ACTUAL LEGITIMATE COST AS A BASIS FOR UTILITY REGULATION — THE EXPERIENCE OF THE FEDERAL POWER COMMISSION

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The experience of the Federal Power Commission, in the control of certain public utilities under the economic theory of actual, legitimate, original cost, bids fair to revolutionize public utility control in the United States. In the application of this theory the Commission has had not only a favorable legislative basis upon which to act, but also significant judicial support.

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The Background of the Legislative Basis

The legislative basis upon which the Federal Power Commission operates is contained in three acts (with amendments): the Federal Water Power Act,\(^1\) Part Two of the Public Utility Act of 1935,\(^2\) and the Natural Gas Act of 1938.\(^3\)

The first of these acts was intended primarily to provide for the conservation of natural resources and to prevent monopoly control of these resources. The other two were concerned chiefly with the fixing of rates for electricity and gas sold in interstate commerce. Indirectly, however, they served as the medium through which the Federal Power Commission could remedy many of the financial abuses that had developed.\(^4\)

Though it is impossible to go into detail here as to the abuses that had crept into the financial transactions of operating companies, chiefly as the result of the holding company system, a brief statement regarding them is necessary for an understanding of the Commission's accounting systems and its determinations as to original cost. In essence, the principal abuses were as follows:\(^5\)

1. A holding company or its subsidiary service companies made exclusive contracts with its affiliated operating companies for the furnishing of services, such as construction fees, engineering fees, management fees, legal fees, advertising, rents, etc. The charges made for these services were greatly in excess of what they would have been upon an arm's length contract basis. Through common control of the service companies and the operating companies, the holding companies had power arbitrarily to dictate contracts and fix charges for services. Persons who simultaneously were officers of the holding company, the service company, and the operating company, could negotiate contracts imposing unjustifiable costs upon operating companies. Such excessive costs would inevitably be reflected either in the rate base or in operating expenses, and would greatly increase rates.

\(^1\)41 STAT. 1063 (1920), 16 U. S. C. §§ 791-823 (1946); hereinafter cited FWPA.
\(^2\)49 STAT. 847 (1935), 16 U. S. C. §§ 824-825 (1946); hereinafter cited PUA.
\(^3\)52 STAT. 821 (1938), 15 U. S. C. § 717 (1946); hereinafter cited NGA.
\(^4\)Part I of the Public Utility Act provided for regulating and controlling holding companies as such, and entrusted this function to the Securities and Exchange Commission. Part II of the act dealt extensively with operating companies. Under its provisions, many of the wrongful economic situations which the holding company system has created by relationship to operating companies may be remedied through the actions of the Commission.
\(^5\)84-A FTC, REPORT ON PUBLIC UTILITIES 615 (1935).
2. When holding companies took charge of purchased properties, they often set these up on their books at a value far above not only the cost to the original company, but above the price they had paid. This extra write-up would be placed in the rate base.\textsuperscript{6}

3. Wholly owned subsidiary companies were required to pay an excess of cost to the holding company for its properties transferred to the subsidiaries.\textsuperscript{7}

4. Write-ups were made on the basis of appraisals given by the engineers of the holding company or subsidiary company, who purported to be independent appraisers but secretly acted for the company.

5. Write-ups took place by the giving of block shares.

6. Often an affiliated construction company would charge the operating companies excessive amounts for construction work.

7. In several cases a holding company charged its subsidiary operating companies excessive interest rates on money advanced to them.

8. Discount was capitalized by writing up the fixed capital account to create an apparent capital surplus, and then transferring it to a surplus account.

9. Reserves for depreciation were set up, which were far too low, thus transferring to profits amounts that should have gone into reserves; and at the same time large reserves were claimed as items of annual expense.

10. Constant pressure was put upon regulatory bodies to have good

\textsuperscript{6}An examination of the Associated Gas and Electric Company showed that the holding company had written up their investments by $33,000,000, that the subsidiary companies had written up their investments by $115,000,000, and the operating companies had also made a write-up of $115,000,000. \textit{Hearings before Committee on Interstate Commerce on H. R. 5423, 74th Cong., 1st Sess., pt. I, 154 (1935)}.

\textsuperscript{7}Judge Healy: Now, as I have just said, all of these properties in those three states cost the Electric Power and Light Corporation $52,425,920.76, but the three newly organized companies, the Arkansas Power and Light, the Louisiana Power and Light, and the Mississippi River Power and Light . . . paid . . . a consideration of $18,094,079.24 in excess of its own cost in acquiring the properties." \textit{Id.} at 161. In another case the American Gas and Electric Company paid $62,000,000 for certain properties. It sold them to the Appalachian Electric Company, which it organized, for $112,129,000. This consideration was paid in bonds, preferred stock, and common stock. What did the American Gas and Electric Company do with these securities? It sold the bonds and the preferred shares, and was left with 5,000,000 shares of Appalachian common which represented voting control. American Gas and Electric had recovered nearly the actual cost of the properties turned over to the Appalachian Power Company, and still held common shares with a stated value of $50,000,000 which had cost, by one method of calculation, but $3,600,000. \textit{Id.} at 165.
will, going value, franchise values and appreciated land value placed in the rate base, as well as plant value estimated on prospective revenues.

11. Companies tried to have such items as lobbying expenditures, entertainment expenses, bonuses, employee welfare benefits, taxes prior to and after construction, studies in respect to undertakings, and similar items, placed in the capital account or the rate base. Attempts were often made to have excessive land costs, or the costs of land which was not being used for the public service, placed in the rate base.8

The result of holding company organization and practices, before the passage of the 1935 Act, was that many operating companies had become pawns in the hands of holding companies, and many holding companies were parasites upon the operating companies. The accounts of the operating companies were filled with items of expense which could have no proper place in a system based upon actual legitimate original cost.9

It is against this background that the legislative basis of the Federal Power Commission's work must be examined.

THE LEGISLATIVE BASIS

The favorable legislative basis upon which the Federal Power Commission has been able to develop economic theories and regulatory practices that have been upheld by the courts consists, as was mentioned above, of three acts dealing with electrical and gas utilities; the Federal Water Power Act, with amendments; Part II of the Public Utility Act of 1935; and the Natural Gas Act of 1938, with amendments.


The Federal Water Power Act of 1920 and its amendments contemplated five situations in which it would be necessary to ascertain the actual legitimate cost of a water power project licensed by the Federal Government:

1. For determining the net investment of the licensee, in the event that the United States should elect to take over the project. In such case it was required to pay the licensee his "net investment" in the project taken. This amount might not "include or be affected by the value of any lands, rights of way, or other property of the United States licensed by the Commission . . . or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights of

8Blachly and Oatman, Natural Gas and the Public Interest 50-59 (1947).
9Many similar practices were found in the natural gas industry. For a summary of these evils, see FTC, op. cit. supra note 5, or Blachly and Oatman, op. cit. supra at 57, 58.
way, lands or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee.”

2. For determining just and fair compensation for the temporary use of the project in the event that operation thereof is taken over by the United States for purposes of national safety.

3. For determining what would constitute a reasonable rate of return upon the net investment, in the establishment of amortization reserves. The statute provides that after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specific reasonable rate of return upon the net investment of the licensee of a project, the licensee shall establish and maintain amortization reserves. In the discretion of the Commission these shall be held until the termination of the license or be applied from time to time to reduce the net investment.

4. For determining the rate base when the Commission regulates the rates of licensees in the absence of state regulation. For the purposes of rate making, no value may be claimed by the licensee or allowed by the Commission for any licensed project or projects in excess of the value prescribed in case the government takes over the property under section 14 of the act as amended. In other words, for rate making purposes good will, going value, prospective revenues, and the like may not be included. Water rights, rights of way, interests in lands, etc. may be placed in the rate base only at actual reasonable cost. This provision, which eliminates the possibility of evaluation on the basis of reproduction cost, becomes a condition of the license.

5. For determining what is necessary to provide for the maintenance and repair of the project under section 10 (c) of the act. In order that the Commission may determine the “actual legitimate original cost of and the net investment in a licensed project,” the licensees are required to file statements showing construction costs and prices paid for water rights, rights of way, lands or interests in lands. The Commission is given wide powers of investigation and the right to make necessary revisions.

The Commission may prescribe rules and regulations for the estab-

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10 FWPA § 14.
11 Id. at § 16.
12 Id. at § 10 (d).
13 Id. at § 19, 20.
14 Id. at § 10 (c).
15 Id. at § 4 (a).
lishment and maintenance of a system of accounts. It may also examine books and accounts of licensees and require them to submit statements and reports.16 Further, it is authorized to hold hearings on the basis of which to ask the courts to revoke a license for cause.

Thus under the Federal Water Power Act, the Commission was not only directed explicitly to use actual original cost as a rate base, and for other purposes, but was also given the tools with which to make its administration effective. To all intents and purposes the licensees were required to consent to the original cost basis as a condition precedent to the securing of a license. Since the license is considered as a gratuity or privilege,17 the licensee is in no position to contest the original cost basis as being unconstitutional. The importance to future developments, of this method of handling the rate base, can hardly be overemphasized.

The Public Utility Act of 1935.

Part II of the Public Utility Act of 1935 gave to the Federal Power Commission certain jurisdiction over that part of electric energy sold at wholesale in interstate commerce. The reasons for passing such a law were twofold: (1) the manipulations of holding companies, and (2) the fact that the power to regulate these rates had been held by the Supreme Court to be beyond the jurisdiction of the states,18 thus making it plain that the federal government would have to undertake any regulation considered necessary. The chief objectives of the act were to “insure reasonable wholesale rates and to prevent interstate companies from discriminating in favor of one state at the expense of consumers of another state.”19

1. By this act, the Commission was given wide powers to fix rates and to pass upon the issue of securities. Both of these powers were to be exercised after hearings. The Commission was authorized to investigate and ascertain “the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.”20 Upon the request of the Commission, a utility under its control must file with it “an inventory of all or any part of its property and a statement of the

1641 Stat. 1066 (1920). This section was amended by the Public Utility Act of 1935 which will be discussed below.
20PUA § 208 (a).
original cost thereof”; and must “keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.”

2. The statute provided that every licensee and public utility should make and keep such accounts and records as the Commission might by rules and regulations prescribe.

The Commission was given access to, and the right to inspect and examine, all accounts, records, and memoranda of licensees and public utilities. It may by order require other information, such as copies of maps, contracts, reports of engineers and other records and papers.

3. After notice and opportunity for hearing, the Commission may “determine by order the accounts in which particular outlays and receipts shall be entered, charged or credited.” Furthermore, the burden of proof to justify every accounting entry questioned by the Commission is placed upon the person making, authorizing or requiring it, and the Commission has power to suspend a charge or credit pending submission of satisfactory proof in support of it. Particular powers with respect to rates of depreciation are bestowed upon the Commission.

4. The Commission has power to issue rules and regulations, particularly those defining accounting, technical and trade terms; also power to prescribe forms of statements, declarations, applications and reports.

5. The act authorizes the Commission to investigate “facts, conditions, practices or matters,” which it might find necessary or proper in order to determine the existence of any violation of law, rules, regulations, or orders. It has authority to administer oaths and affirmations, to subpoena witnesses and compel their attendance, and to require the production of books and records. In case of contumacy, or refusal to obey a subpoena, the Commission may invoke the aid of any appropriate court of the United States, which has the power to compel attendance under the sanction of contempt. When a company seeks court review of an order issued by the Commission, its findings of fact, as a basis for such order, if supported by substantial evidence, are conclusive.
The statutes obviously gave the Commission a full quiver of administrative arrows for the enforcement of interstate electric rate regulation. Most of these regulatory weapons were made applicable to federal water power project licensees, as well as to companies selling electricity in interstate commerce.

*The Natural Gas Act of 1938.*

Due to the fact that natural gas is produced in a rather small number of states but is used in a relatively large number, many companies in the natural gas business operate in interstate commerce. The power of the states to regulate such companies does not extend to their interstate operations. In the case of *Missouri v. Kansas Gas Co.* it was held that the business of piping natural gas from one state to another and selling it to distributing companies, which sell it locally to consumers, is interstate commerce free from state interference. In consequence the *Natural Gas Act of 1938* provided for federal control over the transportation, sale and use of such gas and over natural gas companies engaged in its transportation, by the Federal Power Commission.

1. It was declared by the act that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest. The act was made applicable "to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale to the ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sales, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." (Italics supplied.) Thus the Commission was given no power over the rates to be charged for direct sales, over the production and gathering of natural gas, or over the selling rates of companies who purchase the gas at wholesale rates for local distribution.

2. The act provided that the rates and charges, and the rules and regulations affecting such rates or charges, shall be "just and reasonable." The Commission was given authority, upon its own motion, or

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29265 U. S. 298 (1924).
30NGA § 1 (b). Italics added because of the significance attached to this provision later.
31Sales made directly by pipe line companies to ultimate consumers along their routes, particularly large industrial consumers. NGA § 4 (c).
32NGA § 5 (a).
upon the complaint of a state, municipality, state commission or gas distributing agency, to determine the just and reasonable rates, charges, classifications, rules, regulations, practices or contracts and to fix the same by order.\textsuperscript{33}

3. Congress did not, as in the Federal Water Power Act, specifically provide that actual, legitimate original cost should be the basis for rate making. Section 6 of the Natural Gas Act came very close to establishing such a basis. By this section the Commission was given power to "investigate and ascertain the actual legitimate cost of the property of every natural gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property."\textsuperscript{34} Upon its request, natural gas companies were required to file with the Commission an inventory of all or any part of their property and a statement of the original cost thereof, and also to keep the Commission informed regarding the cost of all additions, betterments, extensions and new construction.

4. The Commission, after hearing, may require natural-gas companies to carry depreciation and amortization accounts in accordance with its rules and prescribed forms. It is also empowered to ascertain and fix by order the proper and adequate rates of depreciation and amortization of the several classes of property used in the \textit{production, transportation, or sale} of natural gas.\textsuperscript{35} (Emphasis supplied.) These provisions, which are closely related to the Commission's rate-making power, apply to \textit{all} the property of a natural gas company, including its production and gathering facilities and properties. Various other sections of the act apply to production and gathering facilities and properties as well as to other properties of natural gas companies. It seems obvious that the act intended to give the Commission power to consider production and gathering facilities in regulating rates.\textsuperscript{36}

Every natural gas company affected by the act must file reports with the Commission in the manner prescribed by it.\textsuperscript{37} The Commission may require the gas company to make adequate provision for currently determining costs and other facts.\textsuperscript{38} It is unlawful for any company to will-

\begin{itemize}
\item \textsuperscript{33}Id. at § 5 (b).
\item \textsuperscript{34}Id. at § 6 (a).
\item \textsuperscript{35}Id. at § 9 (a).
\item \textsuperscript{37}NGA § 10 (a).
\item \textsuperscript{38}Ibid.
\end{itemize}
fully hinder or obstruct the making, filing or keeping of any information or record required to be made, filed or kept.39

5. A special interest in the enforcement of the act is recognized in the case of a state, municipality, or state commission. All these are given the right to enter complaints which must be answered by the company within a reasonable time.40

6. The Commission has power to investigate questions of violation of the act, or of rules and regulations or orders issued thereunder; and to make investigations which may aid in the enforcement of the law or of such rules or orders.41 It may also make special types of investigations applicable only to natural gas companies, such as an inquiry into the adequacy or inadequacy of gas reserves. After hearing, it may determine the propriety and reasonableness of the inclusion in operating expenses, capital or surplus, of all delay rentals or other forms of rental or compensation for unoperated lands and leases.42

7. Any member of the Commission or officer designated by it may administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of books, agreements or other records which the Commission may believe relevant and material to an inquiry.43 In case of contumacy or failure to obey a subpoena, the Commission may invoke judicial aid.44

8. Whenever it appears to the Commission that any person is engaged in, or is about to engage in, acts or practices which will constitute a violation of the law, rules and regulations or orders thereunder, it may bring an action in an appropriate district court to enjoin such practices or acts. The court has power to issue writs to compel obedience.45

Summary of Statutory Provisions on Original Cost.

There can be little doubt that in all three acts discussed above, Congress left the way open for the use of actual legitimate original cost as the rate base. Such a base is expressly provided for in one instance; and it may also be inferred from many other provisions of all the acts. By these three statutes, as amended, the Federal Power Commission

39Id. at § 10 (b).
40Id. at § 113.
41Id. at § 14 (a).
42Id. at § 14 (b).
43Id. at § 14 (c).
44Id. at § 14 (d).
45Id. at § 20 (a).
has been given the tools for establishing a rate base upon the economic basis of original cost. These tools (although not every one is given in every act) may be listed as follows:

1. The requirement that the utilities shall file statements of the original cost of additions, betterments and new construction.
2. The power of the Commission to examine records of all kinds showing cost.
3. The power of the Commission to revise statements of costs filed by the utilities.
4. The right of the Commission to prescribe a uniform system of accounts, to specify the accounting classification of particular outlays and receipts, and to make such determinations effective by orders enforceable by the courts.
5. Placing upon the person who enters or who is responsible for an item in an account the burden of proof that it has been placed under the right heading.
6. The right to issue rules and regulations governing the accounting system, which have the force of law.
7. The power of the Commission to require statements and reports giving all relevant information as to financial position and financial operation.
8. Providing penalties of fines and imprisonment for making false statements and reports.
9. Requiring the utility to keep records and make reports in the manner prescribed and to preserve them.
10. The right of the Commission to have access to all accounts and documents.
11. Requiring depreciation accounts and specifying forms which they must take.
12. The power to issue authoritative rules and regulations governing depreciation accounts.
13. The power of the Commission to fix the rate of depreciation, and to require the utility to conform to that rate.
14. Prohibition of wrongful charges to depreciation or expenditures.
15. The authority of the Commission to issue rules and regulations defining accounting, technical and trade terms.
16. The right to make investigations of facts, conditions, and practices to determine whether there have been violations of law, rules, regulations or orders.
17. The right to hold hearings, to administer oaths and affirmations, to subpoena witnesses and documents, and to take depositions.
18. The right to invoke judicial aid to compel attendance of witnesses and the giving of testimony, and to secure documents.
20. Making the findings of the Commission conclusive upon review, if supported by substantial evidence.
21. Providing that states, municipalities, state commissions or other agencies may bring complaints before the Commission for decision.

THE COMMISSION'S INTERPRETATION OF ITS JURISDICTION IN RESPECT TO THE APPLICATION OF THE ACTUAL LEGITIMATE COST BASIS

The Federal Power Commission has taken the view that it is authorized to use the original cost method as a rate base for utilities under its jurisdiction. In respect to water power licensees, it was required by statute to use this basis. In respect to interstate electrical utilities, several statutory provisions seem to indicate that such a basis may be used.\(^46\) Probably the Commission has also been influenced by the fact that in the fixing of rates of electrical and gas utilities by state commissions, this method has quite often been upheld by the courts.\(^47\)

The Natural Gas Act requires that the rates for gas sold for resale in interstate commerce shall be "just and reasonable."\(^48\) However, it provides no specific standards by which "just and reasonable rates" are to be determined. Section 6 comes close to furnishing a criterion for rate making, by providing that "the Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost of depreciation and the fair value of such property."\(^49\) Upon

\(^49\) "Thus, the Commission was given power to investigate and ascertain "the actual legitimate cost of the property of every public utility." Utilities were required to file with the Commission inventories of " . all or any part of its property and a statement of the original cost thereof . [and to] keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction." 49 Stat. 853 (1935); 16 U. S. C. § 824g (1940).


\(^47\) "Id. at § 4 (a).

\(^47\) "Id. at § 6 (a).
request, also, any gas company must furnish statements of the original cost of all or any part of its property. 50 The Commission has interpreted this statute as giving it the power to fix the original cost of all the property of natural gas companies, including production properties, and to use such cost as the basis for rates. 51

Armed with the legislative basis for regulation under these three acts, and acting upon its interpretation of their provisions in respect to "original cost", what has the Commission done to base rates upon original cost? This question may be answered by considering the general theory, the detailed development of the original cost doctrine, and the development of an accounting system based upon original cost.

The General Doctrine of Original Cost.

In the first place, it should be noted that the Commission has applied the doctrine of original cost, with a minor exception, to all the utilities under its jurisdiction: water power licensees, electrical concerns, and natural gas companies. 52 It has definitely repudiated the principal doctrine of Smyth v. Ames; namely, that value is the proper basis for rate making; also the subordinate bases of reproduction cost, value of the service, etc. It has done this in briefs before the Supreme Court, in its decisions, and in statements made at Congressional hearings and elsewhere. In two important rate cases, one involving natural gas and the other involving electric rates, 53 the Commission secured the consent of the Supreme Court to file briefs as amicus curiae. These briefs protested against the fair value theory and defended the constitutionality of the prudent investment or final cost principle.

In the brief in the former case, 55 the Commission said: "The only sound basis—sound in administration, in economics, and in law—upon which the public utility properties should be valued for rate-making purposes is the historical cost of those properties—that is, the prudent investment in them. It [the Commission] believes that such a basis is

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50Id. at § 6 (b).
51See note 36 supra at 63, 64. See also FPC, REPORT ON THE NATURAL GAS INVESTIGATION, No. G-580 (Comm'r's Smith and Draper) 23, 242-243 (1948).
52In respect to licensees, according to statute, there is only one basis for determining reasonableness. In respect to the other two types of utilities, while original cost is used as the chief basis, it is possible also to consider value.
entirely consistent with the requirements of the Fifth and Fifteenth Amendments of the Constitution." The Commission urged the Supreme Court to abandon the doctrines of fair value and reproduction cost as developed in *Smyth v. Ames* and subsequent cases, on the ground that they placed an obstruction "athwart the path of effective administrative rate making." It argued that the rule of *Smyth v. Ames* is "unreasonable", is "arbitrary and capricious", has "stifled the regulatory process", and has "no real and substantial relation to the object sought to be attained."

