeal personal property. It has the characteristics and incidents of other sorts of property, and it is as much entitled to the protection of the courts as is any other character of property. *United States v. Dubilier Condenser Corp.*, 289 U. S. 178, 187 (1933); *Consolidated Fruit Jar Co. v. Wright*, 94 U. S. 92, 96 (1876); *Rohmer v. Commissioner of Internal Revenue*, 153 F.2d 61 (C. C. A. 2d 1946). In *Bement v. National Harrow Co.*, 186 U. S. 70, 88 (1902), it was held that an owner of a patent has the right to sell it or to keep it; to manufacture the article himself or to license others to manufacture it; to sell such an article himself or to authorize others to sell it. Many times it has been said, as in
National Phonograph Co. v. Schlegel, 128 Fed. 733, 735 (C. C. A. 8th 1904), that "it rests with the owner to say what part of (his) property he will reserve to himself and what part he will transfer to others and upon what terms he will make the transfer". Conveying less than title to the patent or part of it, the patentee may grant a license to make, use and vend articles under the specifications of his patent for any royalty or upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure. Adams v. Burke, 17 Wall. 453 (U. S. 1873).

An equitable title to patent rights will arise out of any contract which purports to give a person a beneficial interest in a patent right; even when it does not amount to an assignment or grant of legal title, nor to a license to make, to use, or to sell the invention. General Motors Corp. v. Blackmore, 53 F.2d 725 (C. C. A. 6th 1931). And where no affirmative relief is sought by the holder of an equitable title to a patent, such a title will be upheld by a court of equity, as against all claims made under the naked legal title. Cook v. Sterling Electric Co., 118 Fed. 45 (C. C. Ind. 1902).

On the second issue, relating to the assignment of the Class A patents, Judge Wyzanski of the district court stated that: "The theory of the Custodian is not in accord with the patent law. Where the patentee assigns to another the exclusive right to make, use and vend the invention, but that other by a collateral agreement disables himself from making, using or vending the invention, or that other grants back to the assignor an exclusive license there is nonetheless a valid assignment of title." Standard Oil Co. v. Markham, supra at 661.

The circuit court did not disturb this finding, but stated: "If the problem must be visualized in terms of title as a unit, there are various precedents cited by the District Court which tend to support its view. . . . But we do not feel that it must be so regarded." Standard Oil Co. v. Clark, supra at 929. In a concurring opinion, Judge Frank vigorously disagreed with the court's apparent approval of the trial judge's ruling that title had passed, which he believed to be contrary to the precedents.

The doctrine of patent law regarding assignments has long been established. Probably the most frequently cited case in connection with patent assignments is the case of Waterman v. Mackenzie, 138 U. S. 252 (1890), where Mr. Justice Gray in delivering the opinion for the Court said at page 255:

"The monopoly thus granted is one entire thing, and cannot be divided into parts except as authorized by those laws (of the United States). The patentee or his assigns may by instrument in writing, assign, grant and convey, either, (1) the whole patent comprising the exclusive right to make, use and vend the invention throughout the United States; or, (2) an undivided part or share of that exclusive right; or, (3) the exclusive right under the patent within and throughout a specified part of the United States. . . . Any assignment or
transfer, short of one of these, is a mere license, giving the licensee no title in the patent. . . .

"Whether a transfer of a particular right or interest under a patent is an assignment or a license does not depend upon the name by which it calls itself, but upon the legal effect of its provisions. . . . The grant of an exclusive right under the patent within a certain district, which does not include the right to make, and the right to use, and the right to sell, is not a grant of a title in the whole patent right within the district, and is therefore only a license."