The rule is unreasonable, because it is impossible to reconcile the two different bases of original cost and reproduction cost as *Smyth v. Ames* attempted to do. Hence regulatory agencies have been compelled "to make a polite bow to the elements mentioned, but to employ in fact either prudent investment or the speculative element, reproduction cost, as the sole criterion of value." Neither commissions nor courts can combine or compose the results of these different types of value without acting in an arbitrary and capricious way. Reproduction cost elements cannot be regarded as value *per se*: "The mere fact that an article would cost a great deal to reproduce today is no evidence at all that it is worth the cost of reproduction. . . ." The fair value principle, by emphasizing reproduction cost, "ignores the economic worth or value of property and substitutes therefor an arbitrary criterion." The theory of reproduction cost, to have any validity, must be deemed to have some connection with market value, yet by its very nature such cannot exist because there is no market value for public utility properties. The reproduction cost theory, applied to electrical utilities, is even "more bereft of persuasiveness in arriving at true value," because of the rapid development of electrical equipment and efficiency; yet the regulatory bodies are prohibited by the courts from recognizing these factors. "The estimated reproduction cost of property is not and cannot be evidence *per se* of value, and to require it to be so by interpretation of our fundamental law is wholly unreasonable, for it establishes an

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56 *Id. at 15.*
57 *Id. at 16.*
58 *Id. at 18.*
59 *Id. at 19.*
61 *Id. at 20.*
62McCardle v. Indianapolis Water Co., 272 U. S. 400, 417, 418 (1926).*
63See note 61 supra.*
economic principle by fiat of law, which principle will necessarily increase and multiply the grievous and inequitable results which have been identified with regulatory practices of the past.64

The rule is arbitrary and capricious, "because the requirement automatically gives a factual basis to that which is at all times, at best, conjectural."65

The rule has no real or substantial relation to the object sought to be attained, that is, to give adequate compensation for property devoted to public purposes. Compensation measured by "such a vague and speculative basis cannot be the compensation that is guaranteed by the Constitution."66

The rule has stifled the regulatory process, because the emphasis on reproduction cost of the fair value rule has caused regulatory agencies to fall behind with their work. This is due to the long time required to make appraisals and valuations, the unreliability of the results obtained, and the enormous expense involved.67

In arguing for the prudent investment theory, the Commission maintains that under such theory "only one variable instead of two would be encountered in fixing public utility rates, namely, the rate of return. The investment would not be a variable, arrived at by the consideration of a mass of conflicting data, but instead would represent amounts appearing in books kept in the usual course of business."68 "It will permit the fixing of rates currently, and will eliminate delays of five to ten years so characteristic of past and present rate making. The ease of its administration is obvious."69 One end to be obtained by regulation is reasonable compensation for the use of property; and this can be achieved with greater accuracy by the prudent investment or original actual cost method than by the fair value method.70

Much of the same line of argument against the rule of Smyth v. Ames was used in the brief of the Solicitor General and staff, and the Federal Power Commission, in the Driscoll case.71 It was argued that what is devoted to the public service is the capital invested in the business and

64Id. at 21.
65Ibid.
66Id. at 27.
67Id. at 30.
68Id. at 39.
69Id. at 41.
70Ibid.
not the value of the property.72 "The profits of business in general must of necessity, for the purposes of comparison, be based upon investment, since that is the basis of accounting and financial reporting."73

Moreover: "If when rates of return in industry in general are high as based upon investment, but low as based upon the only evidence of value we have, namely, value of securities, and the computed high rates are applied not to investment but to the estimated reproduction cost of properties, a double defect occurs: (1) the application of the rate of return is faulty; and (2) the basis on which it is applied, reproduction cost, is speculative."74 Rates of return when applied to the reproduction cost of public utility property may work hardship on either the utilities or the consumers. "A literal compliance with the reproduction cost principle permits the utility to reap the profits of every type of unearned increment which accrues to monopolistic or semi-monopolistic enterprises. The inclusion of this element in a rate valuation penalizes the consumer by transferring to the utility valuation the appreciation in property and equipment which is generally attributable to the efforts of the community at large, including the consumers of the utility service. It is submitted that the use of the unearned property increment as an element of value, at least for rate-making, is wholly unjustifiable as a matter of sound economic theory or legal principle."75

The brief develops further the statement made in the Pacific Gas and Electric Company case in respect to the relationship between reproduction cost and market value. "Value in the last analysis means exchange value—the ability to command other commodities or services in exchange—and this necessarily leads to market value, which is not and cannot be synonymous with reproduction cost."76

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72 "Id. at 29.
73 "Id. at 30.
74 "Id. at 31.
75 "Id. at 32, 33.
76 "Id. at 36. The Commission quotes with approval: "In exchange-value economics the real value of a plant is not determined by the cost of reproducing the identical plant but by the cost of producing the commodity in a new plant having the most modern equipment required to produce the article. . . . It is the cost of building a modern plant of similar capacity that determines the value of a plant in an unregulated competitive industry, and not the cost of reproduction of a similar plant. Hence reproduction cost does not cause the owner of a regulated enterprise to fare the same as the investors in unregulated competitive enterprises." Wilson, Herring and Eustler, Public Utility Regulation 126 (1928).
Since regulatory bodies are prohibited by the *McCardle* rule from applying the substitute-plant principle, when they use reproduction cost as a base they are compelled to employ the formula of the value of property used in public service. Hence old and obsolete structures and old equipment must be valued on the basis of what it would cost to reproduce them today, even though they would not be reproduced under any imaginable circumstances.\(^{77}\) This involves a complete inventory of property and the pricing of each item. "The pricing process is one monstrous example of guesswork."\(^{78}\) The Commission gives many examples of the time and expense involved in the reproduction cost base, and of the unreliable results obtained. It also points out the fact that since the enormous costs of making appraisals are ordinarily charged to operating expenses, they are paid for by consumers.\(^{79}\)

The Commission then gives the economic theory of the prudent investment base, with several important arguments to support it. This theory goes on the ground that, "The thing devoted to the public use by the investor is not specific property but capital embarked in the utility enterprise. Upon the capital so invested the due process clause of the Constitution guarantees the utility the opportunity to earn a fair return."\(^{80}\)

The Commission argues that prudent investment affords a stable rate base which is of advantage to both investors and consumers. Such a rate base would become a matter of fact and not of mere opinion; it would not "fluctuate with the market price of labor, materials, or money"; it would not "change with hard times or shifting populations"; and it would not be distorted by the "fickle and varying judgment of appraisers, commissions, or courts."\(^{81}\) It would be fair to investors, since "Investors rightly expect a return on the capital which they put into the enterprise, rather than on the imaginary fair value or reproduction cost of the property."\(^{82}\) Moreover, "Protracted, costly, and unsatisfactory controversies over valuation are obviated. Rates can be fixed currently, with a minimum of delay."\(^{83}\)

It is also argued in the brief that there are no constitutional impedi-
ments to the fixing of a rate base upon prudent investment or original cost, since the rate of return can be used to assure the utilities of earnings comparable to those of other investments. In times of prosperity the rate of return may be increased and in times of depression decreased. "By adjusting the rate of return, income of the utility can be raised or lowered within permissible limits, thus accomplishing all that has been claimed for the fair value rule. The dual standard of high rates of return on high rate bases in times of prosperity and low rates of return on low rate bases in times of depression . . . cannot afford just compensation for the use of property devoted to the public service. . . . Profits may and should fluctuate with economic conditions through a flexible rate of return, but the base itself, like the investment base in other businesses, will not fluctuate with changes in the price level and with pseudo-scientific estimates of reproduction cost."84

Attention is called to the fact that, whereas the value theory was perhaps the only theory that could have been used conveniently before regulatory accounting procedures had been introduced, at present accounting has advanced to such a state that it is possible to know what the original investment is. Because there has been a long period of proper accounting and control over security issues, and over mergers and consolidations of utility properties, it must be recognized that conditions which called for the decision of Smyth v. Ames are no longer existent.85

The Commission furnishes proof that the prudent investment standard is supported and approved by many regulatory bodies and a great body of professional opinion. In summary, the brief says that the rule of prudent investment, combining as it does exactness, ease of application, and a proper principle for the determination of just compensation, is the standard for rate-making most adapted to modern business conditions and practices in this country, "and that the case at bar offers the court an opportunity to write off the books an unsound and unworkable rule of rate-making."86

The positive theory of the Commission as to what constitutes actual legitimate original cost has been stated repeatedly. "Cost," says the Commission, "means the amount of money actually paid for property or services, or the cash value at the time of the transaction of any

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84 Id. at 62.
85 Id. at 65.
86 Id. at 69.
consideration other than money." The Commission holds that there is no difference between "actual legitimate original cost", "original cost", "historical cost", or "prudent investment." It takes the view that the legitimate cost must be predicated upon facts; that actual net investment is the best evidence of value, and that where this investment is protected there can be no question of confiscation. The rate base then becomes the actual legitimate cost of the property (including construction work in progress) "used or useful in furnishing service, less the existing depletion and depreciation, plus necessary working capital."

Only when actual facts of cost cannot be ascertained is it necessary for the Commission to take cognizance of reproduction cost. "It would be inappropriate," says the Commission, "in this [rate] proceeding to engage in the long, tortuous, and essentially meaningless process of first attempting to determine the amount of the extremely speculative element of reproduction cost and then attempting to determine the equally speculative factor of how much weight should be given to the first speculation in arriving at a conclusion with respect to 'fair value'," when historical records are in such shape that prudent investment may be accurately determined. The Commission holds that it can entirely disregard reproduction cost if it sees fit, except in those cases where the prudent investment cannot be accurately determined.

The Commission also turns thumbs down on "trended original cost", on the ground that, like reproduction cost, it is not founded on facts, and consequently has no probative value in determining the rate base.

The theory of the Commission, and of the accounting system which it has established and which it requires the utilities to use, is founded upon the antithesis which it sees between cost and value as a basis for rate making. Cost is something which can be known. It remains stationary during the ups and downs of the business cycle. It does not, like stocks, change with public opinion, the successful or unsuccessful

"See Northern States Power Co. (Wisc.) 33 P. U. R. (n.s.) 279, 281-282 (1940). In our discussion we shall in general, use the expression "original cost."
"Cleveland and Akron v. Hope Natural Gas Co., 44 P. U. R. (n.s.) 1, 16 (1942).
"Ibid.
"Id. at 269.
"See note 89 supra, at 8, 9.
The operation of the business, or other unknown factors. It can be recorded and used as a basis upon which to estimate the charges necessary to obtain a certain rate of return. The cost remains constant; the rate of return can be made a variable in case it is deemed necessary to meet changing economic conditions.

Value, on the other hand, is something that cannot be definitely known unless there is some machinery by which it can be measured from day to day; for example, a competitive market. Since such machinery does not exist in respect to public utilities, competitive market value cannot be used as a basis for rate fixing. It is true that the suppositious value of a public utility may fluctuate from day to day according to economic circumstances, public opinion and other factors. However, these fluctuations, except in the market value of stocks and bonds, are not reflected in transaction prices in a free competitive market; nor can they be so reflected, for the more or less monopolistic nature of the public utility enterprises, the terms of their franchises or licenses, and the legal restrictions and regulatory authorities which control them, prevent the formation of a “natural” price by which value could be measured. Hence the attempt to use value as a rate base means that some method of estimating value must be found. In practice, this involves a hearing procedure. But such a procedure is expensive, consumes much time and produces no scientific results. By the time any results whatever are obtained, the whole situation may be so changed as to make them of no significance in showing current value. Hence value as a rate base is unsatisfactory.

Two chief corollaries of the use of cost rather than value as a rate base must be stated. First, if cost is used every item which shows the actual legitimate investment of capital must be recorded and used permanently as a basis for the establishment of rates. Second, all items which merely tend to show value, not cost, must be eliminated, either immediately or gradually; for cost and value can no more mix than oil and water.

The Doctrine of Prudent Investment or Original Cost as Developed in Detail by the Federal Power Commission

Like any other general doctrine, that of original cost is a complex of many different factors. What factors should be included in the concept of cost, and what should be excluded, has been one of the chief problems of the Federal Power Commission. Its detailed development of the doctrine has resulted from its performance of three tasks: (1)
the regulation of rates, (2) the determination of the original cost of licensed utilities in case the same were to be taken over or operated by the government, and (3) the establishment and enforcement of accounting and reporting practices. As the economic, legal and accounting theories of the Commission appear to be uniform with respect to all these duties, they will not be separated in the following discussion.

The detailed application of the doctrine of actual, legitimate, original cost to matters controlled by the Commission, while concerned primarily with factors entering into the rate base, also has ramifications into the period of plant operation. These two phases of the problem will be considered separately.

1. Factors entering into the rate base.

Numerous disputes have arisen between the Commission and the utilities as to the factors which should be capitalized or included in the rate base. The utilities have sought to include goodwill, value as a going concern, franchise value, affiliated company transactions, studies in respect to the undertaking, lobbying expenditures, engineering fees, legal expenditures, customers' contributions, interest paid before and during construction, taxes paid prior to and during construction, bonuses, losses during construction, entertainment expenses, traveling expenses, employee welfare benefits, payments to affiliates for various kinds of services, working capital, and so on. Much of the detailed theory of the Commission has been developed in respect to these specific items. While some of them may seem relatively unimportant, their allowance or disallowance may make a wide difference in capital structure. If allowed, they are entered as a book value upon which a reasonable rate of return must always be paid. It is therefore to the advantage of a utility to have as many as possible of them placed in the capital accounts.

(a). Good will, going value, and so on.

The Commission maintains that several factors which have often been considered as elements of value, such as good will, going value, franchise value, and monopoly value, should be eliminated from the concept of cost. All such values, says the Commission, "tend to merge". "They are all rooted in and are associated with prospective earning power."95 The proper accounting procedure is to refuse to enter them, or, where they already exist as entries, to eliminate them as rapidly as possible.96

95Pacific Power and Light Co., 46 P. U. R. (n.s.) 131, 139 (1943).
The earnest expectation of things to come cannot be capitalized. Thus, the purported present value of future savings anticipated in the purchase of gas under certain advantageous contracts cannot be capitalized. "It would be a travesty on regulation to permit fictitious amounts of this character to inflate the rate base." \(^97\) However, the actual cost to an electric company of franchises may be entered on the company's books, where there is no evidence in the record to indicate another consideration. \(^98\)

(b). Affiliate company transactions.

A second group of items, that should be eliminated, as adding nothing to the property devoted to the public interest, includes many inter-affiliate company transactions. In the past, these were a common source of inflated capitalization, \(^99\) but the Commission has repeatedly refused to allow them. For example, it has held that the excess over the original cost of electric properties, paid to a parent company when a corporation was organized as a wholly-owned and controlled subsidiary, is a write-up which cannot be used as a part of the rate base. It makes no difference that the present fair value of the property fully supports the security structure; that is, that the alleged values have caught up with and absorbed the write-up. \(^100\) Nor may such a write-up be accomplished by the device of a new corporate entity. "We will not permit such a subterfuge to obscure the real transaction. We will look through the form to the substance." \(^101\)

Cost, not value, is the fundamental basis of accounting for public utility plants. Any system which allows shifting and changeable values would nullify the effective regulation of public utilities. \(^102\) If property accounts can be written up at will, so long as the company is able to support such manipulation by evidence of present fair value, "It would follow that the plant accounts should be written down every time there

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\(^{99}\)Often a write-up was created by causing one company to convey its assets to another company at a price in excess of the figure at which they were bought by the selling company, both companies at the time being subject to common control." Healy, *Financing the Utility Property Account, Report of the Committee on Corporation Finance of the National Association of Railroad and Utilities Commissioners*, app. 429 (1940).

\(^{100}\)Pacific Power and Light Co., 46 P. U. R. (n.s.) 131, 135 et seq. (1942).

\(^{101}\)Id. at 137.

is a decrease in plant values. . . . The amounts to be honestly and properly recorded in a utility's plant account should not be permitted to oscillate with the ebb and flow of economic tides.\textsuperscript{108} No part of a write-up can be included in the rate base when it does not represent the actual legitimate cost or investment.\textsuperscript{104}

Thus, the excess of recorded cost of acquired properties over bona fide cost to affiliated transferors is a write-up and not properly chargeable to the plant account.\textsuperscript{105} When the licensee and those from whom it acquired its fixed capital are in substance and effect one and the same, the cost to the licensee of the fixed capital cannot exceed the cost thereof to the transferors. So when the transferee of fixed capital is nothing but the \textit{alter ego} of the transferors, allowable cost to the licensee cannot exceed allowable cost to the transferors.\textsuperscript{106}

Costs to a power company can be no more than the aggregate of the costs to predecessors where the power company came into being as the culmination of reorganizations and mergers of predecessor companies through the exchange of securities, while the ownership and direction remained the same.\textsuperscript{107} A transaction whereby a power company, by an exchange of stock, acquired from its president (who had been a director and the largest stockholder of its predecessor) a part interest in a company to be merged, could not result in an increase in the actual, legitimate cost.\textsuperscript{108}

"Their theory [the company's] that the mere formal existence of a new corporate entity, regardless of identity of ownership, management, and business, is sufficient to support the contention that a new cost has been incurred, would enable utilities to convert cost accounting to value accounting by the simple expedient of forming a new corporation. This would be contrary to the basis of our system of accounts. . . . Our system of accounts is firmly rooted in the cost concept, which has been generally recognized as the proper basis for regulatory purposes."\textsuperscript{109}

The original cost of property acquired by a natural gas company

\begin{footnotes}
\item[108] Northwestern Electric Co., \textit{supra}, 148, 150.
\item[104] Cities Service Gas Co., 50 P. U. R. (n.s.) 65, 72 (1943).
\item[100] Utah Power & Light Co., 53 P. U. R. (n.s.) 164, 168 (1944). "Of the $26,476,921.36 representing write-ups and other improper charges arising out of transfers of properties, $26,434,849.26 has no place at all on Light Company's balance sheet. It does not represent any bona fide cost." \textit{Id.} at 170.
\item[100] Susquehanna Power Co., 54 P. U. R. (n.s.) 418, 425, 434 (1944).
\item[109] \textit{Id.} at 207.
\item[102] \textit{Id.} at 202.
\end{footnotes}
from an affiliate is properly included in the rate base, instead of the amount in the plant account, consisting of a capitalized deficit of the affiliate and the amount paid for its stock.\(^{120}\) The Commission has consistently held that transactions at less than arm’s length do not result in an increase in actual legitimate cost. The courts have rather uniformly taken this view.\(^{111}\) In allocating overhead expenditures in cost accounting, the Commission maintains that there must be “a relationship of overhead costs to direct costs or the allocation is unwarranted.” Though it knows that there is a continuous pressure in a holding company system to realize as great profit as possible on its contracts with operating corporations subject to its control,\(^{112}\) it is firm in its position.

This brief recital indicates that the Federal Power Commission is making a successful attempt to eliminate from rate bases large items of alleged cost resulting from inter-affiliate transactions, and that it is being upheld in this endeavor by the courts.

(c). Land costs.

Several cases have arisen involving land costs. In general only the cost of land that is actually being employed in public utility services may be capitalized. Thus, the cost of land acquired for the anticipated future storage and handling of coal, etc., or the cost of land held for possible future use in providing a barge channel, is held to represent an investment in property which is not presently used and useful in the service of the public.\(^{118}\) Ordinarily a project should not be charged with costs of parcels of land lying entirely outside its borders; but such costs may be included under special circumstances, as where they represent land acquired to obtain a ferry service immediately down stream from the dam site, and useful in project construction;\(^{114}\) or were acquired

\(^{120}\)Cities Service Gas Co., 50 P. U. R. (n.s.) 65, 76 (1943).

\(^{111}\)Northwestern Electric Co. v. FPC, 321 U. S. 119 (1944). In this case the Commission had found that an item of $3,500,000 of cost of physical property was all represented by obligations issued by the company, and that the common stock did not represent the value received. It had found also that the write-up should be disposed of by applying net income, above preferred stock dividend requirements, to its elimination, and so ordered. The company protested and brought the case into court. Upon review the Supreme Court held that if the amount should remain, it would have to be in the nature of a new item reflecting present value in excess of actual cost, and therefore incompatible with a cost system of accounting. See also Panhandle Eastern Pipe Line Co. v. FPC, 143 F.2d 488 (C. C. C. 8th 1944); Alabama Power Co. v. McNinch, 94 F.2d 601 (App. D. C. 1937).

\(^{118}\)Pennsylvania Power and Light Co., 44 P. U. R. (n.s.) 344, 359 (1942).


because a certain reservoir would interfere with a potential dam site on a tributary creek. Likewise, where lands are not included in a project, profits from such lands should not be considered in establishing original cost, since the lands themselves have not been allowed as a factor therein.

In one of the Alabama Power Company cases, the Commission held that land acquired by a federal licensee should be included in the actual legitimate original cost of a power project, at the fair market value of the parcel when an affiliate had obtained it. The Commission disallowed a figure representing one-half of the outstanding stock and bonds of the affiliate, as urged by the holding company, which also controlled the licensee. In the absence of any showing as to the fair market value of the land when the licensee acquired it, the Commission set a figure based on facts in its possession.

Where it is necessary to acquire an entire tract of land in order to obtain the portion needed for a project, such cost may be allowed, less the appraised value of the non-project portion. Incidental expenses, such as those incurred in building a bridge to replace one flooded by an electrical project, may be included in the costs of the project. The Commission will not allow an extremely high price for land paid by the company to a state, where it could have secured the land by condemnation proceedings.

(d). Studies in respect to the undertaking.

As a general rule, the cost of studies in respect to a utility undertaking may not be placed in the capital account, since they are in the nature of an operating expense. This is true of outlays for many types of studies, including studies of the estimated load, costs and expected revenue; expenses in making reclassification studies in order to comply with the Uniform System of Accounts; and the cost of making a study

\[^{116}\text{Ibid.}\]
\[^{117}\text{See note 114 supra, at 459, 460.}\]
\[^{118}\text{Id. at 461.}\]
\[^{119}\text{Id. at 471.}\]
\[^{120}\text{Alabama Power Co., 43 P. U. R. (N.S.) 37, 52 (1942). In this case a price of $1,000 per acre was fixed by the governor. The Commission fixed the maximum price at $125 per acre. In Alabama Power Co. v. FPC, 136 F.2d 929 (C. C. A. 5th 1943), the Commission was upheld in finding that the price was excessive, but not in finding that $125 per acre was a reasonable amount.}\]
\[^{121}\text{Alabama Power Co., 37 P. U. R. (N.S.) 35, 465 (1941).}\]
\[^{122}\text{Cleveland and Akron v. Hope Natural Gas Co., 44 P. U. R. (N.S.) 1, 26 (1942).}\]
of power requirements of the system subject to a federal license.123 Such accounts should be carried as suspense accounts, until the sites investigated are developed or definitely abandoned. The same thing holds in respect to studies of the estimated cost of developing sources of hydroelectric and steam power; load forecast studies; and studies of capacities, location of condensers, and voltage regulation.124

On the other hand, the cost to a natural gas company of making a survey of natural gas resources to assist in determining future policy with respect to the acquisition of gas acreage, as a result of which the investigated acreage has been acquired, should be included as a part of the cost of natural gas rights.125

(e). Lobbying expenditures.

Membership dues in lobbying organizations do not constitute a direct or indirect cost of construction and must therefore be disallowed.126

(f). Engineering fees.

Engineering fees relating to the procurement of necessary data required to be furnished to the Commission in connection with an application for a power project license should be allowed as a part of the project cost. The same is true of engineering fees representing an out-of-pocket expense incurred in defending the economic feasibility of a power project before the state and federal regulatory commissions, against a vigorous and elaborate attack by another utility company.127 Engineering fees paid by an affiliate to its parent when the former has no engineering organization of its own, and when such fees represent actual out-of-pocket cost to the parent company, will be allowed as part of the original cost.128

(g). Legal expenses.

Legal expenses related to acquisition and construction may be included in the original cost account, but fees for legal services rendered after the construction period, and not shown to be related to the construction, will not be allowed as a part of the cost of the project. Also,

128Id. at 455.
a semi-monthly retainer relating to operation rather than to construction should not be allowed as a part of construction cost.\(^{129}\)

(h). Customers’ contributions.

Contributions made by consumers should be considered as a cost of construction, and should not erroneously be treated as a reduction in the costs of construction; for it makes no difference who furnishes the money or material.\(^{130}\)

(i). Cost of issuing stock and bonds.