In 2 Walker on Patents § 339 (Dellier’s ed. 1937), is found an excerpt from Six Wheel Corp. v. Sterling Motor Truck Co. of California, 50 F.2d 568, 571 (C. C. A. 9th 1931), where it was held:

"A patent ‘assignee’ who is deprived of even the common-law right to make, sell, and use; who is restricted as to the contracts he shall make concerning the res; who must constantly keep in mind the ‘interests’ of the purported grantor; who can lose the res, such as it is, for being in arrears with his guaranty—such an ‘assignee’ is one by label only, for he does not enjoy that irreducible minimum of control over the patented article which has been defined by the Supreme Court as the true assignee’s inalienable prerogative."

It has been settled for many years that whether the transfer of an interest or right under a patent is an assignment or license, does not depend upon the name by which it is called but upon the legal effect of its provisions. Waterman v. Mackenzie, supra, recently echoed in Kenyon v. Automatic Instrument Co., 160 F.2d 878 (C. C. A. 6th 1947).

Where there are several instruments involved in the transaction, they bear the same significance in law as though their respective provisions were incorporated in a single writing and should be read together in determining the real intent and agreement of the parties. See Littlefield v. Perry, 21 Wall. 205 (U. S. 1874); also Doherty Research Co. v. Vickers Petroleum Co., 80 F.2d 809 (C. C. A. 10th 1936).

Looking at all the instruments together involved in the transaction including the original agreement where, in one provision, S.I.G., obligates itself for the period of the agreement not to engage in any business save that of granting licenses or transferring interests in the patent rights, and another provision restricts any transfer of “interests” by S.I.G. to corporations which shall not be empowered to engage in manufacturing operations and shall be obliged to conduct the licensing of the patent rights conveyed to them under “conditions” the same as those imposed upon S.I.G., plus the provision in the corporate charter of S.I.G. which prohibits it from engaging in manufacturing operations; it is believed that the legal effect of these provisions would preclude the transfer of legal title under the established doctrines of patent assignments.

In the Crown Die & Tool Co. v. Nye Tool & Machine Works, 261 U. S. 24, 36 (1923), after pointing out that a transfer of the bare right to exclude others from making, using and vending could not be such an assignment as
would justify the Patent Office in issuing the patent to such assignee under Rev. Stat. § 4895 (1875), 35 U. S. C. § 44 (1940), Mr. Chief Justice Taft stated:

"The error in the position of the respondent and the court below is in a failure to distinguish between the property or title or interest in a patent capable of assignment and the chief incident of that property, title or interest, an incident which can only pass by assignment when attached to the right to make, use and vend. . . ."

The decision of the trial court (i.e., that title passed) and its implied acceptance by the circuit court in the instant case is at variance with the previously accepted rule laid down in Six Wheel Corp. v. Sterling Motor Truck Co., supra that the transfer of the exclusive right to license third parties to make, use and vend without granting the transferee the common-law right to make, use and vend is a license only. However, whether this doctrine is to be discarded or not will remain an open question until it is settled more definitely by the courts in the future.

ROBERT B. WASHBURN

REAL PROPERTY—A Right of Way over Land Is a Non-continuous Easement and Upon Severance of the Tenements Does Not Pass Unless It Is a Way of Necessity.

Prior to 1941 the Alabastine Company owned land and the factory buildings located thereon in Michigan. The land, which fronted on Chicago Drive, was divided into two parcels herein numbered one and two. The Company, which was engaged in the paint manufacturing business, had established a driveway across parcel number two to be used for ingress and egress from the buildings on both parcels. Parcel number two was conveyed to the defendants by warranty deed. No reservation was made in the deed as to the quasi easement over parcel two, but subsequent to the conveyance Alabastine continued to use the driveway by license of the defendant. Later, parcel number one was conveyed to the plaintiffs. The deed included "any and all rights of the Alabastine Company of ingress and egress to the said property (parcel one)." Plaintiffs claim an implied reservation by the Alabastine Company of a continuous easement and right of way over parcel number two. Defendant denies the existence of an implied easement because the claimed easement was not a way of necessity for the Alabastine Company but only a way of convenience. Held, a right of way is a non-continuous easement and upon severance of the tenements does not pass unless it is a way of necessity or the operative words are sufficient to grant it de novo. Levy v. Dossin's Food Products, 72 F. Supp. 855 (D. C. Mich. 1947).

A property owner cannot have an easement over his own land span, Burling
v. Leiter, 272 Mich. 448, 262 N.W. 388 (1935), but he may use part of it for the benefit of another part. When he thus utilizes one part for the benefit of another, it is said that a quasi easement exists, the parcel benefited being referred to as the quasi dominant tenement, and the part burdened as the quasi servient tenement. See Tiffany's Real Property § 781 (3d ed. 1939). Upon the transfer of either part, without express reference in the deed to the quasi easement, an easement by implication based on the pre-existing quasi easement may come into being. Wiesel v. Smira, 49 R.I. 246, 142 Atl. 148 (1928).

Where the quasi dominant tenement is first conveyed, most courts hold that the grantee acquires, by implied grant, an easement corresponding to the pre-existing quasi easement if such easement was apparent, continuous, and necessary for the beneficial use of the land conveyed. Paine v. Chandler, 134 N.Y. 385, 32 N.E. 18 (1892); Wiesel v. Smira, supra. See 17 Am. Jur., Easements § 43. Necessary, however, means little more than highly desirable. Wiesel v. Smira, supra. It does not mean that the necessity must be absolute, i.e., that there can be no enjoyment whatsoever of the land without the exercise of the easement. Fossum v. Stark, 302 Ill. 99, 134 N.E. 12 (1922); Bonelli Bros. v. Blakemore, 66 Miss. 136, 5 So. 228 (1888); Paine v. Chandler, supra. The creation of easements by implied grant is based on the maxim that the grant of any principal thing shall be taken to carry with it all that is necessary to the grantee for the beneficial enjoyment of the thing granted. But when the quasi servient tenement is conveyed first, most courts hold that the owner does not reserve any easement without express stipulation in the deed, unless the easement is strictly necessary. Conrad v. Smith, 203 Ky. 171, 261 S.W. 1103 (1924); Brown v. Fuller, 165 Mich. 162, 130 N.W. 621 (1911). These cases find support in the principle that a grantor can not derogate from his own grant. The distinction between implied grants and implied reservations is thus recognized by the majority of the courts, see 17 Am. Jur., Easements, § 45, but there are many cases which hold that the grantor stands upon the same footing with the grantee and no distinction between implied grants and implied reservations should be recognized. Note 17 Am. Jur., Easements § 45. At the present time there is evidence of a trend to disregard the distinction in cases of rights of way, as shown by recent cases which fail to make the distinction in jurisdictions where such a distinction was formerly recognized. Cf. Jasper v. Worcester Finishing Co., 318 Mass. 752, 64 N.E.2d 89 (1945); Provident Ins. Co. v. Doughty, 126 N. J. Eq. 262, 8 Atl. 2d 722 (1939); Ashby v. Justus, 183 Va. 555, 32 S.E.2d 709 (1945). These later cases place the grantee and the grantor on the same footing with respect to the degree of necessity that must be shown in order to create an implied grant or reservation.

The instant case is clearly one involving an implied reservation. Since Michigan is one of those states recognizing the distinction between an implied grant and an implied reservation, Cf. Brown v. Fuller, supra, it appears strange that the case was not decided upon that theory and in keeping with the majority
doctrine that upon conveyance of the quasi servient tenement an easement is not reserved, without an express stipulation in the deed, unless the easement is strictly necessary. Michigan, however, prefers to deal with the problem of rights of way over land in a different manner, and in doing so avoids the necessity of making a distinction in the cases of implied grants and implied reservations when considering a case such as the principal one. This is achieved by holding, with many other jurisdictions, that a right of way is not continuous. 

Denton v. Lidell, 23 N. J. Eq. 64 (1872); Providence Co. v. Corliss Co., 9 R.I. 564 (1870); Hoffman v. Shoemaker, 69 W. Va. 233, 71 S. E. 198 (1911).