Financing costs, according to the theory of the Commission, are a part of the cost of money, and should therefore be charged to operating expenses instead of being placed in the capital account. Thus, bond discount “is a part of the cost of money and so related to the coupon rate of interest that, only by considering discount together with the stated coupon rate of bond interest, can the actual effective interest rate be determined.”\(^{131}\) Discounts on bonds issued to pay interest on bonds previously issued, cannot be allowed as interest during construction.\(^{132}\) Likewise, the expenses incurred in selling stocks and bonds, claimed by a power project company as organizational expenses, must be disallowed because they represent a financing cost.\(^{133}\) The same is true in respect to premiums applicable to the financing of a subsidiary, that have been erroneously credited to the capital account of a licensee.\(^{134}\)

(j). Interest.

In general, interest must be considered an operating expense. Interest during construction is allowable as a capital cost; but it cannot be allowed as such after the date when construction becomes available for use,\(^{135}\) or after the maximum date for finishing the project provided for by the license.\(^{136}\) A public utility company which has exercised its permissible discretion in not charging interest to plant construction while such was in progress, cannot later attempt to add such item to plant

\(^{129}\)Id. at 452.


\(^{131}\)Id. at 370.


\(^{133}\)Alabama Power Co., 43 P. U. R. (n.s.) 37, 47 (1942).


cost; for this not only fails to conform to sound accounting principles, but also vitiates principles of equity in respect to consumers.\footnote{Northwestern Electric Co., 36 P. U. R. (n.s.) 202, 207 (1941).}

(k). Taxes prior to and during construction.

Where taxes accrued prior to the construction period they do not represent proper project costs and will therefore be disallowed.\footnote{See note 133 supra, at 37, 48.} The theory here seems to be that if a company were allowed taxes prior to construction, it might purchase land and hold the same indefinitely, although the land would not in any way be contributing to the service of the public.\footnote{See also Alabama Power Co. v. McNinch, 94 F.2d 601, 618 (App. D. C. 1937).} Taxes can be placed in the rate base only during the period of construction.\footnote{Susquehanna Power Co., 54 P. U. R. (n.s.) 418, 441 (1944).} After construction taxes become operating expenditures.

(l). Insurance during construction.

The actual cost of insurance during construction is allowable. However, a 10% charge over and above the charges made to an affiliate will be disallowed as a part of the original cost of the project, in the absence of evidence that such excess charges represented actual cost.\footnote{Alabama Power Co., 41 P. U. R. (n.s.) 449, 466 (1942).}

(m). Losses during construction.

A net loss suffered by a federal licensee as the result of a bank failure should be allowed as a part of the original cost of a power project, where the funds on deposit belonged to the licensee, were used solely for the project construction, and were necessary to meet current needs. However, additional liquidated dividends should be credited to project cost as they are received.\footnote{Puget Sound Power and Light Co., 45 P. U. R. (n.s.) 237, 248 (1942).} Past losses or losses prior to construction are not properly included in the rate base.\footnote{Cities Service Gas Co., 50 P. U. R. (n.s.) 65, 73 (1943). This doctrine has been sustained in FPC v. Natural Gas Pipeline Co., 315 U. S. 575, 588-592 (1942); Galveston Electric Co. v. Galveston, 258 U. S. 388 (1922).}

(n). Bonuses.

Bonuses paid to an affiliate's employees have been disallowed in determining the actual legitimate cost of a project. This was done because the declaration of a bonus was entirely optional, was not a matter of
right, and was not connected with the performance of any extra work.\textsuperscript{144}

When in addition to regular salaries, certain officers and employees of the contractor were paid contingent salaries, such payments were held by the Commission to represent a distribution of profits. No portion of them was allowed as a part of the actual legitimate original cost of the project.\textsuperscript{145} The Commission emphasized the fact that these bonuses were not distributed to employees generally, but to a select few. Further, they were "measured by a percentage of the net earnings of the corporation."

(o). Rents.

In determining the actual cost of a power project, rent paid to a subsidiary of a federal licensee for office space should be allowed, but only to the extent of the actual cost to the subsidiary.\textsuperscript{146} The expenses of offices opened by an affiliate of a federal licensee because of expanding business should be disallowed in determining the actual legitimate original cost of a power project, when the affiliate is assured of the licensee's business.\textsuperscript{147} Likewise, rental and other expenses of branch offices of an affiliated construction company, maintained to contact existing and prospective clients and to develop new business, do not represent overhead costs on a federally licensed power project, since the affiliate is already assured of the licensee's business.\textsuperscript{148}

(p). Entertainment expenses.

Entertainment expenses cannot be reflected in the actual, legitimate, original cost of a licensed power project.\textsuperscript{149}

(q). Traveling expenses.

When traveling expenses have no relation to the cost of the project, they will be disallowed. Examples of disallowed expenses are the costs of moving employees and their families between various jobs and branch offices,\textsuperscript{150} and the costs of transporting and entertaining officers of a management company.\textsuperscript{151}

\textsuperscript{144}Alabama Power Co., 41 P. U. R. (n.s.) 449, 470 (1942).
\textsuperscript{145}Puget Sound Power and Light Co., 45 P. U. R. (n.s.) 237, 245 (1942).
\textsuperscript{146}Alabama Power Co., 41 P. U. R. (n.s.) 449, 466 (1942).
\textsuperscript{147}Id. at 467.
\textsuperscript{148}See note 145 \textit{supra}.
\textsuperscript{149}Ibid.
\textsuperscript{150}Ibid.
\textsuperscript{151}Ibid.
\textsuperscript{152}Lexington Water Power Co., 1 F. P. C. 430, 457 (1937).
(r). Employees' welfare and benefits.
This item must be disallowed when unrelated to the project.162

(s). Payments made to affiliates for services.
In an Alabama Power Company case, the licensee claimed as a part
of the project cost a 3% fee in the amount of $373,470.65 paid to its
affiliate, Dixie Construction Company, pursuant to the cost-plus con-
tracts under which the project was constructed. This was disallowed
on the ground that there was no arm's length bargaining between the
licensees and the construction company.153 The Commission may dis-
regard the rate of interest agreed upon between affiliated companies
where the dealings were not at arm's length.154
Likewise, executive salaries representing new business expense, adver-
tising expense, and publicity expenditures, must be disallowed as a part
of the original cost of a federally licensed power company, where there is
affiliation.155

(t). Working capital.
Both during the construction period and also during operation, a
utility must have a certain amount of cash on hand—working capital on
which to operate until money comes in as payments for services. There
is always a period of lag. "Working capital", according to the Com-
misson, "consists of two chief elements, materials and supplies needed
in the business, and cash necessary to meet the operating expenses from
day to day pending collection of revenues."156 A reasonable working
capital can be added to the rate base. The time element during which
working capital is needed is important. There must be a close rela-
tionship between operating expenses and cash working capital. Thus, where

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153See note 145 supra.
1 F. P. C. 25, 39 (1932) where a remitur fee was disallowed. The commission was upheld
The U. S. Court of Appeals in this case based its decision upon the fact that the construc-
tion company was to all intents and purposes only a construction department of the
Alabama Power Company, therefore, since the Federal Power Act contemplates that the
construction item should be based on actual legitimate original cost, this 3% profit, repre-
sented by the fee, could not have been included as a part of the cost.
155In determining the actual legitimate cost of Mitchell Dam, Proj. No. 621; Chelan
Elec. Co., Licensee, 1 F. P. C. 102, 108 (1933), the Commission cites Smith v. Illinois
Bell Telephone Co., 282 U. S. 133 (1930), to sanction its contention.
expenditures do not have to be made until receipts are in, as in regard to the purchase of gas, the payment of taxes, etc., adjustments must be made to meet these situations. For example, the cost of gas purchased must be excluded from the computation of necessary cash working capital, when revenues derived from gas sale are recovered before the payment for the purchase of gas is due.\textsuperscript{167} Taxes accrued but not payable are considered available as a part of cash working capital.\textsuperscript{168} Surplus cash on hand and cash held for payment of dividends, payment of interest and debt requirements cannot be considered as working capital. Prepaid expenses, gas packed in lines, and cash set aside for reclaims may be considered as working capital and placed in the rate base.\textsuperscript{159}

(u). Construction work in progress.

Reasonable estimates of property additions to be used in the immediate future should be taken into consideration in establishing the rate basis. The Commission, however, will not place in the rate base capital expenditures estimated for the future. It will allow them only when the actual legitimate costs have been incurred.\textsuperscript{160} The exclusion of incomplete construction from the rate base does not deprive a company of just compensation on its actual investment. To allow in addition to interest capitalized during construction a return during the construction period would result in duplicate charges against the customers. In so far as a claim includes future capital expenditures, it must be disallowed.\textsuperscript{161}

The courts have upheld the Commission in this respect. In the \textit{Natural Gas Pipeline Co.} case\textsuperscript{162} the court held: "The refusal to include in the rate base capital expenditures not yet made cannot involve con-

\textsuperscript{157}Cleveland and Akron v. Hope Natural Gas Co., 44 P. U. R. (n.s.) 1, 23 (1942).
\textsuperscript{158}Interstate Natural Gas Co., Inc., 48 P. U. R. (n.s.) 267, 278 (1943); Detroit v. Panhandle Eastern Pipeline Co., 45 P. U. R. (n.s.) 203, 213 (1942); Canadian River Gas Co., 43 P. U. R. (n.s.) 208, 223 (1942). In the Interstate Natural Gas Co. case it was held (p. 278): "Taxes are accrued, and, in effect, collected from the customers long before they have to be paid by the company. These tax accruals, representing the excess of charges taxed to operations over the amounts actually paid at a given date, have always exceeded $500,000." \textit{See also} Cities Service Gas Co., 50 P. U. R. (n.s.) 65, 83 (1943).
\textsuperscript{159}Cities Service Gas Co., 50 P. U. R. (n.s.) 65, 83 (1943).
\textsuperscript{160}See note 157 \textit{supra}, at 22.
\textsuperscript{162}FPC v. Natural Gas Pipeline Co., 315 U. S. 575 (1942).
fiscation.” When construction has been placed in service or will be so placed before the end of the year, it must be included in the rate base. 163

2. Factors to be considered during operation.

(a). Depreciation.

According to the Federal Power Commission, depreciation means “the loss in service value not restored by current maintenance, incurred in connection with the consumption or prospective retirement of electric or gas plant in the course of service from causes which are known to be in current operation and against which the utility is not protected by insurance.” 164 “The actual existing depreciation must be deducted from the actual legitimate cost of the property devoted to the public service in arriving at the rate base.” 165 The Commission sees two separate aspects of the depreciation problem. The first relates to depreciation expenses or the amount of the depreciation charge, while the second relates to the actual depreciation of the properties at any given time. These two aspects of the problem should always be in agreement. 166 The Commission quotes with approval the following statement: “The same factors which cause annual depreciation also cause depreciation to be deducted from property in determining the rate base.” 167

Where proper accounting practices have been preserved throughout the life of the property, the resulting depreciation reserve is a good measure of actual depreciation in any property, or of accrued deprecia-

164 This is a composite definition taken from, FPC, Uniform System of Accounts Prescribed for Public Utilities and Licensees, Definitions 5 (1937), and FPC, Uniform System of Accounts Prescribed for Natural Gas Companies, Definitions 4 (1940). In respect to natural gas companies there is added to the definition “and, in the case of natural gas companies, the exhaustion of natural resources.”
165 Los Angeles Gas and Electric Co. v. California Railroad Comm’n., 289 U. S. 287, 312 (1933); Cleveland and Akron v. Hope Natural Gas Co., 44 P. U. R. (n.s.) 1, 16 (1942); Interstate Power Co., 32 P. U. R. (n.s.) 1, 10 (1940).
166 Actual existing depletion and depreciation is the extent to which the service life, that is the economic life, of the property has been consumed due to such forces as exhaustion of the natural gas supply, wear, inadequacy, and obsolescence. Annual depletion and depreciation measure the economic service life consumed in one year. Actual existing depletion and depreciation are the accrued consumption of the utility’s economic service life on a certain date; the annual allowance for depletion and depreciation must, therefore, be correlated with the actual existing amount to avoid injustice to the utility or the rate payer.” Cleveland and Akron v. Hope Natural Gas Co., 44 P. U. R. (n.s.) 1, 17 (1942).
167 Report of the Special Committee on Depreciation of the National Association of Railroad and Utility Commissioners 438 (1938).
tion. Where, however, proper accounting practices have not been followed, it is necessary to make a field examination so that annual depreciation expenses and the total amount of the depreciation at any one time can be harmonized.

Depreciation should be related to original cost rather than to the cost of reproduction new. Where the property base suggested by a company for the accrual of depreciation includes write-ups and other improper items, these will not be allowed by the Commission. "The Constitution does not require that the owner who embarks in a wasting-asset business of limited life shall receive at the end more than he has put into it," as Mr. Justice Stone said in the *Natural Gas Pipeline* case.

It is not proper to allege a small amount of accrued or existing depletion and depreciation to be deducted in fixing the rate base, and yet to claim, as some companies have done, the allowance of a large annual amount of depreciation for future operating expenses. "... the dual standard advocated is a pincers operation which always results in squeezing too much from the rate-payer." To put it bluntly, since the accrued depreciation is deducted from the rate base, it is to the advantage of the company to enter in the accounts little accrued depreciation; but since the annual depreciation is an expense that can be figured in establishing the rate, it is to its advantage to enter as large an item of expense for depreciation as possible. The Commission's duty is to arrive at a single fair estimate of depreciation; since if observed depreciation is less than the depreciation reserve, there has been an unwarranted charge to the public. If properly is retired, its full cost

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170 "It is inequitable to predicate depletion and depreciation upon the delusive reproduction cost." The method used by the Commission has been approved by the Supreme Court in *FPC v. Natural Gas Pipeline Co.*, 315 U. S. 575, 592, 593 (1942).
175 The Commission has said that where the observed depreciation was less than the depreciation reserve, "... then clearly the respondent has been charging the purchasing companies annually in excess of a reasonable amount as depreciation expense and the future allowance should be reduced accordingly." Chicago District Electric Generating Corp., 39 P. U. R. (n.s.) 263, 275 (1941).
must be deducted from reserve requirements: that is, retirement is equivalent to accrued depreciation.176

(b). Surplus.

Theoretically, if rates were adjusted perfectly there would be no such thing as surplus, since what came in would exactly pay all necessary expenses, provide for depreciation, and provide a reasonable return upon the investment. In actual practice the rate fixed may provide somewhat less or somewhat more than has been anticipated. To place surplus in the capital account or in the rate base would mean that the users of services would be paying interest on that which they themselves had contributed. The Commission consistently refuses to admit surplus as part of the rate base.

The statute itself determines, as we have seen, what shall be done with excessive earnings of licensees under the Federal Water Power Act. It provides that after the expiration of the first twenty years under a license, excessive earnings shall be accumulated in an amortization reserve, for use in the reduction of the net investment in the project.177 However, a power company may not accumulate a reserve out of earnings sufficient in amount to equal, at the expiration of the license, an amount excluded by the Federal Power Commission from the original cost of the project, instead of charging such an amount to earned surplus. "To sanction such a proposal would be to nullify the basic purposes of the Federal Power Act, to ignore the interstate consumers and investors and to permit the declaration of dividends out of capital."178 The courts have upheld the Commission in this matter, saying that even though such a charge to surplus rather than to investment may affect a company's credit, the market price of its securities, and the interest which it must pay on bank loans, it is in no sense confiscatory.179

(c). Other items.

Several items which must be considered in connection with operating expenses are also taken into consideration in connection with expenses

177FWPA § 10 (d).
179"Clearly, the required charge to surplus is in no sense a confiscation of the petitioners' property when we keep in mind that what is involved is a licensed project not only subject to accepted conditions of amortization, recapture, or taking over, but subject also to revocation of the license if certain of its conditions are not complied with." Louisville Gas and Electric Co. v. FPC, 129 F. 2d 126, 134 (1942).
during construction. The most important of these, such as working capital, lobbying expenses, and interest, have already been discussed.

Special Applications of Doctrine of Original Cost to Field Reserves and Production and Gathering Facilities of Natural Gas Companies

One of the most important of the legal and economic issues raised in the application of the theory of original cost has concerned the accounting allowances to be made (1) when gas is sold to the pipe lines by independent producers, and (2) when natural gas companies have their own field reserves and production and gathering facilities. The gas companies naturally wish both cases to be treated in the same way—that is, they desire gas gathered in their own fields to be treated as if the gas had been purchased at the market price.

The position of the Federal Power Commission in respect to these two different situations has been summarized as follows: 180

“(1) For all gas entering interstate pipe lines from producers and gatherers under arm’s-length contracts, the Commission has always allowed the entire price paid by the pipe line company as a cost to be included in the determination of reasonable rates for sales of gas subject to its jurisdiction.

“(2) For all gas entering interstate pipe lines from production and gathering by a pipe line company or by its subsidiary or affiliate, the Commission has always allowed the full cost of the production and gathering operations, including a fair return on the net investment in such operations. The Commission has consistently included in such costs delayed rentals, all costs of exploration, including the drilling of dry holes, royalties, etc. In short, the Commission has treated the production and gathering of pipe lines or their affiliates as parts of utility operations, the entire reasonable cost of which should be borne by the pipe line customers.”


It will be remembered that under the Federal Water Power Act of 1920, the Commission was charged with the responsibility of determining the “actual legitimate cost” and the “net investment” of all licensed projects, in order to establish a basis (a) for rate making,

and (b) for just and fair compensation in case certain contingencies should arise, such as the operation or taking over of a project by the government. In order to meet this responsibility, it was necessary to prescribe a system of accounts. Here several difficulties appeared. Most of the federal licensees were also subject to the accounting requirements of state commissions. The National Association of Railroad and Utilities Commissioners had worked out a uniform accounting system which was widely used; but certain provisions of the Federal Water Power Act, particularly those in respect to original cost and depreciation, made it impossible for the Commission to adopt this in toto. In 1922 the Federal Power Commission set up its own system, and for some years two systems were used side by side.

Several forces made for the adoption of the uniform system, applicable not only to water power licensees but (with suitable modifications) to electric and gas utilities, which is now used by the great majority of the state commissions as well as by the Federal Power Commission. Both the states and industry had experienced a growing dissatisfaction with the accounting system developed by the National Association of Railroad and Utilities Commissioners. This dissatisfaction was accentuated by the shift toward a stricter control of public utilities in order to end the financial abuses which had grown up and which became evident during the 1929 panic.181

After making an investigation into the power industry at the request of the Senate, the Federal Trade Commission recommended that Congress enact remedial legislation to restore "soundness and common honesty in corporate and particularly in holding company affairs"; also that an appropriate agency be given "power to make and enforce regulations as to uniform accounting." It stated that if the matter of write-ups were left entirely to the regulatory ventures of the several states, "it is more than doubtful that it will ever lead to the realization of effective regulation. More specifically, this means the nation-wide jurisdiction must be promptly invoked to regulate and to reinforce state regulation."182

181 See FTC, REPORT ON PUBLIC UTILITIES, Vols. I-LXXXIV (1928-1935) making a comprehensive study of the public utility industry pursuant to S. Res. No. 83, 70th Cong., 1st Sess. (1928). These reports revealed that the assets of public utility holding and operating companies had been written up by approximately one and one-half billion dollars. If these inflated values were placed in the rate base it would mean that consumers were paying something like $90,000,000 per year on a plant value which never existed.

182 See Jackson, Legal Survey on Use of Valuation "Write up" of Fixed Capital Assets as Basis for Security Issues, 73 A REPORT ON PUBLIC UTILITIES 109, 139 (1934).
This report of the Federal Trade Commission led to the passage of the 1935 Water Power Act, which greatly extended federal control in the interstate electric field. Such extension meant that a large number of companies would be forced to keep two sets of books in order to meet the diverse requirements of the federal and state commissions, unless a uniform system were established. Hence new attempts were made to secure such a system. After improved systems of accounts had been considered by several states, the Federal Power Commission, with the collaboration of representatives of the National Association of Railroad and Utilities Commissioners, state commissions as such, and the gas and electricity industries, established a uniform accounting system for electrical utilities which has been adopted by the great majority of states. “Out of numerous meetings came a revised system of accounts for electric utilities, prescribed by the Federal Power Commission ... and in substantially identical form approved by the Executive Committee of the Association [Railroad and Utilities Commissioners] in June and recommended by the Association at its annual convention in November, 1936. At the same time the Association recommended an accounting classification for gas utilities which follows the essential major principles of the electric system.” This system, with certain modifications in particular instances, is now prescribed by thirty-five regulatory commissions. As the result of these studies and recommendations, the accounting systems of the great majority of the states and that of the federal government are now practically uniform in respect to electrical and gas utilities.

The new uniform system of accounts for electrical utilities was approved by the Federal Power Commission on June 16, 1935, and became effective as of January 1, 1937. In November, 1939, the Federal Power Commission adopted an Order Prescribing a System of Accounts Under the Natural Gas Act. This system, which was based on the same general principles used for electric companies, took effect on January 1, 1940.

In each case, the system is established on a “cost” as distinguished from a “value” basis. In brief, it provides for two chief accounts into

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186FPC Order No. 69 (1939).
which, after appropriate study, all other accounts are to be entered: (1) Utility Plant, and (2) Utility Plant Adjustments. The Utility Plant account shows the actual legitimate cost; that is, the bona fide investment. This account is divided into several sub-accounts, such as Utility Plant in Service, Utility Plant Leased to Others, and Utility Plant Held for Future Use. In the sub-accounts, particular items such as land rights, structures and improvements, transmission plant, distribution plant, etc., must be entered at original cost. By original cost is meant “the cost of such property to the person first devoting it to the public service.”

Where the accounting utility was the first to devote the property to public service, naturally the original cost is the cost to it. Where, however, the utility has purchased an operating system at arm’s length, for more or less than the original cost, the difference is classified in a sub-account designated as Utility Plant Acquisition Adjustments. These accounts are of prime importance in the attempt to establish an original cost rate basis. The accounting system includes detailed instructions as to the items which shall go into each account.

The Utility Plant Adjustments account is designed to show the amount by which the book value of the plant, at the effective date of the system of accounts, differs from the cost of the plant to the utility. It requires the inclusion of all write-ups, inflation, “water” and other fictitious amounts which have been injected into the books of accounts.

Other important accounts in addition to the balance sheet accounts are: the Earned Surplus account; the Income accounts; the Operating Revenue accounts; the Operating Expense accounts; and the Clearing accounts.

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188 Arm’s length purchase is distinguished from affiliated company transactions.
190 The balance sheet accounts are intended to “disclose the financial condition of the utility at a given date by showing its assets and other debits, and liabilities, capital stock surplus (or deficit) and other credits.” FPC, Uniform System of Accounts for Public Utilities 12 (1937).

The earned surplus account is “the collective title of a group of accounts which form the connecting link between the income account and the balance sheet.” Id. at 84. These accounts, include, basically, the net credit and debit balances transferred from the income account of the year.

“The income accounts are . . . designed to show for each month and each calendar year the operating revenues and expenses, the other income, the income deductions, the net income, and the amount of income or loss remaining for transfer to earned surplus.” Id. at 87.
The Uniform System of Accounts deals with the numerous factors entering into the calculation of costs, and gives careful definitions and instructions telling where each item shall be placed. It is an essential tool for regulation on the original cost basis. The significance of this accounting system (as adapted to classes of utilities) depends not only upon the fact that the various accounts and subsidiary accounts have been established, but also upon the further facts that utilities must classify their accounts in detail according to the appropriate system, that the Power Commission can cause them to conform to this classification, and that it can order particular items to be placed in specific accounts. In case of failure to comply, court action may be had by the Commission. This means, in the last analysis, that the various items entering into original cost and forming the composite cost upon which rates are based (which is also, in the case of licensees, the valuation at which the government may take them over or operate them), are prescribed by the Federal Power Commission. The accounting system, then, after it comes into full operation, almost automatically sets forth the original cost. Hence the main problem, if accounts have been kept properly, is that of determining a fair rate of return.

"The operating revenue accounts . . . are designed to show the amounts of money which the utility becomes entitled to receive from furnishing electric utility service and from service rendered but not yet billed where the utility exercises its option and records on its book such accrued electric revenue." *Id.* at 96.

"The operating expense accounts . . . are designed to show in detail the cost (except depreciation, amortization, certain property losses, and taxes) of furnishing electric utility service." *Id.* at 102.

The clearing accounts include "charges made by associated companies against the utility for any purpose whatsoever, except interest, including charges for management, supervision, purchasing, construction, accounting, engineering, legal, financial, rent, advertising material, supplies, equipment and other items." *Id.* at 113. This type of account is particularly important from the viewpoint of associated or affiliated company transactions. It serves as a means of preventing the insertion of unjustly high expenditures for such services.

Another important problem is uniformity of practice.

"The possibility of conflicts between the two jurisdictions [federal and state] does not end when a new system of accounts is ordered. Any system of accounts requires interpretation from time to time. Inconsistent interpretations by state and federal accounting authorities will in the course of time destroy uniformity in applying the system of accounts. Such a result can be avoided if both state and federal agencies arrange for consultation or exchange of views on such interpretations. This kind of cooperation between agencies whose authority is in part exclusive, in part concurrent, is no novelty in a political system operating according to the rules of dual sovereignty, and is becoming an increasingly important issue in administrative law and practice." *Morehouse, supra* note 184, at 965.
The Doctrine of Original Cost and the Courts

The doctrine of original cost in respect to the utilities under the jurisdiction of the Federal Power Commission has been attacked before the courts in four different ways.192 These are: (1) the attack upon the regulation of natural gas; (2) the question of the jurisdiction of the Commission over production and gathering facilities; (3) the constitutionality of the use of the original cost method; and (4) questions as to the detailed application of the theory of original cost. Each of these points will be discussed as briefly as possible.

The Attack Upon the Regulation of Natural Gas.

The constitutionality of the Natural Gas Act was attacked in 1942 by the Natural Gas Pipeline Co.193 The company contended that the regulation of natural gas, as imposed by the act, is in violation of the Fifth Amendment to the Constitution, because the natural gas business is not affected with a public interest, and is therefore not subject to price regulation. It maintained that its sales are sales of an ordinary commodity to a few selected buyers; that the company is not a common carrier; and that it had not constituted itself a public utility or dedicated its property to a public use.194

The Supreme Court held that the arguments of the Natural Gas Pipeline Company were without merit. The sale of natural gas originating in one state, which is transported and delivered to distributors in any other state, constitutes interstate commerce, a matter expressly subjected to Congressional regulation by the Constitution of the United States. "It is no objection," said the Court, "to the exercise of the power of Congress that it is attended by some incidents which attend the exercise of the police power of a State. The authority of Congress to regulate the price of commodities in interstate commerce is at least as great under the Fifth Amendment as is that of the States under the Fourteenth to regulate the prices of commodities in intrastate commerce.

192These attacks have centered upon the Natural Gas Act. The constitutionality of the doctrine of original cost contained in the Water Act could not well arise, since Congress was dealing with a subject matter concerning which the federal government has complete dominion. The method of determining the "net investment of the licensee" by the original cost method was an integral part of the grant of the license. In respect to interstate licensees under the Public Utility Act, it is probable that the decisions which had been made in respect to state cases acted as a deterrent to those who opposed this method. Practically all of the attacks, therefore, have been made upon the Natural Gas Act.


"The price of gas distributed through pipelines for public consumption has been too long and consistently recognized as a proper subject of regulation under the Fourteenth Amendment to admit of doubts concerning the propriety of like regulation under the Fifth. And the fact that the distribution here involved is by wholesale rather than retail sales presents no differences of significance to the protection of the public interest which is the object of price regulation."

The Jurisdiction of the Commission Over Production and Gathering Facilities.

1. The view taken by the Commission.

It has been noted that a provision of the Natural Gas Act prohibited the application of the said act to the "production or gathering of natural gas"; and that the Commission, although it claims no jurisdiction over production and gathering as such, or over the physical activities connected therewith, insists upon its power to include the original cost of production and gathering facilities in the rate base. The Commission also holds that it has jurisdiction over the facilities of production and gathering when they constitute an integral part of a company's total operations.

Thus, in the case of the Canadian River Gas Company, the Commission said: "The particular contention of Canadian, that in so far as it is engaged in the production and gathering of natural gas it is not subject to the jurisdiction of the Commission, is unsound. Canadian's production and gathering operations are an integral part of its total operations. . . . Furthermore, Canadian's operations are an integral part of Colorado's operations and the two comprise a single operating system. The investigation of Canadian's production and gathering property and operations is indispensable in regulating Canadian's rates and charges for the sale of natural gas in interstate commerce for resale and for the transportation of natural gas in interstate commerce." As will appear later, the Supreme Court sustained the Commission in the matter.

Acting upon the assumption mentioned, the Commission took jurisdiction over the producing and gathering facilities of a natural gas company and allowed the company 6½ per cent on the depreciated cost of such properties and facilities. It next took jurisdiction over the pro-

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196 43 P. U. R. (n.s.) 205, 213 (1942).

ducing and gathering facilities of companies affiliated with a natural gas company, and allowed a 6 1/2 per cent return on the depreciated cost of the properties of the affiliates. In each instance, the utilities affected asked the courts for relief. Both of these cases finally went to the Supreme Court upon writs of certiorari. In both cases, the Commission was sustained.

2. The action of the courts.

In the Hope case, the Commission had taken jurisdiction over the production and gathering facilities, as well as other relevant factors, in determining the rate base. When the case reached the Supreme Court, this high authority expressed its approval of the jurisdiction assumed by the Commission. In a footnote to its decision, the Court said: "It is suggested, however, that the Commission in ascertaining the cost of Hope's natural gas production plant proceeded contrary to Sec. 1 (b) which provides that the Act shall not apply to 'the production or gathering of natural gas.' But such valuation, like the provisions for operating expenses, is essential to the rate-making function as customarily performed in this country. . . . Indeed Sec. 14 (b) of the Act gives the Commission the power to 'determine the propriety and the reasonableness of the inclusion in operating expenses, capital, or surplus of all delay rentals or other forms of rental or compensation for unoperated lands and leases.'

A much stronger and more clearly defined upholding of the jurisdiction of the Commission in respect to the production and gathering facilities of interstate pipe lines was given in the Colorado Interstate Gas Company case. Here the Commission had set a rate base which included the production and gathering properties of an affiliate, the Canadian River Company. An allowance had been made for working capital to enable Canadian to carry on its production and gathering operations; also an allowance for Canadian's operating expenses, which included the cost of producing and gathering natural gas. The Supreme Court rejected the contention of the petitioner that section 1 of the act, in respect to production and gathering facilities, placed a

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201324 U. S. 581 (1945).
limitation upon the Commission's power to include the same in the rate base. It said:

"That does not mean that the part of Sec. 1 (b) which provides that the Act shall not apply 'to the production or gathering of natural gas' is given no meaning. Certainly that provision precludes the Commission from any control over the activity of producing or gathering natural gas. For example, it makes plain that the Commission has no control over the drilling and spacing of wells and the like. It may put other limitations on the Commission. We only decide that it does not preclude the Commission from reflecting the production and gathering facilities of a natural-gas company in the rate base and determining the expenses incident thereto for the purpose of determining the reasonableness of rates subject to its jurisdiction."

In the case of the Panhandle Eastern Pipe Line Co., the facts were as follows: The Commission had included in the rate base the company's production and gathering facilities. The petitioner claimed that it was incumbent upon the Commission to determine the field price or actual field value in the area in which the company produces gas, and to allow the petitioner that price as an expense item for all gas produced by it and taken into its interstate pipeline system. The court held that this question is controlled by the Canadian River case and went on to say: "It is clear that the value of producing properties and gathering facilities is affected whatever rates are fixed. That is inevitably true whether the leaseholds are put into the rate base or whether as petitioner urges the gas is valued as a commodity. That result is not avoided unless Congress puts a floor under production properties and gathering facilities of natural gas companies and fixes a minimum return on them." The court quotes with approval the opinion of Judge Sanborn in the Circuit Court of Appeals, who said: "If there is an infirmity in the Commission's determination of the amount which should be included in the rate base as the cost or value of such facilities, we think the infirmity arises from the method used in the making of the valuation, and not from any lack of jurisdiction."

3. Conflicting attitudes regarding the question.

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204324 U. S. 635 (1945).
200Id. at 649.
200Panhandle Eastern Pipe Line Co. v. FPC, 143 F.2d 495 (C. C. A. 8th 1944).
Although the courts have definitely upheld the Federal Power Commission's jurisdiction over production and gathering facilities in connection with the establishment of the rate base, there is still widespread opposition toward permitting the Commission to exercise such jurisdiction. This opposition is based on various grounds and comes from various sources.

For example, Justice Jackson's separate opinion in the *Hope* case attacks the economic expediency of applying the doctrine of original cost to production and gathering facilities, although it does not deny the Commission's jurisdiction. The opinion states that transporting natural gas and producing and gathering it are two components of the business of quite divergent character; and maintains that although the original cost rate base may be applicable to the transportation part of the business, it is not applicable to the production and gathering part of the business, since this is "more erratic and irregular and unpredictable in relation to investment than any phase of any other utility business."207 Justice Jackson also indicates doubts of the adequacy of the Commission's price fixing formula to protect the public interest. He remarks that the Commission should take into consideration all aspects of that interest, which he considers to be: the elusive, exhaustible, and irreplaceable nature of natural gas; the factors of investment and monopoly; the developmental risks; the need to put natural gas to the greatest social use; the ultimate use of gas; the fact that the natural gas business has two component parts; the problem of reduction and possession, and the problem of transportation; the fact that a reasonable price paid for gas in the field need not be anchored to a rate base of any kind, whereas a natural gas transportation line may well be; the effect of a low industrial rate upon the exhaustion of the supply, and so on.208 He suggests that if the Commission fails to take all these factors into consideration, in a case which comes before the Supreme Court, the case should be returned to the Commission.209

The petroleum and gas industries are attacking the Commission's views and practices, for very different reasons. They desire legislation which would definitely make it impossible for the Commission to place production and gathering facilities in the rate base. At the same time, they wish all gas produced by a pipe line company, or purchased by it from an affiliate, to be considered a commodity, bought at the "prevail-

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208Id. at 646.
209Id. at 660.
ing market price in the field or fields where produced," and entered in the books as an operating expense. Such an arrangement is expected to be much more lucrative than the present practice. These provisions have been written into the Rizley Bill, and is sponsored by the oil and gas interests.

Two members of the Federal Power Commission, Commissioners Smith and Wimberly, go along with the general theory of the industry. However, they would give the Commission power to determine whether the field prices have been established by independent bargaining, to prevent "price rigging", to fix a reasonable commodity value where there is no sufficient objective test of field price, and to make appropriate adjustments for dissimilarities regarding such matters as quality, pressure, volume, location and other special conditions.

Commissioners Olds and Draper believe that the jurisdiction of the Federal Power Commission to include production and gathering facilities in the rate base, as asserted by the Commission and sustained by the Supreme Court, should remain unchanged. If the Commission did not have this power, they maintain, the companies which control the bulk of natural gas reserves would have full opportunity to "exploit the country's limited natural gas reserves in such a way as to secure the largest and quickest profits, without regard for either the regional or the national interests. The 'fair field price' or 'commodity value' amendment alone, in whatever form it may be offered, would literally net these corporations billions of dollars over the life of the fields, whose lives would be measurably shortened by banning consideration of the conservation aspects associated with interstate transportation and sale of natural gas."

From this brief discussion it is clear that the question of the Federal Power Commission's jurisdiction to include gathering and production facilities in the rate base is far more than a matter of statutory interpretation. It involves problems of fundamental public policy.

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23For an analysis of the chief problems connected with natural gas regulation see Blachly and Oatman, Natural Gas and the Public Interest (1947).
The Constitutionality of the Use of the Original Cost Method.

Almost immediately after the Natural Gas Act was passed, the Commission, following complaints from the cities of Cleveland and Akron, instituted on its own motion an investigation into the contracts, rates and agreements of the Hope Natural Gas Company, as well as the contracts and rate schedules of the Natural Gas Pipeline Company of America and its affiliate the Texoma Natural Gas Company. When the Pipeline case was brought before the Supreme Court upon certiorari, the Commission repeated the arguments which it had previously made to the court as amicus curiae in the Driscoll and Pacific Gas and Electric Co. cases. It urged the abandonment of the reproduction cost theory, and maintained that the Commission should exercise reasonable administrative discretion in establishing a rate base. The Court sustained the contention of the Commission by unanimous decision. The most important holding in the case is found in the following statement:

"The Constitution does not bind the rate-making bodies to the service of a single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambient of their statutory authority, to make 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, produce no arbitrary results, our inquiry is at an end."215

Shortly after the Pipeline case had been decided, the Hope Natural Gas Company appealed from an action in which the Commission had relied exclusively upon the prudent investment or original cost base, and had fixed a rate expected to result in a reduction of more than $5,000,000 annually.216 No weight had been given to reproduction cost, since the Commission held that such cost was "not predicated upon facts" and was "too conjectural and illusory to be given weight in these proceedings." The Commission also refused to consider "trended original cost", on the theory that this concept is "not founded on fact," but is "basically erroneous and productive of irrational results."

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216Id. at 575.
When the case reached the Supreme Court,\(^{217}\) it brought forth from that body a variety of opinions and dissents, all of which are important, but most of which cannot be discussed here for lack of space. The majority opinion\(^{218}\) dealt primarily with rate making theory, the method of determining the reasonableness of rates, and the position of the court in the control of administrative rate making.

Repudiating the theory that in rate regulation the valuation of the property should be based upon principles applicable to the taking of property under eminent domain, the court placed rate regulation on a police power basis. "Rate-making," said the court, "is indeed but one species of price-fixing. The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid."\(^{219}\) The theory that a fair rate of return depends upon a fair value, when that value depends upon the rate of return, was also demolished by the court. Fair value, it said, "is the end product of the process of rate making, not the starting point. . . . The heart of the matter is that rates cannot be made to depend upon 'fair value' when the value of the going enterprise depends on earnings under whatever rates may be anticipated."\(^{220}\)

In respect to methods of determining the reasonableness of rates fixed by the Commission, the Court affirmed the "pragmatic adjustment" method mentioned in the Pipeline case. The Commission, reiterated the court, is not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function involves the making of "pragmatic adjustments."\(^{221}\) The method employed is not controlling, nor is the theory upon which rates are established. The important question is whether "the result reached", the final effect, the "impact of the rate order", the "end result", or the order "viewed in its entirety" can be deemed to meet the requirements of the act. Regarding the relationship of the court to the administration in rate making, the Court said: "The Commission's order does not become suspect by reason of the fact that it is challenged. It is the product

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\(^{218}\)This opinion was written by Mr. Justice Douglas who had participated in the concurring opinion in the Pipeline case, and had there maintained that rate making should be placed upon the police formula, rather than on the principle of eminent domain.


\(^{221}\)Id. at 602.
of expert judgment which carries a presumption of validity. And he who would upset a 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.

"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."222

It seems clear, from these decisions of the Supreme Court, that the doctrine of original cost as applied by the Federal Power Commission (including the cost of production and gathering facilities) is constitutional.


As has been noted above, differences between the Commission and the various utilities under its jurisdiction regarding specific items entering into the picture of original cost have to do with such matters as goodwill, going concern value, market value, affiliated agency transactions, land costs, studies in respect to the undertaking, lobbying expenses, engineering and management fees, customers' contributions, cost of issuing stock and bonds, interest and taxes prior to and during construction, losses incurred during construction, insurance during construction, bonuses, rents during construction, entertainment expenses, traveling expenses, employees' welfare and benefits, payments made to affiliates for interest or services, construction work in progress, the handling of depreciation, working capital both during construction and operation, surplus and reserves, and the rate of return on the investment. In respect to such of these factors as have been contested judicially, the courts have almost uniformly upheld the Commission in its economic and accounting theories. A complete discussion of the many factors listed above is not necessary for our present purpose. However, citations to the principal cases involving these points are given in the footnote below, in order to complete the picture.223

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222Ibid.
223(1) Goodwill, going concern value, market value, etc. Colorado Interstate Gas Co. v. FPC, 142 F.2d 943 (C. C. A. 10th 1944); Alabama Power Co. v. McNinch, 94 F.2d 601 (App. D. C. 1937).
(2) Affiliate company transactions. Cities Service Gas Co. v. FPC, 155 F.2d 694, 703 (C. C. A. 10th 1946), cert. denied, 329 U. S. 773 (1946); California Oregon Power Co. v. FPC, 150 F.2d 25 (C. C. A. 9th 1945), cert. denied, 326 U. S. 781 (1945); Colorado Interstate Gas Co. v. FPC, supra at 956; Pennsylvania Power and Light Co. v. FPC, 139 F.2d 445 (C. C. A. 3rd 1944), cert. denied, 321 U. S. 798 (1944);
SUMMARY AND CONCLUSIONS

A concatenation of circumstances has done much to displace the doctrine of value as a basis for the fixing of rates and to substitute therefor the doctrine of original cost. Although this development had its germs in certain state regulatory cases brought before the Supreme Court after 1930, much more has been accomplished through the regulation of the utilities under the jurisdiction of the Federal Power Commission; namely, water power licensed projects, interstate electrical concerns, and natural gas transportation companies.

The regulatory activity of the Federal Power Commission is based upon three important federal statutes with their amendments. The first of these, the Federal Water Power Act, expressly provided for the original cost basis. Both the Public Utility Act of 1935, Part II, and the Natural Gas Act of 1938, as interpreted by the Federal Power Com-

Niagara Falls Power Co. v. FPC, 137 F.2d 787 (C. C. A. 2d 1943), cert. denied, 320 U. S. 792 (1943); Puget Sound Power and Light Co. v. FPC, 137 F.2d 701 (App. D. C. 1943); Alabama Power Co. v. FPC, 134 F.2d 602 (C. C. A. 5th 1943); Alabama Power Co. v. McNinch, supra.


(4) Engineering fees. Pennsylvania Power and Light Co. v. FPC, supra at 451; Colorado Interstate Gas Co. v. FPC, supra.

(5) Interest upon preconstruction expenditures. Alabama Power Co. v. McNinch, supra; Colorado Interstate Gas Co. v. FPC, supra at 961.


(11) Expenses. Mississippi River Fuel Corp. v. FPC, supra; Colorado Interstate Gas Co. v. FPC, supra at 957.


(13) Rate of return. Colorado Interstate Gas Co. v. FPC, supra at 961-962.

(14) What actual legitimate cost is. Niagara Falls Power Co. v. FPC, supra.

(15) Rate order must be viewed in its entirety. Interstate Natural Gas Co. v. FPC, 156 F.2d 949 (C. C. A. 5th 1946), cert. denied, 329 U. S. 802 (1947).

mission and the courts, left the way open for the Commission to use original cost as a rate base. All these statutes gave the Commission the necessary administrative powers to make effective its decisions as to rate bases, including the power to make rules and regulations on such matters as accounts and accounting systems, the keeping of records and documents, and the submission of reports. In addition to making general rules and regulations, the Commission might determine by order the accounts in which particular items should be entered, and fix by order rates of depreciation. Wide powers of investigation, with access to accounts, records and memoranda, were also bestowed upon the Commission.

Acting upon this statutory basis, the Commission, with the assistance of state regulatory authorities, and with the cooperation of some of the utilities concerned, has worked out accounting systems for the utilities under its control. Practically the same accounting systems are used by a majority of the state regulatory commissions. These systems are based upon a comprehensive economic and legal doctrine which controls the items entering into each account. Although the systems adopted by the Commission have been attacked in many lawsuits involving the validity of the doctrine governing the accounting factors, they have been almost universally upheld. Thus the use of original cost as a rate base, as expressed in the various factors entering into the accounting systems, has not only a widely accepted economic foundation but also a strong legal basis.

Each accounting system becomes almost an automatic controller of the rate base. Since the system is set up to show original cost, a matter which is primarily factual, there is no need for the Commission to hold long-drawn-out and expensive hearings as to the present day value of the plant, or some other estimated or guessed-at valuation in order to determine a rate base. The rate base of original cost has been shown by the accounting system. The chief problem then before the Commission, in the establishment of a rate, is that of passing upon the correct percentage of return—something which has never caused much difficult litigation.

The courts have done a great deal to assure the success of the doctrine of original cost as interpreted by the Commission: (1) by upholding its statutory jurisdiction; (2) by striking the death blow to the doctrine of fair value; and (3) by upholding the Commission in its determinations as to the economic factors which should or should not be included in the original cost basis, and as to the handling of operating expenses, depreciation, surplus, and other factors.
The problem of the statutory jurisdiction of the Commission has been of special importance in respect to its control over natural gas companies. The Supreme Court has upheld the Commission in applying the doctrine of original cost to the production and gathering facilities of natural gas companies, as well as to their interstate transmission facilities.

Due partly to a changed attitude of the courts in recent years, and partly to the powerful arguments brought before the Supreme Court in briefs by the Attorney General, the Federal Power Commission and the National Association of Railroad and Utilities Commissioners, the Supreme Court has now made it plain that regulatory agencies are free within the scope of their authority, to fix just and reasonable utility rates without regard to the fair value formula. The Natural Gas Pipeline Company, the Hope Natural Gas Company, and the Panhandle Eastern Pipeline cases have done away with the contention that fair value or replacement value should be used as a basis for rates; and have made it clear that the Commission will be upheld in using the original cost basis. The courts appear at present to realize that the fair-value theory and its corollary, the reproduction cost theory, are unsound in both their economic and legal connotations.

The present day doctrine of the courts, that the Commission in setting the rate base is not bound by any particular formula, but may make "pragmatic adjustments", may use any formula so long as the "end result" is not confiscatory, and the order "viewed in its entirety, produces no arbitrary results", may be open to adverse criticism in certain respects. However, there can be no doubt that it upholds the proper exercise of administration discretion. In effect, it gives to the Commission a wide leeway regarding the basis employed for rate making; and it is particularly significant in that it makes possible the use of original cost as a rate base.