Now, since an easement can not be implied from a pre-existing quasi easement unless the latter is continuous, Bonelli v. Blakemore, supra; Burling v. Leiter, supra, it is evident that the effect of holding a right of way non-continuous is to take this type of easement out of the quasi easement category, and to place it in the class of ways of necessity, i.e., that type of easement wherein the necessity must be absolute. In the instant case the necessity was not absolute and therefore the case follows the rule laid down in similar cases previously decided in the jurisdiction. Milewski v. Wolski, 314 Mich. 445, 22 N.W.2d 831 (1946); Waubun Beach Ass. v. Wilson, 274 Mich. 598, 265 N. W. 474 (1936); Zemtn v. Neiszorg, 247 Mich. 563, 226 N. W. 242 (1929).

The effect of Michigan decisions involving implied easements of rights of way is clear. It is to wipe out the distinction between implied grants and implied reservations where rights of way over land are concerned. Both are merged into ways of necessity and thus form the basis for the rule that in Michigan an easement of a right of way over land will not be implied unless the facts and circumstances clearly indicate that it is a way of necessity and not merely a way of convenience.

R. C. BENITEZ


Upon its organization, Mendham Corporation, the taxpayer, acquired in exchange for its entire capital stock certain improved property valued at $325,000 and which had been mortgaged by its transferor, River Park Corporation. The taxpayer did not assume the bond secured by this mortgage. This was a tax-free transaction under the so-called exemption provision of the Internal Revenue Code, § 112. The basis for gain or loss on sale or other disposition, as established by River Park, was the total cost of the property as improved, or $369,735.42. River Park’s total deductions for depreciation
amounted to $27,783.33. The taxpayer’s total deduction for depreciation amounted to $37,780.09. Thus the adjusted basis of the property in the hands of the taxpayer—not including certain additional deductions claimed for interest on the mortgage and taxes—was $304,172. After the property was transferred to taxpayer, foreclosure proceedings were instituted by the mortgagee and title was conveyed to the mortgagee by sheriff’s deed, following a nominal bid of $100. For a consideration of $3,200, the mortgagee orally agreed with River Park not to seek a deficiency, and although the agreement was never executed, the expiration of the limitation on any proceeding to collect the debt occurred the same year. Held, a taxable gain was realized by the taxpayer to the extent that the proceeds of the mortgage received by the transferor-mortgagor, River Park Corporation, exceeded the adjusted basis for the property in the hands of the taxpayer. Mendham Corp., 9 T. C. No. 48 (Sept. 10, 1947).

A gain or loss from the sale or other disposition of property is, for tax purposes, measured by the difference between the amount realized therefrom and the adjusted basis. Int. Rev. Code § 111. The term “adjusted basis” means the cost or other basis of the property adjusted upwards for items which are capital expenditures or capital additions, and downwards for exhaustion of the property by reason of depletion, depreciation, etc. Int. Rev. Code § 113 (a)(1)-(19) and (b)(1)-(4). It has been held that the transfer of property to a mortgagee in lieu of foreclosure proceedings and in satisfaction of the mortgage debt is a disposition of property under the above section when the mortgagee has agreed to look only to the property, and that if the amount of the mortgage debt exceeds the mortgagor’s basis for gain or loss on the property, he is liable for the taxable gain which to that extent results. Lutz & Schramm Company, 1 T. C. 682 (1943). Also in line with this view, it has been held that upon foreclosure by a mortgagee and his acquisition of title to the property for a nominal bid, a taxable gain was realized where the taxpayer’s basis of cost of the property was adjusted by depreciation deductions to an amount less than the amount of the mortgage debt. Here the running of a statute of limitations on the time for institution of deficiency proceedings against the mortgagor had the effect of transferring the property in complete settlement of the mortgage debt. R. O’Dell & Sons, Inc., 8 T. C. 1165 (1946).