Much controversy has arisen as to whether the doctrine of original cost is applicable to the production and gathering facilities of natural gas which belong to the pipe line companies. A negative or doubtful position on this question has been taken by the natural gas and petroleum interests, certain members of the Federal Power Commission, one mem-

ber of the Supreme Court, and others. Much of this controversy turns upon points of economic and social policy. Those who favor treating gas as a commodity, to be entered upon the account books (as if it had been bought by the pipe lines whose properties produce it) at a fair "field price", maintain that the original cost formula has many serious disadvantages. They say that the use of such a formula will hinder exploration for petroleum and natural gas; will prevent the necessary development of production and gathering facilities; will have a tendency to lower the price paid for gas by pipeline companies to independent producers and gatherers; will make for wastage of natural gas; and will prevent the pipeline companies from making a speculative gain, the possibility of which is necessary to induce companies into business and is an integral part of the free enterprise system.

To do away with the use of the original cost formula employed by the Commission in respect to production and gathering facilities, an attempt is being made to pass an act familiarly known as the Rizley Bill. This bill, which was passed by the House of Representatives and is now before the Senate, would limit the jurisdiction of the Federal Power Commission, insofar as the transportation of gas is concerned, to trunk line transmission facilities in interstate commerce; and would otherwise definitely limit its jurisdiction in such a way as to make it impossible for the Commission to consider the original cost of gathering and production facilities for any purpose. The bill makes it mandatory upon the Commission to allow as an operating expense, not only the cost of gas purchased from independent producers, but also the cost of gas "... produced by a natural-gas company or purchased from a subsidiary or affiliate... at the prevailing market price in the field or fields where produced. ..." All "reasonable compensation... for delivering the same to the inlet or inlets of the transmission facilities of such natural-gas company," must also be entered as an operating expense. Other serious limitations are placed upon the powers of the Commission. The net effect of this bill, if enacted into law, would be to remove from the jurisdiction of the Federal Power Commission all power to determine rate bases in the natural gas business, except in respect to main trunk interstate pipe lines. It would be able to apply the original cost formula only to these lines.

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226 See Blachly and Oatman, Natural Gas and the Public Interest 12 et seq. (1947) for a detailed analysis of the contesting interests.
228 Id. at § 4 (12).
229 Id. at § 5½ (a) (1), (2), (3).
Those who believe that the Commission should be free to use the formula of original cost in fixing the rate base, and should be able to apply it to the gathering and production facilities, take the view that this formula is economically sound, firmly established by statute and court decision, and a logical part of the general powers of the Commission. They maintain that a combination of several circumstances in respect to natural gas, if not controlled by the Federal Government through the application of original cost to production and gathering and to the other factors of investment, will lead to serious economic and social consequences. These circumstances are:

1. Most of the production and gathering facilities of natural gas, as well as the reserves, are held by a few large companies. The sums invested in production and gathering facilities are relatively low. The fact is, that natural gas can be delivered at a price so low that coal and electricity cannot compete. Due to this monopolistic position combined with a relatively small investment in reserves, companies which own large fields, if freed by the Rizley Bill from any effective control over the same, will be able to raise the "field price" of gas until it is just below the competitive price of other fuels, and will therefore receive over the life of their fields an unjust enrichment of as much as from $500,000,000 to over $1,000,000,000 above the price that they would make if their facilities were placed under the original cost basis. This heavy amount will be taken from the pockets of consumers. It is true that a very low price might also work adversely to the public interest by encouraging the use of natural gas and thus hastening the exhaustion of the supply. Hence, the Commission should have broad and flexible powers, so that both of these evils can be avoided.

2. The Rizley Bill would permit pipe line companies to undertake large expansions of capacity without regulatory control, and would thus rapidly deplete the natural gas supply for purposes that could be just

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230 For a list of those both generally and specifically in favor of leaving the jurisdiction of the Federal Power Commission where it is or even enlarging it, see Blachly and Oatman, op. cit. supra note 226, at 12. Among others, these include two members of the Federal Power Commission, certain gas producing states, public service commissions, and competitors of natural gas companies.

231 It must be remembered that the Commission has jurisdiction not only over rates, but also over the construction, extension or abandonment of interstate facilities, and the exportation and importation of natural gas, determining the cost of production and transportation, ascertaining rates of depreciation, the uses to which natural gas may be put, etc.

232 FPC, REPORT ON THE NATURAL GAS INVESTIGATION, No. G-580 (Commissions Draper and Olds) 300 et seq. (1948).
as well supplied by coal; would soon leave without an adequate fuel supply the states which now produce the gas; would leave the same states without adequate financial support; might cripple the coal mining industry; would displace many of the great number of workers employed therein; may make for such serious maladjustments, both when natural gas is taking the place of coal and also when the supply of natural gas tends to become exhausted, as to cause grave economic difficulties.

3. Further, the Rizley Bill would preclude the Commission from considering all necessary aspects of public convenience and necessity, including conservation, the availability of other fuels and the purposes which the proposed deliveries of gas are to serve; and would "remove or devitalize those aspects of regulation which are primarily designed to protect the public, leaving in effect those provisions of the act which, in the main, protect the monopoly position of the industry."\

Another approach to the problem is contained in a bill introduced by Representative Heselton, seeking to establish a National Petroleum Commission which would have power to prescribe by regulation "such prohibitions and requirements with respect to the production, refining, distribution, and sale of petroleum and petroleum products (including natural gas) as it deems necessary for the protection of the national security and economy." In other words, this bill would give the new Commission general managerial powers.

In view of the rapid depletion of petroleum and natural gas, the effects which such depletion may have on industry, upon competing fields, upon producing states, upon those who have invested large sums of money in natural gas appliances, and more particularly upon national defense, it appears that Congress should consider the whole problem most thoroughly, and should not be stampeded into hasty action by special interests or sincere reformers. Questions of law, economics and public policy should be studied and balanced. In the meantime, the authority of the Federal Power Commission should be interpreted broad-

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"The cost to the country of such tampering with the Natural Gas Act will be enormous. It will cost the consumers of gas, both without and within the primary gas-producing states, tens of millions of dollars a year. It will deny to the great raw material producing states of the West, North Central and West South Central regions the fullest opportunity of balancing their economics with industrial development. It will impair the economic health of the nation in time of peace and impair security in time of war through placing impediments in the way of the widest possible dispersion of industry." *Id.* at 3.

*H.R. 5392, 80th Cong., 1st Sess. (1947).*

*Id.* at § 3 (a).
ly and extended, if necessary, so that the national treasures may be conserved while a legislative policy is developed.

The problem of original cost in respect to electrical utilities, which seems to have been solved adequately, is a relatively simple accounting matter. The same is true regarding the regulation of the main trunk natural gas transportation systems. In respect to gathering and production facilities for natural gas, however, the use of original cost as a rate basis must be looked at as only one phase of the very important problem; adequate control over the production, use and conservation of petroleum and natural gas so that the most important uses may be served, economic stability maintained, and adequate reserves held for the needs of national defense. Justice Jackson, who discussed many aspects of this basic problem in the Hope case, maintained that the Federal Power Commission, in fulfilling its task of serving the public interest, already has the duty and the authority to look into all phases of the situation. It is the opinion of the present writers that the powers of the Commission should be supplemented by a clear mandate to consider every aspect of the public welfare while preserving all private rights.
IMMUNITY OF THE STATE FROM SUIT BY ITS CITIZENS—TOWARD A MORE ENLIGHTENED CONCEPT

Homer Allen Walkup*

PART II

Prior to commencing discussion of the interesting question as to when suits against government officers are and are not held suits against the sovereign of which the court is without jurisdiction, elements both of general relevancy and current interest are believed to justify digression to allude to a doctrine closely related to that of nonsuability of the sovereign, and likewise stemming from the Crown Prerogatives. That is the rule that the sovereign is not bound by any statute unless named therein. Under what may be termed (2) (B) of Blackstone’s categorization of the direct prerogatives—i.e., the prerogative in domestic affairs—with reference to the capacity of the king as a part of the legislature, Blackstone states:

"First, he is a constituent part of the supreme legislative power; and, as such, has the prerogative of rejecting such provisions in Parliament as he judges improper to be passed. . . . I shall only further remark, that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised . . . affect him not in the least if they may tend to restrain or diminish any of his rights of interests. For it would be of most mischievous consequence to the public, if the strength of the executive power were liable to be curtailed by constructions and implications of the subject. Yet where an act of Parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the Crown, it is said to be binding as well upon the King as upon the subject; and, likewise, the King may take the benefit of any particular act, though he be not especially named."79

One of the earliest recorded cases in which the issue is indicated to have arisen in this country was a case decided by Mr. Justice Story, on circuit,80 holding that the United States was not bound by a statute of limitations, the decision being grounded squarely on the Crown Prerogative. Subsequent lower federal and state court cases asserted the same proposition,81 although in subsequently applying the same principle

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*For Part I, see 36 Georgetown L. J., p. 310 (1948).
*People v. Rossiter, 4 Cow. 143 (N. Y. 1825)—bankruptcy statute; Commonwealth v.
to hold inapplicable to the United States itself the provision of the Judiciary Act that an assignee of a chose in action could not sue in the federal courts unless the assignor could similarly have sued, Mr. Justice Story buttressed his arguments from Bacon's *Abridgment* and *Blackstone* with those of inapplicability of the reason for the rule, and effective amendment by subsequent statute. Contemporaneously there arose in the Supreme Court the question as to whether the equitable doctrine of laches—wholly separate and apart from any statute—applied to the United States. Here Mr. Justice Story, in deciding the issue in the negative, relied upon the cognate principle that the King is not to be prejudiced by the negligence of his servants. Story, *On Agency*, sets forth an expression of the latter principle which is widely cited.

In *U. S. v. Knight* the Supreme Court appears to have been presented for the first time with the issue as to whether the United States was bound by a federal statute in which it was not named. The statute was one requiring writs of execution from federal courts to conform to local practice. Suit was brought by the government upon the bonds of two imprisoned federal debtors, alleging breach of condition to continue "within the limits of the jail yard," such limits under the local law being coextensive with the county limits which concededly had not been exceeded by the prisoners. Mr. Justice Barbour stated that the prerogative was nothing more than "... a great principle of public policy, which belongs alike to all governments, that the public interests should not be prejudiced by the negligence of public officers, to whose care they are confided. . . ." This was said to be the real basis of the prerogative


*U. S. v. Kirkpatrick*, 9 Wheat. 720 (U. S. 1824)—in suit against sureties on a collector's bond, laches alleged in failure by the United States to require an accounting from the principal for over four years.

"Section 319: "It is plain that the government itself is not responsible for the misfeasances or wrongs, or negligences or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subservive of the public interests."

*14 Pet. 301 (U. S. 1840).*

*Act of May 19, 1828, c. 68, § 3.*

*U. S. v. Knight, supra at 315.*
in England, where it originated.\textsuperscript{88} Here, there being no present or threatened injury to the public interests through the negligence of public officers, the 1828 statute did apply to the United States. and the prisoners' bonds had not been breached.

\textit{Green v. U. S.}\textsuperscript{89} held the statute removing the common law disability of parties to litigation from testifying therein\textsuperscript{90} to apply to suits to which the United States was party plaintiff as to any other. The fact that the "United States" (as an incorporeal fiction) could not itself testify did not deprive the defendants of their statutory right. The case is of interest, as here, for the first time, the Court is found referring to the rule that the government is not bound by statutes in which it is not named in the following manner: "... we do not see why this rule of construction should apply to acts of legislation which lay down general rules of procedure in civil actions. ..."\textsuperscript{91} (Underscoring supplied). Semantically speaking, terming this a "rule of construction" may not be vastly different from saying that it is a flexible principle for the public protection that need not be applied where no public injury is threatened from applying a particular statute to the government. But does this not bring into the picture the additional element of so-called legislative intent?

Yet four years later, in \textit{Dollar Savings Bank v. U. S.}\textsuperscript{92} Mr. Justice Strong, who was sitting on the Court when the \textit{Green} case was decided, is found reasserting the prerogative rule with the further statement that, "The rule thus settled respecting the British Crown is equally applicable to this Government. ..."\textsuperscript{93} The case involved an action of debt brought for taxes by the United States, the government having failed to comply with a statute requiring administrative assessment of the tax as a con-

\textsuperscript{88}But see Attorney General v. Randall [1944] 1 K. B. 709, holding that the English Debtors' Act of 1869, section 4, providing that "no person shall, after the commencement of this Act, be arrested or imprisoned for making default in the payment of a sum of money," did not apply with respect to a person indebted to the Crown. In the light of this decision it would appear either that Mr. Justice Barbour's statement of English law respecting the prerogative is no longer correct, or that the British take a sterner view concerning the public injury involved in letting debtors go scot free.

\textsuperscript{89}Wall. 655 (U. S. 1870).


\textsuperscript{91}Green v. U. S., supra at 658.

\textsuperscript{92}19 Wall. 227 (U. S. 1874). In addition to the point here involved, the case is considered of historic interest as being perhaps the earliest U. S. Supreme Court decision dealing with the re-enactment rule as applied to \textit{administratite} interpretations of statutes, holding that the rule applied only to judicial interpretations.

\textsuperscript{93}Id. at 239.
diction precedent to instituting suit. Two justices dissented on the ground of hardship to taxpayers in suing without prior assessment, but the dissent did not attack the statement of the majority respecting the royal prerogative as applied to the United States. Neither the Green nor the Knight case was cited, the Court reverting to the decisions of Mr. Justice Story on circuit and other lower federal and State court cases for its authority. U. S. v. Herron,94 decided in the same year, affirmed the rule of Dollar Savings Bank in holding that a claim of the United States was not barred by a discharge in bankruptcy.

Lewis, Trustee v. U. S.,96 held the United States not bound by priority provisions of a bankruptcy statute not specifically fixing the priority of federal claims, considering the 1797 statute,96 providing first priority of payment in insolvency proceedings for debts owed to the United States, to be the applicable act. But where a later bankruptcy statute specifically provided that claims of the United States, other than for taxes, should be subordinated to claims of employees of the bankrupt for wages earned within three months of the filing of the petition, Guaranty Title & Trust Company v. Title Guaranty & Surety Company97 held the 1797 Act amended to that extent. The reasoning of the Court, per McKenna, J., was that such was the intent of Congress, and represented a beneficent policy.98

Litigation in which the government sought to impeach and nullify the basic Bell patents upon the telephone, alleging fraud on the part of Bell in that he did not first invent the device, provided two cases on the subject, the first of which adopted the rule of the Green case semble, and the second, strongly reaffirmed the position set forth in Dollar Savings Bank v. U. S. In the first Bell case,99 the Court held that by repealing statutory provisions for cancellation of patents upon scire facias, and

9420 Wall. 251 (U. S. 1874).
9592 U. S. 618 (1876).
96Act of March 3, 1797, 1 Stat. 515 (1797).
9724 U. S. 152 (1912).
98Following the Lewis case in order of chronology was U. S. v. Beebe, 127 U. S. 338 (1888), refusing to apply the rule with respect to non-running of statutes of limitations against the sovereign (nullum tempus occurrit regi) to a suit by the United States to set aside patents to the land upon which Little Rock, Arkansas, was located, on the ground that the patents had been procured by fraud forty-five years before. Here the Court said that the United States was merely a nominal plaintiff, having done no more than to file the suit which was thereafter maintained by private real parties in interest.
providing substitute legislation to test patents upon suits for infringement, Congress did not "intend" to preclude the United States from suing in equity for the purpose of cancelling a patent issued by it.\textsuperscript{100} The second \textit{Bell Telephone} decision\textsuperscript{101} held that the Act of March 3, 1891, establishing Circuit Courts of Appeals, and providing that their judgments should be final "... in all cases arising under the patent laws. ..." did not preclude appeal to the Supreme Court by the United States. Chief Justice Fuller cited \textit{Dollar Savings Bank}, and recited Mr. Justice Strong's statement that "so much of the royal prerogative as belonged to the king in his position as universal trustee enters as much into the principles of our state as it does into the principles of the British government. ..."

\textit{United States v. Stevenson}\textsuperscript{102} involved a statute,\textsuperscript{103} one section of which made it a "misdemeanor to prepay transportation or encourage importation of contract laborers into the United States (though not prescribing any criminal penalties therefor). The following section provided that any person violating the preceding section should "forfeit" $1,000.00, and might be "sued" therefor "by the United States" or by any other person. Stevenson and another were indicted for violation of the section making the act a misdemeanor. The Court, per Mr. Justice Day, held the criminal proceeding proper, the opinion citing \textit{Dollar Savings Bank} and stating that even though the general rule may be that a special remedy provided by a statute for enforcement of a right which the statute creates, impliedly excludes other remedies, "... if such prohibition is intended to reach the government in the use of known rights and remedies, the language must be clear and specific to that effect. ..." Had the Court stopped with this, the case might be chalked up as another reaffirmance of \textit{Dollar Savings Bank}. But the Court continued: "In the present case, if it could be gathered from the terms of the statute, read in the light of the history of its enactment, that Congress has here provided an exclusive remedy, intended to take from the gov-

\textsuperscript{100}Referring to another prerogative—that of issuing patents—the Court stated, "... in this country where there is no kingly prerogative but where patents for lands and inventions are issued by the government ... [an] ... appropriate remedy is by a proceeding by the United States against the patentee. ..." This is mildly amusing in the light of the holding and language used in the second \textit{Bell} case, based squarely upon the royal prerogative.

\textsuperscript{101}U. S. v. American Bell Telephone Co., 159 U. S. 548 (1895).

\textsuperscript{102}215 U. S. 190 (1909).

\textsuperscript{103}Immigration Act of February 20, 1907, §§ 4, 5, 34 Stat. 1246 (1907).
ernment the right to proceed by indictment, and leaving to it only an action for the penalty, civil in its nature, then no indictment will lie. . . ." The opinion went further to state that Congress did not so intend.

*U. S. v. California*\(^{103}\) held California liable for $100.00 statutory penalty, provided by the Federal Safety Appliances Act, for operating, upon a State-owned terminal railway, a car with a defective coupling device. In answer to the contention advanced by California that it was a sovereign not named in the Act specifically or by class, Mr. Justice Stone stated that "... language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial. . . ." *Dollar Savings Bank* was cited and was not expressly discredited. Mr. Justice Stone again jousted the king in *Guaranty Trust Co. v. U. S.*\(^{104}\) and as Chief Justice writing the majority opinion in *U. S. v. Rice*.\(^{106}\) In the *Guaranty Trust* case, a New York bank had offset funds deposited by the provisional government of Russia, which had functioned from March until November, 1917, against funds due the bank from Russian banks which had been seized by the Soviet Government. Upon recognizing the Soviet Government on November 16, 1933, the United States was assigned all amounts due from United States debtors to the Soviet Government as successor to former governments. The United States sued the bank as assignee, concededly standing in the shoes of the Soviet Government, the bank interposing a plea of the statute of limitations. The bank was awarded judgment on its plea, the Court stating that the only reason for the rule *nullum tempus occurrit regi* was that of protection of the public against the negligence of public officers, which reason did not apply with respect to a foreign sovereign. The *Rice* case, a 5-3 decision, held applicable to the United States the provision of the Judiciary Act prohibiting appeal or writ of error from an order of a federal district court remanding a removed cause to the State court from whence it was removed. There the Chief Justice reasserted the proposition set forth in *U. S. v. California* that statutory language and objectives appearing with reasonable clarity were not to be overcome "by resort to a mechanical rule of construction." Justices Black, Rutledge and Douglas dissented, questioning the intent of Congress that

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\(^{103}\) 297 U. S. 175 (1936).

\(^{104}\) 304 U. S. 126 (1938).

\(^{106}\) 327 U. S. 742 (1946).
the statute should apply to the United States, but further stating: "... It has long been held that if the United States is to be deprived of a right or a remedy by the general terms of a statute, 'the language must be clear and specific to that effect'. ... This seems ... to be a clear case for the application of that rule."

Hence with this background, on March 6, 1947, was decided United States v. United Mine Workers of America. The case arose on certiorari from the Supreme Court to the Court of Appeals, District of Columbia, (prior to judgment in that Court) to review convictions of contempt, civil and criminal, by the district court, of the labor union and its president, John L. Lewis. The convictions were based upon failure by the union and its president to comply with a temporary restraining order issued by the district court, restraining the defendants from continuing in effect what was substantially a strike notice directed to employees in bituminous coal mines in the possession of, and under operation by, the United States. The defendants contended that the district court was without jurisdiction to issue the restraining order, in that the Norris-LaGuardia Act provided that no court in the United States should have jurisdiction to issue a restraining order in cases of this character, except under terms and conditions imposed by the Act, which terms and conditions were concededly not here met. The Act does not state in terms whether it is or is not applicable to the United States. The district court based its action entirely upon Dollar Savings Bank v. U.S., in holding that the Norris-LaGuardia Act did not apply to the United States. In the Supreme Court, the issue was squarely presented as to the present status of the prerogative rule.

106The statute involved was section 2 of the Judiciary Act of March 3, 1887, 24 Stat. 552 (1887), 28 U.S.C. § 80 (1940). At the time the statute was enacted there was no way in which the United States could have been a defendant in a State court proceeding —there being no consent to suit in State courts—hence could never have been in a position to remove a cause, ergo, never in a position to appeal from an order remanding a cause removed. The instant case arose under the Act of April 12, 1826, c. 15, sec. 3, 44 Stat. 239 (1926), providing that the United States may be bound by State court proceedings relating to Indian lands in specified cases, provided that certain procedural prerequisites have been met. The government removed the case to the federal court pursuant to this statute, and then intervened, appealing from the subsequent order of the district court dismissing the petition in intervention and remanding the cause to the State court. The Supreme Court decided the case upon a question certified to it by the Circuit Court of Appeals to which the government had appealed the order of remand.

10767 Sup. Ct. 677 (1947).

Chief Justice Vinson, joined by Justices Reed and Burton in the plurality opinion, stated that although the rule that statutes which in general terms divest pre-existing rights and privileges will not be applied to the sovereign without express language so requiring, may be only a rule of construction, still it "... has been invoked successfully in cases so closely similar to the present one ... and the statement of the rule in those cases has been so explicit ... that we are inclined to give it much weight here. Congress was not ignorant of the rule which these cases reiterated. ..." Mr. Justice Frankfurter wrote a separate opinion, concurring in the general result reached in the case, but dissenting, *inter alia*, to the foregoing proposition, describing it as an "abstract canon of construction that carries the residual flavor of the days when a personal sovereign was the law-maker," and stating that "... this canon, like other generalities about statutory construction, is not a rule of law..." He further drew a distinction between reading a statute in such a manner as not to bind the sovereign by restrictions, and interpolating into a statute limiting the jurisdiction of a court the qualification that such limitation does not apply when the government invokes the jurisdiction, stating that "No decision of this court gives countenance to such a doctrine of interpolation. ..." Mr. Justice Jackson was of the opinion that the Norris-LaGuardia Act relieved the District Court of jurisdiction, hence he must be deemed, at the very least, to concur with Mr. Justice Frankfurter that the prerogative rule is no more than a canon of construction. The separate dissenting opinion of Mr. Justice Rutledge does not discuss the point, but he subscribes generally to Mr. Justice Frankfurter's opinion as to the application of the Norris-LaGuardia Act. The separate dissent of Mr. Justice Murphy did not discuss the point, and his opinion that this was in essence a private dispute to which the Government was no more than a nominal party, is not necessarily inconsistent with either of the views expressed concerning the binding effect of the statute upon the United States.

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109 U. S. v. American Bell Telephone Co., 159 U. S. 548 (1895), discussed in the text, page 546, *supra*, did not interpolate the prerogative rule into a statute limiting the jurisdiction of the Supreme Court, although the interpolation was made to permit appeal to the Supreme Court in a case in which the statute provided that the judgment of the circuit court of appeals should be final.

110 In so far as Mr. Justice Rutledge now subscribes to the "canon of construction" doctrine respecting the prerogative rule, such viewpoint may be partly inconsistent with his dissent in U. S. v. Rice. See note 105 *supra*. 
The sound core of the matter with which the Court struggles so man-
fully is submitted to have been perceived by Mr. Justice Barbour over a century before in U. S. v. Knight. The late Chief Justice Stone is also considered to have apprehended the true principle involved, although unduly limiting it to the statute of limitations or laches situation embraced in the maxim *nullum tempus occurrit regi*. That principle is believed to be that the public should not suffer through the negligence of public agents, and nothing more. Considering the principle in its broader aspects, it is by no means limited to the failure of a public officer to perform an act within a prescribed time, but is one of the most pervasive principles in public law. Applying it to the cases dealing with

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111 Pet. 301 (U. S. 1840), discussed page 543, *supra.*
112 Stone, J., in Guaranty Trust Co. v. U. S., 304 U. S. 126, 132 (1938): "The rule *quod nullum tempus occurrit regi*—that the sovereign is exempt from the consequences of its laches and from the operation of statutes of limitations—appears to be a vestigial survival of the prerogative of the Crown, ..." He goes on to state that in the United States the rule is universally recognized to be for the policy of protecting rights and property of all citizens, including even that of the defendant. (The facts of the case are summarized, page 545 of the text, *supra.*

113 The extreme reluctance on the part of courts to work out estoppels against the government is a familiar aspect of this rule. Of a parcel is the willingness of courts to hold those dealing with the government estopped on the slightest provocation, despite absence of classic elements of estoppels, and even though a modicum of acuity and industry on the part of government representatives would have obviated the necessity for the situation ever having arisen. See Maguire and Zimet, *Hobson's Choice and Similar Practices in Federal Taxation*, 48 HARV. L. REV. 1281 (1935), in which the authors refer to courts' rulings on the foregoing situations as "jug handled employment of a principle supposed to embody virtuous justice." See also, Jones, *Estoppel in Tax Litigation*, 26 GEORGETOWN L. J. 868 (1938).

Some miscellaneous cases illustrating applications of the general principle are: U. S. v. Vanzandt, 11 Wheat. 184 (U. S. 1826)—placing funds in the hands of an Army paymaster after he was known to be a defaulter did not bar action by the government against his sureties; U. S. v. Nicoll, 12 Wheat. 505 (U. S. 1827)—failure of government to enforce compliance with periodic accounting requirements held not to discharge sureties, and the case contains dicta that an extension of time given the principal debtor would not discharge sureties as against the government; Dox v. Postmaster General, 1 Pet. 318 (U. S. 1828)—failure to obtain an accounting during a five year period after a postmaster general was removed from office, with his insolvency intervening, raised no presumption of payment by lapse of time; Gibbons v. U. S., 8 Wall. 269 (U. S. 1869)—where Army Quarter-master wrongfully refused to receive lawful tender of oats pursuant to contract, the contract supplier was not permitted to recover damages sustained in selling the oats on the market at a price below the contract price; *compare* U. S. v. State National Bank of Boston, 96 U. S. 30 (1878) *with* State National Bank of Boston v. U. S., 114 U. S. 401 (1885)—if money comes into the coffers of the government through direct fraud of a government agent, an implied contract to repay arises, but if the actual delivery of the
funds is made by a third party who is in fact obligated to the government, then no implied contract to repay arises, despite the fact that the third party obtained the funds paid over through fraud upon the plaintiff, in which fraud government agents participated with full knowledge; Hart v. U. S., 95 U. S. 316 (1877)—negligence of officers of the government in permitting a distiller to remove spirits from a bonded warehouse, thereby losing a lien thereon, constituted no defense in an action by the government against sureties on the distiller’s bond; U. S. v. Thompson, 98 U. S. 486 (1879)—the fact that a Minnesota’s statute of limitations was expressly made applicable to the State of Minnesota did not render it a defense to sureties on the bond of a non-accounting Indian agent (the case is noteworthy for Mr. Justice Swayne’s near-lugubrious verbal picturization of the busy sovereign “engrossed by the cares and duties of his office,” Id. at 489, while his agents wreak havoc upon the public weal; compare Langford v. U. S., 101 U. S. 341 (1880) with U. S. v. Great Falls Mfg. Co., 112 U. S. 645 (1884) and Hill v. U. S., 149 U. S. 593 (1893)—where U. S. agents wrongfully disseise one of property and audaciously claim title for the government, no implied contract to pay for the property arises, but if the agents be inhibited by their consciences to the extent that they cannot boldly assert title to be in the government, then an implied contract to repay will arise; Mintern v. U. S., 106 U. S. 437 (1882)—failure for two years to notify importer of error in failing to collect fully for customs duties on imports, with intervening insolvency of the importer, constituted no defense for sureties on the importer’s bond; Moffat v. U. S., 112 U. S. 24 (1884)—the government prevailed as against an innocent purchaser for value, in cancelling a patent issued upon a fraudulent and fictitious claim entirely designed and perpetrated by the Registrar and Receiver of Public Lands—thoroughly responsible government officers; Stanley v. Schwalby, 147 U. S. 508 (1895)—when the United States, or officers thereof, are sued, it or they can take advantage of any applicable statute of limitations or defense of laches, the rule being otherwise were the government plaintiff rather than defendant; German Bank v. U. S., 148 U. S. 573 (1893), failure of Register of the Treasury to ascertain that bonds were impressed with a trust prior to cancelling them and reissuing them in another name, gave no cause of action against the U. S.; Harley v. U. S., 198 U. S. 229 (1905) where the Chief of the Bureau of Engraving and Printing and the Secretary of the Treasury, with full knowledge, used for six years in connection with government printing operations, a press register upon which the plaintiff held patent rights, no quasi-contractual obligation was imposed upon the government to compensate the plaintiff on a quantum meruit basis; U. S. v. North American Transportation and Trading Co., 253 U. S. 330 (1920)—even though there may be an implied obligation for the government to pay for property wrongfully seized by government agents, no damages may be allowed for use and occupation during the twenty year period in which the plaintiff was engaged in trying to get his money, as a delay or default in payment cannot be attributed to the government—the plaintiff could recover only the value of the property at the time it was taken from him two decades before; U. S. v. Minnesota Mutual Investment Co., 271 U. S. 212 (1926)—no quasi-contractual recovery of interest accruing on funds deposited as designated by a federal court, pending the outcome of litigation in which the party who deposited the funds was successful; U. S. v. Michel, 282 U. S. 656 (1931)—a statute imposed a two year limitation on suits to recover taxes incorrectly assessed, the period to run from the date the Commissioner disallowed a claim for refund; the statute further required the Commissioner to mail notice of the disallowance of the claim for refund to the taxpayer within 90 days after disallowance. Here the Commissioner failed to comply with the statute, and did not mail notice of disallowance of claim for refund until three years
whether the United States is bound by statutes in which not named, in the *U M W A*, *Rice*, *California*, *Guaranty Trust*, *Stevenson*, and *Green* cases there was no substantial element of negligence, actual or potential, on the part of the public officers affected. Therefore the Court is found construing the statutes involved to achieve what it believes to be the more workable and desirable result—sometimes expressed as the "legislative intent". In these cases, the exclusionary prerogative rule emerges as a "canon of construction", or "principle of public policy". On the

after he had actually disallowed the claim. Despite complete control of the situation on the part of the government, and the complete lack on the part of the plaintiff of any means (as a matter of right) of ascertaining whether his claim for refund had been disallowed (an absolute condition precedent to suit), the statute was held not to have been tolled by the negligence and affirmative statutory violation on the part of the Commissioner; *U. S. v. Atlantic Mutual Life Insurance Company*, 298 U. S. 483 (1936) statute of limitations on claim against the United States for a general average contribution was not tolled during a five year period while an adjuster employed by the War Department was engaged in attempting to determine the amount of the contribution which should be paid by the United States; *U. S. v. Garbutt Oil Co.*, 302 U. S. 528 (1938)—the Commissioner of Internal Revenue cannot waive requirements of a statute respecting the time in which claim for refund could be filed. *Caveat* as to the dicta in this case that the Commissioner might be able to waive the requirements of his own regulations in such a respect; compare *Munro v. U.S.*, 303 U.S. 36 (1938) with *Bates Mfg. Co. v. U.S.*, 303 U. S. 567 (1938)—where a statute consenting to suit against the United States requires (1) filing of suit within a stipulated period, and (2) mailing of the notice of the suit to a designated governmental official within a stipulated period, lack of timely compliance with (1) would bar the action, despite timely mailing of notice in accordance with (2), but, reversing the situation, lack of timely compliance with (2) would not bar the action so long as delay in mailing the notice was not "unreasonable".

As indicating that the picture sometimes possesses a brighter side, see *American Propellor Company v. U. S.*, 300 U. S. 475 (1937)—although the Commissioner gave the plaintiff "notice" of a tax deficiency, he did not "demand" payment as the statute required. Later the plaintiff sued the government on certain contracts, the government counterclaiming the tax deficiency plus accrued interest amounting to two-thirds as much as the original deficiency of which the plaintiff had received notice. Terming the inequity of allowing the accrued interest "shocking", the Supreme Court, per Sutherland, J., directed that the claim of the government for interest be stricken. Compare equities with *Dollar Savings Bank v. U. S.*, see note 92, *supra*, and with the Michel, North American Transportation & Trading Co., and Moffatt cases, *supra*. *Bull v. U. S.*, 295 U. S. 247 (1935) is one of the *rara avis* in which a mistake made by government agents was permitted to prejudice a claim of the government. There a taxpayer was permitted to recoup an erroneous payment made as estate taxes attributable to certain funds, against a deficiency which the Commissioner assessed against the same funds for unpaid income taxes. This was permitted although the statute of limitations barred a suit for refund of the erroneously paid estate taxes, whereas the assessment for unpaid income taxes was made within the statutory period.
other hand, in cases involving statutes of limitations, laches (where the time limit of a statute is applied), and in the Herron,114 Dollar Savings Bank,115 and Bell Telephone116 cases, application of the statute to the government could arguably have resulted in present or future loss to the public through negligence, incompetence, or lack of diligence on the part of public officials. Here it is the tendency to apply the rule without equivocation, just as it emerges from the pages of Blackstone and Story. Once the principle of protecting the public from the people they hire is out of the picture, then determination of the applicability of a statute to the government can be made in accordance with criteria established for determining the applicability of a statute to any other person, class, or thing. Such criteria were resorted to in the UMW case, and it is difficult to believe that the result of the case would have been vastly different had the kingly prerogatives never stowed away on various west-bound craft in bygone centuries. One may only regret that the Court passed up so excellent an opportunity to prune deadwood from the law.

Suits Against Government Officers and Agents

In answer to the objections voiced in the Virginia Convention by George Mason and Patrick Henry to the grant to the federal courts of jurisdiction of suits between states and citizens of other states, on the ground that this meant state suability in those courts in the absence of consent by the states thereto, John Marshall stated: "... it is not rational to suppose that the sovereign power should be dragged before a court... If an individual has a just claim against any particular State, is it to be presumed that, on application to its legislature, he will not obtain satisfaction...?"117 Yet, thirty-six years later, and despite the intervening unequivocal mandate of the Eleventh Amendment to reinforce his earlier viewpoint, Chief Justice Marshall stated in Osborne v. Bank118 that the Eleventh Amendment was without application unless

114 Discharge in bankruptcy—negligence of officers in failing to learn of proceedings and assert governmental claims.
115 Negligence in failing to comply with assessment statute.
116 The public should not be deprived of remedies to permit rescission of public grants and franchises obtained through alleged fraud and imposition.
117 3 Elliott, Debates 555 (2d ed. 1836). See note 29, page 17. Marshall was also a member of the Virginia House of Delegates in 1782—six years before making the above statement—the session being principally devoted to the cons of paying Virginia's pre-Revolutionary War debt to Great Britain.
118 9 Wheat. 738, 846 (U. S. 1824). See 1 Warren, The Supreme Court in United States
a state were a *party of record*. Had this interpretation been perpetuated, and extended to suits against the federal government, the issue of sovereign immunity to suits could have become a very dead letter indeed, almost any objective being accomplishable by first suing the official having cognizance of the governmental matter in question, and, if monetary damages were the object, by then proceeding against fiscal officers of the government to enforce, on behalf of the judgment creditor, the official’s right to exoneration. Marshall himself, however, repudiated the doctrine to a substantial extent four years after the *Osborne* decision,119 and, after being virtually ignored for threescore years thereafter, it was expressly overruled.120

So the Court early came to grips with litigation against governmental officers, which has since created problems of “plaguing proportions”, to borrow a phrase from a recent carefully prepared and thought-provoking article dealing with this aspect to the sovereign immunity doctrine.121 That article alludes to an earlier note122 in pointing up one of

*History* 526-38 (1921); 2 id. 91-92. Ohio being in a virtual state of rebellion at the time, Marshall was constrained to resort to rather drastic measures to uphold the authority of the federal government. An analogous situation had been similarly dealt with in U. S. v. Peters, 5 Cranch 115 (U. S. 1808). There a Federal court (under the Articles of Confederation) had overruled the decision of a Pennsylvania admiralty court relating to a Revolutionary War prize, and had enjoined the federal marshall from paying the proceeds of the sale of the prize into the State court. The marshall disobeyed the injunction, but the federal court did not enforce contempt procedure, fearing consequences “dangerous to the public peace of the United States.” The state court turned the proceeds over to the Treasurer of Pennsylvania, who retained the funds in his personal possession until his death—having furnished bond to the State therefor. An act of the Pennsylvania Legislature directed the executrices of the Treasurer to pay the funds to the Commonwealth. In the teeth of this Act, however, Marshall issued mandamus to a District Judge, compelling issuance of process to require the executrices to turn the money over to the private litigants who had prevailed in the previous litigation in the federal court.

118Governor of Georgia v. Madrazo: *Sundry African Slaves*, 1 Pet. 110 (U. S. 1828), an *in rem* libel in admiralty for slaves and proceeds of sale of slaves seized by Georgia and placed in the individual custody of the Governor, as provided by State statute. Madrazo sued on the theory of tracing the specific cargo from allegedly void condemnation and sale prior to seizure by Georgia. In holding that the suit was in fact one against the State, barred by the Eleventh Amendment, Marshall attempted to distinguish the *Osborne* case in that (1) this was a suit against the Governor by title rather than by name; and (2) the claim against him was entirely in his official, rather than personal, character; therefore, the State itself might here be considered a party of record.

119*Ex parte* Ayers, 123 U. S. 443 (1887).
121Note 50 Harv. L. Rev. 936 (1937).
the more fundamental of a rather long series of logical inconsistencies and distinctions which do not distinguish, namely, that involved in one of the more common of the devices employed by courts to justify permitting suits against officers—that inasmuch as the officer is acting in excess of his constitutional or statutory authority, his action is not that of the state, but his own individual unlawful act. Yet the injunction is granted by reason of violation of the Fifth or Fourteenth Amendments, the prohibitions of which are applicable only to the acts of the federal government and the States, respectively, not to the acts of individuals.

The cases are susceptible to treatment only by the horse, saddle, and bridle\textsuperscript{123} method, and even so considered separately as to subject matter, the jewel of consistency is lacklustre. The subdivision of the cases which has been arbitrarily chosen is: (1) suits against government officers in their personal capacity; (2) actions for monetary damages against governmental agents and contractors, acting in their representative capacity; (3) possessory actions against government officers for the recovery of specific property held by them in their official capacity; (4) suits to enjoin interference, or to compel recognition by, government officers of property rights asserted to be in the plaintiff; (5) suits to compel affirmative performance of official acts; (6) suits to enjoin routine official action; (7) injunctions and suits against revenue officers; (8) enjoining regulatory action respecting businesses charged with a public interest; (9) suits against officers and agencies of the state, engaged in what are essentially commercial operations. The categories are neither exclusive nor exhaustive, nor is any warranty provided as to compartmentation.

It is deemed important to stress at the outset (though stating the obvious) that the issue in all of these cases is jurisdictional. In theory, whatever merits the case may have are utterly beside the point, as the case is one which it is not within the judicial power to consider if the suit against the officer be in fact one against the government.

(1) True personal liability of officers is determined by relatively well-established principles of agency law, and does not occasion great difficulties. Thus, when in 1799, Captain Little, of the U. S. Frigate Boston, seized the Danish brigantine Flying Fish on unfounded suspicion

\textsuperscript{123}The reference is, of course, to the ancient chestnut concerning the neophyte law clerk who, after laborious examination of the authorities, counseled his employer against instituting replevin for a horse, bridle, and saddle, in that while ample precedents existed for such actions for horses and bridles, horses and saddles, and bridles and saddles, no case reported successful prosecution of replevin for all three items simultaneously.
of violation of the Non-Intercourse Act, he was held personally liable for damages.\footnote{124}{Little v. Barreme, 2 Cranch 170 (1804).} A supervising officer, however, is held accountable in damages only for his individual acts of negligence, partaking of the immunity of his sovereign superior as concerns negligent acts and omissions of those occupying a subordinate position with respect to him.\footnote{125}{Johnson v. Lankford, 245 U. S. 541 (1918).} If he be personally negligent in the performance of his supervisory duties (e.g., as a bank commissioner he fails to exercise the proper standard of care in supervising the affairs of a closed bank),\footnote{126}{152 Mass. 540, 26 N. E. 100 (1891).} then his suability and liability are established by the law. Officials may blanch slightly upon reading \textit{Miller v. Horton}\footnote{127}{Borchard, \textit{Government Liability in Tort}, 34 \textit{Yale L. J.} 1 (1924).} cited by Professor Borchard,\footnote{128}{Yearsley v. W. A. Ross Construction Co., 309 U. S. 18 (1940)—damage to plaintiff's land by "paddle-washing," necessarily carried on in connection with construction being performed under governmental contract.} wherein expert health officers, concluding after investigation that a horse had glanders, ordered its destruction, only to find later that a jury was in scientific disagreement with them.

(2) Contractors with the government enjoy no immunity from suit in connection with the performance of their contracts, although they may be absolved from liability if the tortious act complained of be virtually an unavoidable incident to the proper performance of their contracts.\footnote{129}{Cramp & Sons v. International Co., 246 U. S. 28 (1918).} A contract to build torpedo boats for the Navy carries with it no license to infringe patents.\footnote{130}{Brady v. Roosevelt Steamship Co., 317 U. S. 575 (1943).} Whether the contract does or does not provide for exoneration of the contractor by the government would appear to be an irrelevant consideration.\footnote{131}{...}

Where government officers were sued for monetary damages in connection with acts or omissions in the performance of their official duties, the Court, in some earlier cases showed a disposition to treat the officers in somewhat the same manner as contractors, not holding that their immunity from suit was any greater than that of any other citizens, but if obligations allegedly incurred were, under the applicable principles of law, those of the government, then the agent would be absolved from liability and the complainant left to seek recovery from the principal in whatever manner might be available to him. Thus an action of covenant
upon a lease signed by the Secretary of War pertaining to a War Department building was demuable, not as a suit against the government, but because the liability, if any, was that of the government and not of the defendant Secretary of War.\footnote{Hodgson v. Dexter, 1 Cranch 345 (U. S. 1803).} An action against the Postmaster General, based upon his circularization of postmasters to the effect that they were under no obligation to pay a lobbyist for services rendered in connection with legislation authorizing a retroactive pay raise, was demuable because this was action within the scope of his authority for which he was under no personal liability, not because the suit against him was considered to be a suit against the federal government.\footnote{Spalding v. Vilas, 161 U. S. 483 (1896). That “... the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals...” was deemed an immaterial consideration, as there would be no liability, even assuming that the Postmaster General acted maliciously.} But in \textit{Lankford v. Platte Iron Works},\footnote{235 U. S. 461 (1915)—suit upon a deposit certificate from a since closed bank, the purpose of the “Depositors’ Guaranty Fund” being to liquidate deposits of closed banks. Four Justices dissented. \textit{Compare} Johnson v. Lankford, 245 U. S. 541 (1918). \textit{See} O’Connor v. Rhodes, 79 F. 2d 146 (App. D. C. 1935) wherein suit against the Comptroller General and the Alien Property Custodian (Attorney General) was brought to have declared preferential payments which had been made to the Alien Property Custodian from a closed bank. The suit was permitted to be maintained on the ground that the fund administered by the Custodian was not made up of appropriated monies.} a suit against a state banking board, which, although a statutory board, administered only non-appropriated monies obtained by assessments upon state banks, was held in effect a suit against the state. The departure from the earlier rule is deemed unfortunate, even though the net result of the litigation will usually be the same under either. In a case falling under one of the exceptions to the tort claims act, it could well be difficult to state whether any liability existing was in fact personal or governmental prior to the time that all of the evidence was in. The publicity of an open trial, regardless of ultimate determination as to recovery, affords to the individual some slight sanction against petty bureaucratic tyranny. Moreover, an action against the responsible officer may in some instances provide the only means through which an individual can ascertain the position upon which the government is relying. At a time when clamor is being made for heightened protection for individual rights and liberties, as reflected in administrative procedure acts, opening the courts to any who wish to maintain damage suits against individual officers could afford a relatively
inexpensive means of psychological, if not more tangible, relief.\textsuperscript{135}

(3) The most substantial breach made by the judiciary in the judicially-forged armor of federal sovereign immunity is with respect to possessor actions against officers for property held by them. During the first century of our national history, at least four ejectment cases reached the Supreme Court wherein it was sought to oust officers of the government from government lands. In the first of these cases the government was in fact ousted, Marshall, C. J., not deeming the fact that the United States had erected expensive buildings upon the land—a garrison in Tennessee—to alter the plaintiff’s right of recovery.\textsuperscript{136} The subsequent three cases involved, respectively, land upon which was situated Fort Dearborn, an armory at Harper’s Ferry (in 1859), and a San Francisco fort.\textsuperscript{137} The government was more successful in these cases, though only after hard-fought battles upon the merits. \textit{Carr \textit{v.} U. S.}\textsuperscript{138} was an equity suit, brought against the United States \textit{eo nomine} in the California courts, for the purpose of quieting title to certain land upon which there was a marine hospital. The four earlier cases, in none of which had the issue of jurisdiction been raised, were not cited, but in holding no jurisdiction to exist of the equity suit, Mr. Justice Bradley observed that a contrary rule might result in depriving the government of possession of (\textit{inter alia}) a “fortification”.

With this background there arose, in 1882, the celebrated case of \textit{U. S. \textit{v.} Lee},\textsuperscript{139} which, after detailed consideration by the Justices, established

\textsuperscript{135}See Bell \textit{et al.} \textit{v.} Hood \textit{et al.}, 327 U.S. 678 (1946), a suit against FBI agents seeking recovery of monetary damages suffered through imprisonment and searches by such agents in contravention of the Vth and IVth Amendments. It was held error summarily to dismiss for lack of jurisdiction, as this was obviously a suit under “the Constitution” within the meaning of the Judiciary Act. The merits should have been explored as to whether monetary damages could be recovered for constitutional breaches in the absence of enabling legislation. The jurisdictional aspect as a suit against the sovereign was not discussed.