A different result was arrived at, however, when the foreclosure of a purchase money mortgage was considered. In the case of Charles L. Nutter, 7 T. C. 480 (1946), this was deemed to be a situation “akin to a reduction of sales price”; for the mortgagor merely surrendered property which had fallen in value below the amount which he had undertaken to pay for it and hence no gain resulted from the transaction.

In the case of Crane v. Commissioner of Internal Revenue, 67 Sup. Ct. 1047 (1947), the taxpayer acquired mortgaged property by inheritance. He did not assume the mortgage debt, but took depreciation deductions under § 114(a)
and § 23(e) of the Internal Revenue Code, and ultimately conveyed the property still encumbered to a third person, who likewise did not assume the mortgage debt. It might appear that as the taxpayer did not receive the benefit of the proceeds of the mortgage, but instead sold the property thereafter for the mere value of the equity, that no other taxable gain enured to him as an "amount realized" under § 111(b). But the court looked to the allowed deductions for depreciation and reasoned that, as the taxpayer was situated under §§ 114(a) and 23(e) so as to be entitled to depreciation deductions based on the entire value of the property as of the time he inherited it, Int. Rev. Code § 113(a)(5), that is, a basis similar to the mortgagor's and not merely that value less the amount of the mortgage, the taxpayer must be taxed for gain as if he were the mortgagor himself. Regarding the disposition of the mortgaged property in this light, it is apparent that it resulted in a gain comprising the difference between the amount of the mortgage proceeds (plus the amount, if any, received for the equity) less the basis indicated in § 113(a)(5) adjusted for depreciation deductions.

In an analogous approach to the situation presented in the instant case, it would appear that if the taxpayer could be considered as standing in the shoes of the mortgagor itself, no question would arise but that a taxable gain had been realized.

A different application of a similar view was applied in Commissioner v. Sansome, 60 F.2d 931 (C. C. A. 2d 1932), cert. denied, 287 U. S. 667 (1932). That view was also applied in Commissioner v. Munter, 67 Sup. Ct. 1175 (1947) where it was held that, "... the rule of Commissioner v. Sansome ... for tax purposes, treats a reorganized corporation as but a continuation of its predecessors ...".

The acquisition of the mortgaged property by the taxpayer in the instant case was by way of a transfer recognizing neither gain nor loss, Int. Rev. Code § 112(b)(5), and was likewise a tax-free exchange under § 113(a)(6). After such an exchange, the transferee takes the property accompanied by its transferor's basis. Int. Rev. Code § 113(a)(8). When an operation concerning securities or property, which will ultimately result in either gain or loss, is included within the matter of a tax-free exchange, the result may be, as pointed out in Magill's Taxable Income 169 (Rev. ed. 1947), "... to impose upon the transferee a possible tax upon any appreciation which may have accrued in the hands of the transferor prior to the transfer."

By § 112(b)(5) of the Code, "No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after exchange such person or persons are in control of the corporation." If the taxpayer, Mendham Corporation, is to be considered so closely associated with its parent corporation that no gain or loss was to be recognized as resulting from the transfer of the mortgaged property to it by such parent, and the transaction
excepted from the genus of "sale or other disposition of property" under § 111, then the taxpayer might be considered as holding such property as if in the right of its transferor, and an ultimate gain, if realized, might be imputed to the transferee-taxpayer as standing in the shoes of its transferor, the mortgagor of the property. Nonetheless, the result is to assess one taxpayer as for a taxable gain because of proceeds secured by another from the disposition of property; such other enjoying the benefit of depreciation deductions and having realized the fruits of the transaction. That such a result is anomalous is attested by six dissents to the decision.

BARTLEY T. GARVEY

TORTS—Prospective Passenger Does Not Attain Legal Status of Passenger by Merely Standing or Walking on a Street Car Loading Platform in the Midst of a City Street, with an Undisclosed Purpose of Boarding an Approaching Car.