\textsuperscript{136}Meigs v. McClung’s Lessees, 9 Cranch 11 (U. S. 1815).

\textsuperscript{137}Wilcox \textit{v.} Jackson \textit{ex dem} McConnel, 13 Pet. 498 (U. S. 1839); Brown \textit{v.} Huger, 21 How. 305 (U. S. 1859); Grisar \textit{v.} McDowell, 6 Wall. 363 (U. S. 1868).

\textsuperscript{138}98 U. S. 433 (1879).

\textsuperscript{139}106 U. S. 196 (1882). In a case so replete with dramatic elements, it is not surprising to find that counsel waxed somewhat melodramatic. See 2 \textsc{Warren}, \textit{The Supreme Court in United States History} 675 (1925). Judge Shipman, arguing for the plaintiff, was asked by one of the members of the Court if a successful plaintiff in such a case might remove a lighthouse which the government had placed upon the land. Judge Shipman is reputed to have answered: “Certainly, that is my position. Far better extinguish all the light-houses in the land than put out the light of the law!” Professor Warren credits this to the \textit{New York World}, December 5, 1882.
5-4 that officers of the government might be ejected from land (including Arlington National Cemetery) upon the suit of the son of General Robert E. Lee. Both the majority opinion, written by Mr. Justice Miller, and that of the minority, written by Mr. Justice Gray, were extremely well considered and constitute veritable texts. 140

Three years following the Lee case, the Virginia Coupon Cases142 came before the Court.142 In the way most of these cases actually arose, they were distinguishable from the Lee case only in that they involved possessory actions against state officers for specific articles of tangible personal property, whereas the Lee case had been a possessory action against federal officers for real estate. Thus Poindexter v. Greenhow was an action of detinue for a desk which a tax collector had distrained for state taxes after refusing to accept a tender of repudiated bond coupons in payment of the taxes. Although holding invalid as an impairment of contractual obligations the state statute which forbade further use for payment of state taxes of coupons from the repudiated bonds, the Court did not sustain its jurisdiction on the ground that the cases were substantially indistinguishable from the Lee case. Rather, Mr. Justice Miller, who wrote the stirring majority opinion in U. S. v. Lee, was one of

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142 Poindexter v. Greenhow and following cases, 114 U. S. 270 (1885). The dissent to the group of cases follows Marye v. Parsons, 114 U. S. 325 (1885). Virginia had issued state bonds containing the provision that the coupons thereon might be used in payment of State taxes. After repudiating the bonds, few stones were left unturned in an attempt to discover legislative devices and artifices to prevent use of the coupons in payment of taxes, but the Supreme Court maintained a fairly high batting average in striking down these schemes. The Virginia coupons were again before the Court in Ex parte: Ayers, 123 U. S. 443 (1887), discussed infra. In McGahey v. Virginia, 135 U. S. 662 (1890), Mr. Justice Bradley stated that the controversy between Virginia and her creditors had become a "vexation and a regret".

143 Decided in the three years intervening between the Lee and Virginia Coupon Cases were the leading cases of Louisiana v. Jumel, 107 U. S. 711 (1883), and Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446 (1883), both discussed infra. Holding the Court to lack jurisdiction over a suit against members of a State board established to consolidate and adjust bonded indebtedness, and one against a wholly state-owned railway, respectively, there was a certain identity of subject-matter with the Coupon Cases. The different result in the Coupon Cases, however, could have been justified on the basis of the exception established by U. S. v. Lee, in that most of them were possessory actions for specific property.
the four dissenting Justices in the \textit{Coupon Cases}. In lieu of the rational ground for the decision with respect to jurisdiction, the majority promulgated the doctrine that the state officers, having no purported authority for their acts other than the unconstitutional state statute, were thereby shorn of their official character and subject to suit as individuals. The minority quite aptly branded this "metaphysical". Block's statement, employed in another connection, relative to the "cart before the horse method of examining the merits to reach an answer to the jurisdictional problem,"\footnote{Block, \textit{supra} note 121, at 59.} is quite apropos here, as is his further suggestion of the dilemma presented by the premise of the majority, in that if only the unlawful acts of individual citizens were involved, then there was no constitutional issue before the Court, as the Fourteenth Amendment provides only "... nor shall any \textit{State} deprive any person of ... property, without due process of law...." That the illogical distinction thus created between possessory actions for real estate and those for personalty—whereby in one case the officer is freely suable, in the other, suable only if acting under an unconstitutional statute or in the absence of statutory authority—is something more than a matter of harmless verbalage, is well illustrated by a case recently handed down in the Second Circuit.\footnote{\textit{Stanley v. Schwalby}\footnote{Banco de Espana v. Federal Reserve Bank, 114 F. 2d 438 (C. C. A. 2nd 1940). During the internal unpleasantness existing in Spain in the late thirties, the Secretary of the Treasury purchased a quantity of silver from persons purporting to represent the Spanish government. The plaintiff sued, \textit{inter alia}, the Superintendent of the U. S. Assay Office in New York, who had actual possession of the silver, asserting right to possession of the specific res by virtue of title superior to that of the government. The Court refused to "expand" the exception to the rule of sovereign immunity established by the \textit{Lee} case, holding that it was without jurisdiction in the absence of any allegation that the Superintendent of the Assay Office had committed any unconstitutional or unauthorized act in receiving and retaining the silver. The purely custodial and ministerial character of the duties of the Superintendent was considered to render it unlikely that any such showing could be made. \textit{But see} Land v. Dollar, cited and discussed on the following page.} tends to qualify the \textit{Lee} case by implication. There trespass to try title was brought against officers in possession of a federal military reservation, the officers pleading the statute of limitations. The plaintiff urged that inasmuch as the statute of limitations

\footnote{\textit{147 U. S. 508} (1893). Subsequent to remand in the instant proceeding, the case came up again—one of the plaintiffs having been under disability during a portion of the statutory period—and the title of the government was then held valid on the merits. \textit{Stanley v. Schwalby}, 162 U. S. 255 (1896).}
did not run against the government, it could not be asserted as a defense. Had the Court adopted the obvious position, as it did when an officer of South Carolina was sued for possession of state property,\textsuperscript{146} the plaintiff would have been advised that this was a suit against individual officers, who could avail themselves of legal defenses in the same manner as any other individual defendants. But, apparently loath to remove all vestiges of the sovereign immunity principle from this class of cases, Chief Justice Fuller rested the case upon the proposition that even though statutes of limitations do not run against the government, it may avail itself thereof, when to its advantage.

\textit{Land v. Dollar,}\textsuperscript{147} by a 7-1 decision on the point here under consideration, would appear to have wiped out completely the distinction between possessory actions for realty and those for personality created by the \textit{Lee} and \textit{Virginia Coupon} cases, and to have expanded the \textit{Lee} doctrine in other respects. There an agreement had been made between stockholders of the Dollar Line and the U. S. Maritime Commission, whereby the former were to endorse their stock in blank over to the Commission, and the Commission was to grant an operating subsidy and make and procure to be made certain loans. After having allegedly repaid all obligations resulting from the agreement, the stockholders contended that the stock transfer had been merely a pledge. The Commission contended that the stock transfer had been an outright delivery, and offered the shares for sale. The stockholders petitioned for an injunction against the members of the Commission, both to halt the sale and to compel re-delivery of the stock certificates. With a candor rarely seen in cases of this character, the Court admitted the question of jurisdiction to be dependent upon decision on the merits, and refused to look beyond the complaint in passing upon motion to dismiss. It appearing from the complaint that the claim of the stockholders rested upon "their right under general law to recover possession of specific property wrongfully withheld," the district court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits. Hence the exception to the sovereign immunity rule established by the \textit{Lee} case can no longer be deemed to be limited to (1) possessory actions at law for (2) real estate, or even to (3) tangible personal property, but apparently extends to any

\textsuperscript{146}Tindal v. Wesley, 167 U. S. 204 (1897)—in a purely possessory action against a State officer, the plaintiff was obtaining possession merely as against the officer, not against the state.

\textsuperscript{147}330 U. S. 731 (1947).
form of action or suit for any specific property or specific tangible evidence of a property right alleged to be wrongfully withheld by government officers.\(^{148}\)

(4) The *Land v. Dollar* decision having obliterated distinctions previously existing between possessory actions at law and applications for equitable injunctive relief from interference by officers with property rights asserted in the plaintiff—or to compel recognition of such rights—separate categorization of such litigation is employed only to provide a logical presentation of the development of the law in this respect. As noted by Block,\(^{149}\) the “cart before the horse method of examining the merits to reach an answer to the jurisdictional problem” has always been a striking feature of these cases. That is, the Court usually closely scrutinized the nature and extent of the property right claimed by the plaintiff before determining whether the suit was or was not “against the government”. As noted above, the Land case expressly sanctions this practice and candidly states that the cases cannot be decided otherwise. The injunction cases have in the past employed a procedural device intermittently, and to a large extent interchangeably with a simple statement that the suit styled as one against an officer or officers is in fact against the state, and the Court has no jurisdiction thereof. That device is based upon rules of equity pleading with respect to parties, although accurate terminology has not always been preserved.

*Cunningham v. Macon & Brunswick R. Co.*\(^{150}\) held the State of Georgia to be an indispensable party to a suit to throw a wholly state-owned railroad into receivership, hence, since the state could not be joined without its consent, the suit must fail. Subsequent cases similarly were dismissed because the state was held a “necessary” party.\(^{151}\) Like other

\(^{148}\)See further Domestic & Foreign Commerce Corp. v. Littlejohn, 16 U.S.L.Week 2272, (App. D. C. December 8, 1947). Following Land v. Dollar, the Court of Appeals held that the District Court erred in dismissing for lack of jurisdiction a suit for injunction and declaratory judgment against officers of the War Assets Administration. The suit was based upon alleged default by WAA in performance of a contract for delivery of certain unique surplus coal. The Court of Appeals indicated that if title had passed to the complainant as claimed, then relief might be in order, hence the District Court should have gone into the merits. *Cf.* U.S. *ex rel* Goldberg v. Daniels, 231 U.S. 218 (1913), discussed in note 174, infra.

\(^{149}\)Block, note 121 supra, at 59.

\(^{150}\)109 U. S. 446 (1883).

\(^{151}\)Louisiana v. Garfield, 211 U. S. 70 (1908); New Mexico v. Lane, 243 U. S. 52 (1917). In strict technicality, were the state merely a “necessary”, as distinguished from “indispensable” party, then the very fact that it cannot be sued should provide all justification
devices appurtenant to sovereign immunity, the Court has employed that of the indispensable or necessary party to rationalize decisions wherein it has chosen to deny jurisdiction, and has blithely ignored it when it hasn’t. Mr. Justice Reed raised this ancient shibboleth in his concurring\(^{152}\) opinion in the *Land* case, and it is considered unfortunate that it wasn’t expressly discredited by the Court. The necessary or indispensable party rules might well be applied in cases wherein the particular officers sued are not deemed sufficiently responsible or cognizant of the subject matter of the suit to protect the public interest and it is desired to bring more responsible officers before the court, but their attempted application to an utterly non-existent state entity is indeed an excursion into metaphysical realms.

In addition to the necessary or indispensable party rule, the Court has from time to time announced other criteria, so-called, which at best afford inadequate explanations of the results reached in the cases in which employed, and which, in view of the practice of applying or utterly ignoring them or brushing them aside according to the will of the Court, provide no guide as to the results which may be expected in any future case. Included are (as characterized by the Court): that the suit against the officer may lie because the state was not a party of record;\(^{153}\) that the official act sought to be enjoined was “ministerial,” thereby permitting the suit to lie;\(^{154}\) that the officer was without statutory or constitutional authority, or acting under color of void statutory authority, in

\(^{152}\)The decision of the majority affirmed the action of the Court of Appeals in reversing the dismissal of the suit in the District Court. Mr. Justice Reed concurred that the case should be remanded to the District Court, but for determination of (1) the suability of the Maritime Commission as distinguished from the members thereof, the Commission being deemed an indispensable party to the proceedings; and (2) the effect of the Federal Administrative Procedure Act of 1946. The majority remanded in order that the District Court might determine its jurisdiction of the suit against the members of the Commission by proceeding to a decision upon the merits.

\(^{153}\)Davis v. Gray, 16 Wall. 203 (U. S. 1872). This ground of decision was expressly eliminated by *Ex parte Ayers*, 123 U. S. 443 (1887), overruling Osborne v. Bank, 9 Wheat. 738 (U. S. 1824) to the extent that it stood for the proposition that the Eleventh Amendment applied only to cases in which the State was a party of record.

\(^{154}\)Noble v. Union River Logging Co., 147 U. S. 165 (1893). The term “ministerial” and cases cited in support of permitting the suit, seem to denote what was pretty clearly unconstitutional action. Yet Pennoyer v. McConnaughty, 140 U. S. 1 (1891), decided only two years before, had reaffirmed the proposition that an officer acting unconstitutionally was shorn of his official character and could be proceeded against individually.
performing the acts in question, therefore might be proceeded against as a private individual, and that the action of the officer constituted an "unwarrantable interference with property of the complainant".

Generally speaking, the cases would seem to indicate that a plaintiff out of possession, whose complaint shows upon its face no more than a shadowy claim to title, will not normally be afforded the jurisdiction of his suit to enjoin official action with respect to property. Particularly is this so where the official action is of a preliminary or purely formal character, wherein opportunity has been or will be open to the plaintiff to contest the matter in a regular proceeding for the purpose. The antipodal proposition would appear to be that the Court will entertain a suit by a plaintiff in possession who makes a prima facie showing of something more than colorable title, and who seeks to enjoin an officer from interfering with that possession.

A cautious attitude may be expected with respect to state tax statutes, and it may be questioned whether a candid expression of "forum non conveniens" should not be substituted for some holdings that the state is the real party in interest, or that although a state statute permits proceedings against the particular officer, such statute has the necessary effect of consenting to suits in the state courts alone. Here, as in other

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155 Payne v. Central Pacific R. Co., 255 U.S. 228 (1921); Lane v. Watts, 234 U.S. 525 (1914); Pennoyer v. McConnaughty, 140 U.S. 1 (1891).


157 Litchfield v. Register, 9 Wall. 575 (U.S. 1870). A suit to enjoin the Secretary of the Interior from "acting upon" a pending application to prove pre-emptive right to land.


159 Payne v. Central Pacific R. Co., 255 U.S. 228 (1921)—attempted withdrawal by the Secretary of the Interior of a selection of indemnity lands made by railroads pursuant to statutory authority; Lane v. Watts, 234 U.S. 525 (1914)—attempted withdrawal by the Secretary of the Interior of a grant made by his predecessor in office; Swigart v. Baker, 229 U.S. 187 (1913)—enjoining interference by the Secretary of the Interior with vested water rights in an irrigation project; Davis v. Gray, 16 Wall. 203 (U.S. 1872)—the Governor of Texas was enjoined from interfering with a land grant previously made by the State.

situations, the allegation as to the unconstitutionality of the statute under which the officer operates, may or may not be set forth as a ground for permitting suit, or be disregarded altogether as in Chandler v. Dix.\textsuperscript{181}

Where definite tangible property rights are being infringed by unauthorized or unconstitutional action, courts will usually accord relief against the infringing officers, sovereign immunity and consistency to the contrary notwithstanding. \textit{Exempli}: Preparing the plaintiff from landing freight on a pier which he charges the government with having built upon his property;\textsuperscript{182} an administrative "show cause" proceeding to revoke a patent of lands, a negative burden of proof being imposed upon the patentee to show that the lands in question were "nonmineral" in character—the statute under which the patent was made being so conditioned;\textsuperscript{183} high-handed seizure by Army officers of plaintiff's barges and attempt to remove them from the jurisdiction (the motive being to create indisputable evidence that the plaintiff was not operating his barges as required by contract, thereby justifying, after a fashion, rescission of such contract);\textsuperscript{184} an attempt by the Governor of a state to overrule a decision of a federal district court temporarily restraining enforcement of an order of the State Conservation Commission limiting the production of plaintiff's oil well—such attempted overruling being by resort to declaration of a state of insurrection and ordering out the Texas Rangers to see that the order of the Conservation Commission was obeyed;\textsuperscript{185} and curtailment of vested water rights acquired under an earlier irrigation project, in setting up an additional project in the same locale.\textsuperscript{186} But where plaintiff's "property" right consists merely of a desire to make money by contracting with the government\textsuperscript{187} or by perpetuating an existing contract calling for the supplying of goods and services to the government,\textsuperscript{188} courts are disinclined to enjoin officers to permit accomplishment of such end.

\textsuperscript{181}194 U. S. 590 (1904).
\textsuperscript{182}Scranton v. Wheeler, 179 U. S. 141 (1900).
\textsuperscript{183}Work v. Louisiana, 269 U. S. 250 (1925).
\textsuperscript{184}Coltra v. Weeks, 271 U. S. 536 (1926).
\textsuperscript{185}Sterling v. Constantin, 287 U. S. 378 (1932).
\textsuperscript{186}Ickes v. Fox, 300 U. S. 82 (1937).
\textsuperscript{187}Perkins v. Lukens Steel Co., 310 U. S. 113 (1940)—suit to enjoin minimum wage established by the Secretary of Labor under the Walsh-Healey Act, compliance with the wage standards established being a condition of government contracts. Here lack of "standing to sue" was the stated ground for denying relief.
\textsuperscript{188}Wells v. Roper, 246 U. S. 335 (1918)—suit to enjoin the Postmaster General from annulling plaintiff's contract to furnish automobiles for the delivery of mail in Washington,
Suits against officers to enjoin use of articles claimed to infringe patents have been consistently held suits against the government. An alternative ground for decision in these cases, suggested by Mr. Justice Harlan in the dissenting opinion to Belknap v. Schild, is that the extraordinary remedy of injunction should not issue, but that parties should be left to their action for damages. If the injunction were granted, the government could immediately exercise its power of eminent domain in effect leaving the party to his remedy by negotiation or recovery of monetary damages. This, however, is an argument which might be advanced with respect to other suits to enjoin governmental interference with tangible property.

It is difficult to quarrel with the end results in these cases, but there is not one of them in which the same result could not have been reached by a holding on the merits, utterly disregarding such a purely metaphysical issue as when is a suit directly affecting governmental interests, property, or functions not a suit against the government? Sustaining demurrers to complaints and sustaining motions to dismiss restraining orders and injunctions provide time-honored means of disposing of equity causes wherein a balancing of interests involved indicates that the extraordinary relief sought is not warranted. The disposition of causes in this manner can be just as summary or as attenuated as the court chooses to make it. Certainly it would not detract from the summary treatment of such litigation if courts and counsel were spared the burden of pondering, briefing and expounding volumes of balderdash concerning "suits against the government".

(5) Where attempt is made to compel affirmative action by officers (regardless of whether the proposed order is phrased to prohibit the officer from desisting to act in a particular manner) there exist all the defects of limited physical power of courts and difficulty of supervision of performance inherent in such orders. Thus a well-established equitable principle should render necessity for resort to the immunity doctrine infrequent indeed.

D. C. (The Post Office Department having decided to place six screened mail delivery trucks in experimental use in that City).

Belknap v. Schild, 161 U. S. 10 (1896) (Suit against Navy Yard Commandant to enjoin infringement of patent in use of a caisson gate); Crozier v. Friedrich Krupp Aktiengesellschaft, 224 U. S. 290 (1912) (Suit against Army Chief of Ordnance to enjoin patent infringement in use of certain improvements on guns and gun carriages); International Postal Supply Co. v. Bruce, 194 U. S. 601 (1904) (Suit to enjoin local postmaster from infringing patent in use of postmarking machine).

This was the argument of Chief Justice White in the Krupp case.
Where suit is brought to compel accounting entries to be made, or to require officers to desist from making certain such entries, the relief requested is granted more often than might be supposed.171 This is true even though the practical effect of compelling the entries may be to dip into the federal treasury and pay the plaintiff. It is also mildly surprising to find that where the government is in the position of a mere stakeholder with respect to funds, courts may order fiscal officers to withhold or make payments pending or upon conclusion of litigation concerning such funds.172 On the basis of logic it is difficult to reconcile these cases with *Buchanan v. Alexander*,173 forbidding garnishment of funds in the hands of government disbursing officers.

Courts are no more disposed to compel government officers specifically to perform obligations of the government under executory contracts calling for other than manual transfer of funds or the making of accounting

171Kendall v. U. S., 12 Pet. 522 (U. S. 1838)—compelling the Postmaster General to credit contract mail carriers with awards made by the Solicitor of the Treasury after investigation pursuant to direction of Congress; President of Yale College v. Sanger, 62 F. 177 (C. C. D. Conn. 1894)—enjoining a State Treasurer from delivering monies appropriated by Congress, pursuant to a land grant college agreement, to a school other than Yale, Yale having received the land grant and complied with all conditions; Smith v. Jackson, 246 U. S. 288 (1918)—mandamus to compel a United States Auditor to pay a quarters allowance to a District Judge in the Canal Zone, the conscience auditor being rebuked by the Supreme Court for his very zeal in discharging his stewardship; R. F. & P. R. Co. v. McCarl, 62 F. 2d 203 (App. D. C. 1923)—the Court of Appeals does not order, but throws an unequivocal hint to the Comptroller General that the Court would be gratified if the Comptroller General would cease withholding funds due from the Government to the railroad. The Comptroller General was withholding payment by reason of what amounted to no more than an unliquidated claim based upon an ICC finding that the railroad should pay certain excess income into a revolving fund. The Court indicated that at the very least the Comptroller General might have the grace to cause payment to be made of money due the railroad in excess of the amount of the ICC finding. Miguel v. McCarl, 291 U. S. 442 (1934)—mandatory injunction to an Army disbursing officer to credit retired pay to a retired member of the Philippine Scouts, with the added observation that it was not to be supposed that the Comptroller General would persist in his refusal to return certain substantiating vouchers to the disbursing officer, upon learning of the decision.

172Houston v. Ormes, 252 U. S. 469 (1920)—the Court declared an equitable lien for an attorney’s fee to exist upon money in the hands of the Secretary of the Treasury which had been appropriated to pay the judgment. Mellon v. Orinoco Iron Company, 266 U. S. 121 (1924)—dispute as to party properly entitled to proceeds of indemnity received from Venezuela for expropriation of oil concessions. The Secretary of the Treasury was enjoined on the suit of one claimant from paying the money to the other claimant pending the conclusion of litigation.

1734 How. 20 (U. S. 1846).
entries, than they are disposed to compel such officers to acquiesce in, and continue payment for, the continued performance by others of contracts for furnishing goods and services. Compelling affirmative acts of construction and destruction are likewise not favored. Quite sensibly do the courts conclude that general administration of particular agencies and functions is not likely to be greatly improved by the superimposition of overall judicial supervision.