The plaintiff was walking upon a street car loading platform in downtown Washington. She alleged that she signaled, the car stopped, and as she was about to enter, the car started again and injured her. All the other witnesses testified that the car did not stop and its door did not open, and there was evidence that she stepped in front of the car. It was undisputed that, even with the door open, no part of the car would overhang the platform. A bus which plaintiff knew would go nearer her home than the street car would, was waiting at the corner across the tracks from the loading platform. Plaintiff's counsel requested the trial court to instruct the jury that if it believed the plaintiff's evidence, then she was legally in the position of a passenger in the care of the defendant. The trial court refused to give this instruction. The jurors decided against her and she appealed. Held, a prospective passenger does not attain the legal status of a passenger by merely standing or walking on a street car loading platform in the midst of a city street, with an undisclosed purpose of boarding an approaching car. Howard v. Capital Transit Co., 163 F.2d 910 (App. D. C. 1947).

The question of when a prospective passenger of a common carrier attains the legal rights of a passenger has been one of great controversy in the courts. In the case of steam railroads or interurban trolley lines that have stations which are under their exclusive control, the courts have been prone to consider that a person who is on the station platform and intends to board a train is a passenger. Tobin v. Penn. R. Co., 100 F.2d 435 (App. D. C. 1938), cert. denied, 306 U. S. 640 (1938); Davis v. Olson, 298 Fed. 921 (C. C. A. 8th 1924); Twyman v. Baltimore and O. R. Co., 295 Fed. 639 (C. C. A. 4th 1924).

But when street car companies operate in congested city streets, and where intending passengers and mere pedestrians are co-mingled and use the com-
company's loading platforms over which the company does not have exclusive control, the rule generally has been that merely being upon the platform does not make one a passenger. *Northrup v. Pacific Electric Ry.*, 8 Cal. App. 2d 189, 47 P.2d 365 (1935); *Evans v. Capital Transit Co.*, 39 A.2d 869 (Mun. App. D. C. 1944); *Murray v. Cumberland County Power and Light Co.*, 117 Me. 165, 103 Atl. 66 (1918).

The difficulty has been to define the precise point at which one ceases to be a mere prospective passenger and becomes, in fact, a passenger. Massachusetts, in 1900, laid down a rule from which it has not receded. In *Davey v. Greenfield and T. F. St. Ry. Co.*, 177 Mass. 106, 58 N. E. 172 (1900), the court ruled that if the prospective passenger boarded a street car at the proper place, while it was stopped, and caught hold of the bar near the door, he became a passenger. Later cases have followed this precedent fairly closely.

The early history of District of Columbia appellate decisions on the same point are very similar. If the prospective passenger were in the act of getting on the car, had caught hold of the bar, or had his foot on the step, he was deemed a passenger. *Guenther v. Metropolitan Railroad Company*, 23 App. D. C. 493 (1904); *The Washington and Georgetown R.R. v. Patterson*, 9 App. D. C. 423 (1896); *The Anacostia and Potomac River Railroad Co. v. Klein*, 8 App. D. C. 75 (1896).

In *Jaquette v. Capital Traction Co.*, 34 App. D. C. 41 (1909), the court ruled that Jaquette was not a passenger because he had not complied with the Massachusetts rule in that he had not caught hold of the bar. In the *Howard case*, *supra*, the same court had this to say:

"This court has not had occasion to attempt a formulation of a rule under which it may be determined when a prospective patron of a street car has attained the legal status of a passenger. Our decision in *Jaquette v. Capital Traction Company*, 34 App. D. C. 41, may seem to follow Massachusetts rulings that one must actually lay hold of the car in order to become a passenger. But the facts in that case were that Jaquette, intending to board a car which had stopped in the street to receive passengers, was injured stumbling over the fender as he crossed the track in front of the car. He had not signaled to indicate that he intended to board the car. So the Jaquette case holds no more than that one who, intending to board but giving no signal, walks in front of a standing street-car and stumbles over its fender has not attained the passenger status." (Emphasis supplied.)

Until the *Howard* case, it was generally believed that the District of Columbia followed the Massachusetts' ruling on this point. It would appear from the above quotation that despite the *Jaquette* case some different test may be applied in the District.

A great number of states have applied a different test. Some courts have stated that an actual catching hold of the guard rail or placing a foot aboard is not absolutely necessary if the surrounding circumstances show clearly that the
person intended to become a passenger. Owing to the nature of the street car business, the contractual relation of a carrier and passenger is seldom created by express contract, but must be implied from the action of the two. A street car company is organized to carry passengers, and there is an implied invitation to all persons to enter its cars for transportation. *Berkebile v. Johnstown Traction Co.*, 255 Pa. 310, 99 Atl. 871 (1917).

Many states hold that a prospective street car passenger becomes such when in good faith intending to take passage thereon, he places himself at a usual stopping place, and, either by his position or in some other recognized manner, signals the car to stop, and the signal is responded to by the checking of the speed of the car. *Grier v. Ferrant*, 62 Cal. App. 2d 306, 144 P.2d 631 (1944); *Hart v. Fresno Traction Co.*, 175 Cal. 489, 167 Pac. 885 (1917); *Lavender v. Chicago City Ry.*, 296 Ill. 284, 129 N. E. 757 (1921); *Radermacher v. St. Paul City Ry.*, 214 Minn. 427, 8 N. W.2d 466 (1943). See *Am. Jur.*, Carriers § 964.

In the *Howard* case, supra at —, the court held that conduct like that of appellant would not give rise to the passenger relation "unless accompanied by additional circumstances which we need not enumerate." Evidently, then, it felt that the finality of action required of the prospective passenger under the Massachusetts rule was not absolutely necessary in order to give him the legal right of a passenger.

JAMES F. MCHALE
BOOK REVIEWS


The substance of this slim volume, the Prefatory Note informs us, stems from a series of lectures delivered in Lawrence, Kansas, on December 2-4, 1946. The lecturer, whose legal faith is expressed therein, is the scholarly Associate Justice of the Supreme Court, Wiley Rutledge.

The title is derived from the introductory chapter in which Mr. Justice Rutledge sets out in terms clear, positive and unmistakable his unaltering belief in a government administering justice under law.

"I believe therefore in justice. I believe in abstract justice, though I cannot define it. But in any legal sense I believe in it only as the source from which conceptions of concrete and legally relevant justice arise. I believe in concrete justice, in particular justice, and in the possibility of its growth and expansion. I believe in it as the end of legal institutions and in them as the means by which it may be achieved. I believe too in the growth of the law and in this as the only means for making reconciliation between the conflicting forces and conceptions, separately considered, of order and freedom. Only thus may right accommodations in social living and the maintenance of stable, just social relationships be fulfilled.

"Law, freedom, and justice—this trinity is the object of my faith. Lacking any one of those components, the resultant scheme could only be anarchy or tyranny, chaos or despotism. In neither is there room for faith."¹

Occasionally a reader happens on some felicitous sequence of language which he wishes he had written—this reviewer freely confesses envying the author of the legal Credo quoted above. It is particularly fortunate that in these times of cynicism and disbelief in the law a member of the highest tribunal in the land has succeeded so memorably in crystallizing an inspiring declaration of legal faith. The Bench and Bar owe a debt of gratitude to Mr. Justice Rutledge.

Justice may best be achieved and law most properly administered, the author believes, in a federal union and the remainder of the book is devoted to a discussion of a "chapter in federal democratic living" intended to illustrate the federal principle in actual practice.²

The example chosen is the Commerce Clause of our Federal Constitution and in proving his chosen thesis the author contributes a very

¹Rutledge, A DECLARATION OF LEGAL FAITH (1947) 17-18.
²Id. at 20-21.
worthy addition to the many excellent discussions of that provision. To divulge the evaluation placed on that clause and the conclusions reached by the Honorable Associate Justice would inevitably destroy the meaning and effect of his concise and well reasoned dissertation. Suffice it to say that the jurist's comments will not go unchallenged by students of the Constitution. The treatment accorded to Marshall and Taney will certainly provoke comment both from admirers and detractors of these famous judges.

This section of the work is annotated in a rather complete manner by reference to the leading Supreme Court decisions on the Commerce Clause. Witness the fact that the table of Cases Cited\(^9\) contains a list of 66 cases covering the years 1819-1946. The practical value of having these leading Constitutional cases at hand in such a compact form requires no comment.

The author concludes with a reiteration of his belief in the law and the federal principle and surprisingly enough advocates the extension of this principle on a universal scale.\(^4\)

LEO A. HUARD


This is an outstanding work and the most recent comprehensive treatise on the subject. On 1,758 pages the author presents a closely-reasoned, well-documented analysis of the law of unfair competition and trade-marks.

The treatise is divided into eight parts which are entitled Basic Conceptions (I), Unfair Advertising and Pricing (II), Unfair Interference with a Competitor's Business Relations (III), Mis-appropriation of a Competitor's Values (IV), Remedies and Procedures (VII), International Protection (VIII). These eight parts constitute the first two volumes of the treatise. The third volume contains the text of the applicable acts, of rules and regulations, and of the various international

\(^9\)Id. at 79.

\(^4\)Id. at 77. "Surprisingly" because the book jacket informs us that Mr. Justice Rutledge was born in Kentucky, educated in the Middle West and North West, and spent a substantial part of his professional life in the Middle West—sections not noted for advanced internationalism.

\(^{\dagger}\)Member of New York Bar.
conventions as well as some materials on control of advertising by non-governmental agencies, a table of trade-marks and names, a table of cases and an index.

In Part I, a chapter on "The Theory of Unfair Competition" will be of particular value to the bar and bench when novel questions of law are presented, as occurs almost daily in this field. According to the author "the law of unfair competition . . . relies primarily upon appeals to 'judicial sensibilities' and offers vague generalities about fairness and honesty as substitutes for logical analysis and legal theory." The author undertakes to supply such analysis. To illustrate, his distinction between "constructive" and "non-constructive" competition (page 98 et seq.) is, I believe, a constructive one. The author could have cited continental European judicial authorities in support and further elucidation of this distinction. The author's discussion of the property concept (page 31 et seq.) is equally illuminating and there can scarcely be a doubt as to the correctness of his conclusion that a plaintiff should not be denied protection against the unfair act of a competitor merely because no property right was infringed.

Unfair competition is a growing concept. In groping for the proper principles to apply in its development lawyers and judges will be greatly aided by the author's provocative analysis. Courts are already beginning to take notice of him.

Parts II-IV contain an exhaustive treatment of individual unfair trade practices and acts of unfair competition, with abundant citation of judicial authorities and text writers. In his chapter on disparagement the author follows the views first developed by this reviewer, namely that disparagement of a competitor should, in many instances, be regarded as actionable unfair competition even though the statements made may be true.\(^1\) In fact the author places great emphasis on this subject inasmuch as his discussion of truthful disparagement precedes his treatment of false disparagement. The presentation might have been more effective had the order been reversed since under the present law only false disparagement is actionable and a cause of action for truthful disparagement is merely a hoped-for development.

It is regrettable that Part VI (the law of trade-marks) was written before the passage of the Lanham Trade-mark Act. As a result some of the discussion which deals with federal registration is obsolete. However, it is understood that a supplement is in preparation which will

\(^1\) Wolff, Unfair Competition by Truthful Disparagement, 47 Yale L. J. 1304 (1938).
bring the reader up to date. Meanwhile, the author has published an analysis of the Lanham Act in 1946 *Columbia Law Review*.

There is no room here to set forth all the author's contributions or to discuss those of his views which may be subject to debate. A law review article would be required to accomplish this. All that can be said here is that the author combines a thorough grasp of the law as it is with considerable creative imagination which is nowhere more essential than in the growing field of unfair competition. Nobody interested in this field can afford to miss this treatise.

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