The State Bond Cases provide an interesting chapter.  Louisiana v. Jumel involved a state board set up for the purpose of scaling down the principal and interest on certain bonds, exchanging new bonds for

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174 U. S. ex rel Goldberg v. Daniels, 231 U. S. 218 (1913)—where the Secretary of the Navy changed his mind about selling the decommissioned cruiser Boston, deciding instead to give it to the Oregon Naval Militia, the Court refused to mandamus him into carrying out the contract of sale; Holmes, J., objecting to interference with the government "behind its back". International Trading Corp. v. Edison, 109 F. 2d 825 (D. C. 1939)—the Court refused to require the Secretary of the Navy specifically to perform a contract for the purchase of teakwood. But see Domestic & Foreign Commerce Corp. v. Littlejohn, supra note 148.

175 Hopkins v. Clemson Agricultural College, 221 U. S. 636 (1911)—refusal to compel trustees of the college to remove a convict-built dyke from state land upon which the college was located on the ground that the State was a “necessary party”. (If this be the ratio decidendi, why not argue that inasmuch as the doctrine of U. S. v. Lee would permit ousting the Trustees from the state land altogether, they may certainly be compelled to abate this nuisance?)

176 Naganab v. Hitchcock, 202 U. S. 473 (1906)—Suit to restrain certain acts of the Secretary of the Interior with respect to lands held in trust for the Chippewa Indians—actually the object of the suit being to obtain better overall administration of the trust. Louisiana v. McAdoo, 234 U. S. 627 (1914)—Suit to compel the Secretary of the Treasury to increase sugar tariffs on the ground that the full amount required by statute was not being collected. Louisiana alleged irreparable damage in that her convict-operated sugar mills were adversely affected by the failure of the Secretary to charge the full statutory duty. The suit was barred as one against the government, rather than upon the basis of lack of standing to sue on the part of the plaintiff. U. S. ex rel Hall v. Payne, 254 U. S. 343 (1920)—Attempt to mandamus the Secretary of the Interior to recognize plaintiff's right to a homestead, the question being solely one of administering applicable statutory provisions and determining plaintiff's eligibility or non-eligibility thereunder. Here the writ was denied on the ground that this was within the "discretionary power" of the Secretary.

177 Block's excellent article, supra note 121, at 1073 mentions the "State debt repudiation debacle following the Civil War." Fairness would seem to compel the further statement that economic bankruptcy, absence of representative governments in the states at the time the indebtedness was contracted, and corrupt and profligate use of much of the money borrowed by the unrepresentative governments, all weakened the moral obligation to pay the bonded indebtedness.

178 107 U. S. 711 (1883).
old, and consolidating and reissuing various issues. A suit against this
board for payment of certain bonds was held a suit against the state, al-
though it would appear that the Court could well have stopped with its
assertion that the board had nothing to do with the payment of bonds.
Mr. Justice Harlan here began a series of dissents (in which he was
often joined by Field, J.) in cases denying the right of suit against state
officers, which continued over twenty-five years.\textsuperscript{179} He objected that the
\textit{Jumel} decision was in fact overruled by the \textit{Virginia Coupon Cases}.\textsuperscript{180}
On the ground that the \textit{Coupon Cases} were in fact rested—that legisla-
tion invalidating use of the coupons constituted an unconstitutional im-
pairment of a contractual obligation and officers purporting to act there-
derunder were stripped of their official character—Mr. Justice Harlan’s ob-
jections were quite sound. The cases could have been distinguished on
the basis of \textit{U. S. v. Lee}, but the Court never attempted so to distinguish
them. The \textit{State Bond Cases} constitute notable examples of the dis-
regard by the Court of the fiction of officers stripped of their official
character, where the result which would be entailed by application of
that principle was not relished. At any rate, future attempts to man-
damus state officers into levying taxes to pay defaulted and repudiated
principal and interest on state bonded indebtedness, were consistently
struck down,\textsuperscript{181} and the Court refused even to do so much as to declare
bonds a lien upon state-owned railroad stock which the bonds had been
issued to purchase.\textsuperscript{182}

(6) To what extent may administrators be sued to enjoin their every-
day acts? A state dairy and food commissioner who went beyond his
statutory authority in issuing an order concerning the alleged mislabelling

\textsuperscript{179}After continuing in dissent for a quarter of a century, Mr. Justice Harlan announced,
in \textit{Ex parte Young}, 209 U. S. 123 (1908) that he had changed his point of view concerning
this matter on the ground that permission to sue State officers tended to reduce sovereign
States to the status of mere dependencies.

\textsuperscript{180}Poindexter v. Greenhow, 114 U. S. 270 (1885), and following cases, discussed in text,
\textit{supra}. Despite repeated reaffirmance of the \textit{Jumel} case (see following note), still in Mc-
Gahey v. Virginia, 135 U. S. 662 (1890), the Court petulantly struck down another Virginia
device to hamper and impede persons in the use of bond coupons for payment of state taxes.

\textsuperscript{181}Hagood v. Southern, 117 U. S. 52 (1886); North Carolina v. Temple, 134 U. S. 22
(1890); State of Louisiana \textit{ex rel} N. Y. Guaranty & Indemnity Co. v. Steele, 134 U. S.
230 (1890). That the rule is otherwise with respect to mandamus against county and mu-
nicipal officers to levy taxes to satisfy bonded indebtedness, see Seibert v. Lewis, 122 U. S.
284 (1887); Graham v. Folsom, 200 U. S. 248 (1906).

\textsuperscript{182}Christian v. R. Co., 133 U. S. 233 (1890).
of maple syrup, officers of the Department of Agriculture charged with unauthorized interference with a private manufacturer in the use of the name "Creamo" for his oleomargarine; a Tea Board which excluded tea containing a microscopic quantity of innocuous coloring matter, for the reason that such were "impurities" within the literal meaning of the statute; and a determination by the Secretary of the Treasury as to whether fusel oil was or was not a "synthetic organic chemical" within the meaning of a statute, did not give courts any difficulty in so far as the jurisdictional question was concerned—the issue as to whether such were suits against the government often not being even suggested. One should hasten to add, however, that the fact that such cases are not held to be beyond the jurisdiction of the court by no means implies that one can procure a redetermination by the court of the factual determination made in the administrative agency. The usual judicial review consists of a glance to the statutory authority, and a summary scanning of the facts to determine whether the commissioner's action may be deemed arbitrary.

As official rank and responsibilities increase, and as decisions of greater moment are made, the nearer does one approach the jurisdictional question. American School of Magnetic Healing v. McAnnulty upheld an injunction granted against a local postmaster to prohibit his carrying out a fraud order made by the Postmaster General, denying plaintiff the use of the mails. The Court found that there was not substantial evidence to support the finding of the Postmaster General that the plaintiff had been guilty of fraud. Perkins v. Elg enjoined the Secretary of State from refusing a passport to Miss Elg on the sole ground that she was not a citizen, the Court having ascertained that she was in law and in fact a citizen—the jurisdictional question was not suggested.

Board of Liquidation v. McComb enjoined state officers from mak-

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187Riverside Oil Co. v. Hitchcock, 190 U.S. 316, 324 (1903), quoted in Commercial Solvents Corp. v. Mellon, ibid.: "Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessary jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under these circumstances to review his determinations by mandamus or injunction."
188187 U. S. 94 (1902).
189307 U. S. 325 (1939).
19092 U. S. 531 (1876).
ing a bond issue for the purpose of paying an allegedly invalid claim asserted against a state. In Murray v. Wilson Distilling Co.\textsuperscript{191} however, an injunction was denied, on the jurisdictional ground, to prohibit a state commission charged with liquidation of liquor dispensaries from disbursing funds in its possession prior to payment of plaintiff's claim. The Murray case could have been better decided on the ground of forum non conveniens, inasmuch as the practical effect of granting the injunction would have been to transfer the liquidation of the state dispensaries to the federal court. Suits against the Secretary of the Interior to enjoin acts with respect to public lands and Indian trust lands and funds have fairly uniformly been held suits against the government, not maintainable in the absence of consent.\textsuperscript{192} The Court of Appeals, District of Columbia, has held a suit against the Secretary of the Treasury to enjoin payment to Philippine vegetable oil producers of monies from an earmarked fund collected from processing taxes upon users of the oils, to be a suit against the government.\textsuperscript{193} The suit was by one of the processors, whose interest in the earmarked fund (in view of doubts as to the constitutionality of the statute under which the taxes were collected) was more immediate than that of the individual taxpayer with respect to the general funds of the government, hence it could hardly have been said that the plaintiff lacked standing to sue. The Court considered this situation more nearly analogous to the State Bond Cases than to those cases compelling or strongly suggesting the making of accounting entries.\textsuperscript{194}

Brooks v. Dewar\textsuperscript{195} is notable for the extremely sound approach to the immunity issue employed by Mr. Justice Roberts. This was a suit to enjoin the Regional Grazier of the United States, a responsible subordinate of the Secretary of the Interior, from barring plaintiffs from grazing their livestock in a certain grazing district in default of their

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\textsuperscript{191}123 U. S. 151 (1909).
\textsuperscript{192}Minnesota v. Hitchcock, 185 U. S. 373 (1902)—suits to enjoin sale of parts of an Indian Reservation, the Court raising the jurisdictional question of its own motion, but finding consent to suit had in fact been given. Morrison v. Work, 266 U. S. 481 (1925)—trust land and funds held for Indians.
\textsuperscript{194}If the case were to be decided by analogy, would not Board of Liquidation v. McComb or the stakeholder cases, Houston v. Ormes and Mellon v. Orinoco Iron Co. provide closer analogies? These cases would, however, militate toward permitting the suit.
\textsuperscript{195}313 U. S. 354 (1941).
obtaining a license and paying certain grazing fees as prescribed by rules promulgated by the Secretary pursuant to statute. The Regional Grazier contended that the Secretary was a necessary party, and that this was a suit against the United States—a not unreasonable argument in the light of other cases dealing with the Secretary of the Interior in his relation to public lands, although the regulatory aspect here involved would militate toward permitting review by the courts. Mr. Justice Roberts' treatment of this question follows:

"As this court remarked nearly sixty years ago respecting questions of this kind, they 'have rarely been free from difficulty' and it is not 'an easy matter to reconcile all the decisions of the court in this class of cases"196. . . . The statement applies with equal force at this day. We are not disposed to attempt a critique of the authorities. . . ."197

Whereupon, the Court proceeded to examine the merits to the extent of ascertaining that the Secretary of the Interior had acted within the scope of the authority granted by the statute, concluding the matter in a very small fraction of the time and space in the reports which would have been required even for a cursory critique of the authorities with relation to the issue of sovereign immunity. The moral certainly does not require elaboration.

It is deemed unfortunate that a leaf was not removed from Mr. Justice Roberts' book in deciding Mine Safety Appliances Co. v. Forrestal.198 There a contractor with the Navy Department sued to enjoin the Under Secretary from directing disbursing officers to withhold payments on certain contracts on the ground of a finding made under the Renegotiation Act that the contractor had made excessive profits on other contracts. The unconstitutionality of the Renegotiation Act was alleged. Although conceding that, under previous decisions, if the statute were unconstitutional, the Under Secretary would be stripped of his official character and could be proceeded against personally, the Court borrowed Mr. Justice Holmes' phrase from the Daniels case199 and held this a suit against the government, because granting the injunction would be indirectly compelling the government to make payments on the other contracts, thus trying its liability "behind its back". Mr. Justice Reed con-

196Citing the opinion of Miller, J., in Cunningham v. Macon & Brunswick R. Co., 109 U. S. 446 (1883).
197Brooks v. Dewar, supra at 359-60.
curred in the result, but would have based the holding on the lack of equity jurisdiction, in that the plaintiff had an adequate remedy at law by suit in the Court of Claims.  

(7) The rule set forth in Erskine v. Arsdale that taxes illegally assessed and paid may be recovered by a suit against the collector if protested as illegal and if intent to sue for refund be made manifest, has existed throughout our history with the exception of a period of one month following the decision in Cary v. Curtis. Injunctions to restrain collection of State taxes, where unconstitutional, have consistently been issued through the years, without serious question as to the application of the immunity rule, although since 1867 the federal government has by statute protected its own revenues against such injunctions. In the tax cases, the Court has been reasonably consistent in its statement as to the reason for non-application of the doctrine of sovereign immunity, as being that the invalidity of the taxing statute strips the revenue officer of his official capacity, rendering him individually enjoiable.

The suit against the collector to recover taxes paid as an illegal exaction, being an ancient right of action, will usually be provided by statute in various states, if not as a common law right independent of statute.

A better solution was subsequently found in Macauley v. Waterman Steamship Company, 327 U. S. 540 (1946). This was another case arising under the Renegotiation Act, a declaratory judgment and equitable relief against the administrative officer being denied on the ground that the plaintiff had not exhausted the administrative remedies provided by the Act, i.e., appeal to the Tax Court.

How. 236, (U. S. 1845)—holding that the Act of March 3, 1839, c. 82, § 2, 5 Stat. 339, 348 (1839) (passed following the default of Samuel Swartwout, Collector of Customs, Port of New York, in the amount of $1,374,119.65) requiring customs collectors to cover collections into the Treasury, regardless of protest, and not to hold monies collected pending suit, effectively barred a right of action against the collector. The decision was rendered January 21, 1845, and on February 26, 1845, Congress restored the old liability. This bit of historabilia is taken from a note to the dissenting opinion of Mr. Justice Frankfurter, in Great Northern Life Insurance Co. v. Read, 322 U. S. 47, 58 (1944). Mr. Justice Frankfurter cites Brown, A Dissenting Opinion of Mr. Justice Story, 26 Va. L. Rev. 759 (1940).

Gunter v. A. C. L. R. Co., 200 U. S. 273 (1906); Scott v. Donald, 165 U. S. 58 (1897); Ex parte Tyler, 149 U. S. 164 (1893); Allen v. B. & O. R. Co., 114 U. S. 311 (1885); Humphrey v. Pengues, 16 Wall. 244 (U. S. 1873); Tomlinson v. Branch, 15 Wall. 460 (U. S. 1873).

Chandler v. Dix, 194 U. S. 590 (1904), discussed in text, infra, did not involve denial of injunction against initial collection of tax.

The Court may, however, choose to ignore the rule where it does not deem the injunction proper, as in Chandler v. Dix.
Prior to 1944, the only indications that such suits might not be equally as maintainable in federal as in state courts, were contained in *Smith v. Reeves* and *Chandler v. Dix.* The first case held that a State could validly limit its consent to be sued in a tax refund case to the state courts, and in the *Chandler* case the Court similarly held that the state statute necessarily contemplated suit only in the state courts to set aside tax sales of real estate and enjoin allegedly invalid assessments upon lands held by the State by virtue of such sales. Both suits were against State Treasurers or Auditors General rather than the immediate tax collector. *Atchison, T. & S. F. R. Co. v. O'Connor* (decided subsequent to the *Smith* and *Chandler* cases) held the traditional suit against the tax collector, where the tax was paid under protest upon claim of invalidity of the statute, to be not a suit against the State on the authority of the *Arsdale* decision. Three recent cases hearken back to the *Smith* and *Chandler* cases, and perhaps portend an anachronistic trend as respects extension of the immunity rule. These cases involved tax refund statutes of Oklahoma, Indiana, and Utah, respectively, with provisions for payment under protest and subsequent litigation. The Oklahoma statute provided that the suit should be brought in the court “having jurisdiction thereof”; that in addition such cases “shall have precedence”. In the Indiana case, the statute provided for suit “in any court of competent jurisdiction”. Ford Motor Company brought suit for refund in the federal court, and the question of jurisdiction was never raised until the case reached the Supreme Court. The Utah statute also provided for suit “in any court of competent jurisdiction”, and extant state decisions held that phrase to include both state and federal courts. Moreover, in another place in the same taxing statute, it was provided with reference to other tax situations that they should be “reviewable only” in the Supreme Court of the State. In all three cases, the Court, per Mr. Justice Reed, considered the statutes to fall short of the “clear declaration” of the consent of the State to be sued in the federal courts, which the Court thought to be “required before federal courts should undertake adjudication of the claims of taxpayers against a State.” Three Justices dis-

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207 178 U. S. 436 (1900).
208 194 U. S. 590 (1904).
209 223 U. S. 250 (1912).
sented in both the *Read* and *Kennecott* cases, with two Justices not participating in the latter.

*Ex parte:* In the Matter of Ayers\(^2\) held invalid as a suit against the State of Virginia an injunction against the State Attorney General, restraining him from interfering with the use of bond coupons for payment of taxes, despite prior holdings of the Court to the effect that Virginia statutes prohibiting the use of the same coupons for payment of taxes constituted an unconstitutional impairment of the State contractual obligation. From this decision was derived the general rule that the sovereign immunity doctrine forbids an injunction against attorneys general and prosecuting attorneys to prohibit their exercise of the powers of their offices to enforce state statutes in the state courts. This rule is notable by reason of frequent departures of the Court therefrom, as discussed below.\(^2\)12

Despite both the sovereign immunity doctrine and the prohibitory language of section 3653 of the Internal Revenue Code,\(^2\)13 which is about as explicit and unequivocal as statutory language can be made, injunctions against federal tax collectors are not unknown. Hence, the government may sometimes be thwarted when it not only does not consent to a particular type of suit, but specifically prohibits it. Where the Commissioner of Internal Revenue was considered to have arbitrarily overruled a construction of a statute taxing oleomargarine, which construction had been uniformly and consistently adhered to over a period of forty years, these were “special and extraordinary” circumstances demanding injunction.\(^2\)14 *Rickert Rice Mills v. Fontenot*\(^2\)15 enjoined collection of processing taxes after the AAA had been invalidated, reasoning that this was enjoining a mere personal trespass by the collector. In *Allen v. Regents*\(^2\)16 a state university sought to enjoin collection of federal admissions taxes upon ticket sales to its football games. While the Court refused to grant the injunction on the very realistic ground that college football is “business”, it did consider the case on the merits.

\(^{211}\)123 U. S. 443 (1887).
\(^{212}\)See Looney v. Crane Company, 245 U. S. 178 (1917)—injunction against the Secretary of State and the Attorney General of Texas, restraining the enforcement of confiscatory permit and franchise taxes on foreign corporations.
\(^{213}\)26 U. S. C. § 3653 (a) (1940). With exceptions not here relevant, “. . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.”
\(^{215}\)297 U. S. 110 (1936).
\(^{216}\)304 U. S. 439 (1938).
(8) Attempts to enjoin state regulatory actions respecting businesses charged with a public interest, have been consistently held not to constitute suits against the State.\textsuperscript{217} The manner in which the injunction is sought, however, may render the suit one against the State under Ex parte Ayers,\textsuperscript{218} if attorneys general, prosecuting attorneys, or other enforcement officers are attempted to be enjoined from enforcing the allegedly unconstitutional statute in the state courts.\textsuperscript{219} Ex parte Young\textsuperscript{220} established an exception to the Ayers rule, where the penalties imposed by the regulatory statute are so severe as to render it impracticable to test the constitutionality of the statute through defending prosecution for its violation. Doubt has been cast upon the continued existence of the Ayers rule,\textsuperscript{221} but a recent decision affirms its application in the absence of the extraordinary circumstances of Ex parte Young.\textsuperscript{222}


\textsuperscript{218}Fitts v. McGhee, 172 U. S. 516 (1899)—suit to enjoin prosecution for charging bridge tolls higher than established by statute. The case rested upon (1) No “special duty” upon the Governor of the State, Attorney General, and other officers, to enforce this statute; (2) Ex parte Ayers; (3) the validity of the statute could be tested in defending a prosecution for violation. But see, Prout v. Starr, 188 U. S. 537 (1903), in which the Attorney General was enjoined from proceeding in the state courts to enforce the rates, while litigation testing their validity was pending in the federal courts. Harkrader v. Wadley, 172 U. S. 148 (1898)—State criminal prosecution could not be enjoined solely because of pendency of civil action in federal court involving the same matter, as only where unconstitutionality of the statute is alleged is such a suit not a suit against the State.

\textsuperscript{219}209 U. S. 123 (1908). Following the same doctrine, see, Western Union Telegraph Co. v. Andrews, 216 U. S. 165 (1910); Ludwig v. Western Union Telegraph Company, 216 U. S. 146 (1910)—both cases involved an Arkansas statute providing that removal by foreign corporations of causes from the State into the federal courts constituted ground for revocation of authority to do business in the State, and a $1,000.00 per day penalty was imposed for doing business thereafter. Herndon v. Chicago, R. I. & P. R. Co., 218 U. S. 135 (1910)—a Missouri statute providing a $25.00 per day penalty for failure of trains to stop at all junctions and intersecting points with other railroads.

\textsuperscript{220}Truax v. Raich, 239 U. S. 33 (1915)—a State Attorney General was enjoined from enforcing a statute requiring approximately 80% of the employees of any employer to be electors or natural born citizens. The Court indicated that a suit to enjoin enforcement of an unconstitutional statute was not a suit against the State.

\textsuperscript{221}Beal v. Missouri Pacific R. Co., 312 U. S. 45 (1941)—suit to enjoin Attorney General and county prosecutors of Nebraska from enforcing a “full train crew law”. The law required “brakemen” to a certain number, whereas the Missouri Pacific employed colored “brakemen-porters” who were paid less than “brakemen”. It was held that in the absence of the circumstances of Ex parte Young, the Ayers rule was applicable, and the suit was one against the State.
Although the immunity rule is not rigorously applied to suits against state regulatory commissions, the same is by no means true of the Interstate Commerce Commission. *ICC v. Northern Pacific R. Co.*\(^{228}\) did enjoin an order of the Commission based upon a clearly erroneous finding, but subsequent cases unequivocally state that suits against the Commission are suits against the United States, and the legislative consent to such suits is rigorously construed.\(^{224}\) One of the most extraordinary incidents of the rule in the case of the Interstate Commerce Commission is that suits wholly between private individuals or corporations, wherein an ICC order may be affected, may be held suits against the government of which neither State nor federal courts have jurisdiction.\(^{225}\) Other federal rate-making functions of similar character have been held to fall within the immunity rule,\(^{226}\) though with sufficient jurisdiction in the

\(^{228}\) 216 U. S. 538 (1910)—the statute provided that the ICC might order joint or through rates “where no reasonable or satisfactory through route exists.” The Commission made the finding that no such route existed and established a joint rate for the Northern Pacific. The Court said that the existence of satisfactory through routes in this case was notorious, and enjoined enforcement of the joint rate.

\(^{224}\) Ill. Cent. R. Co. v. P. U. C. of Ill., 245 U. S. 493 (1918). The Urgent Deficiencies Act of October 22, 1913, c. 32, 38 STAT. 219 (1913), 28 U. S. C. § 41 (8) (1940), provided that any “suit” to “enforce, suspend, or set aside” an ICC order could be brought only in the district of residence of the party petitioning for the rate. Here the Illinois Commission was sued by the Railroad to enjoin “interference with” the ICC rate. The Illinois Commission filed a cross bill assailing the validity of the ICC order establishing the rate in question. *Held:* The original bill to enjoin “interference” was not a suit to “enforce” the ICC order, hence could be maintained in Illinois (not the district of residence of the party petitioning for the rate). The cross bill, however, was a suit against the United States as to which there was no consent to suit in Illinois, and was properly dismissed. U. S. v. Griffin, 303 U. S. 226 (1938)—suit to set aside an ICC order *refusing* an increase in rates. *Held,* the Urgent Deficiencies Act consents only to suits relative to *affirmative* orders of the ICC, and no jurisdiction of suits relative to ICC orders exists, other than as conferred by that Act.

\(^{226}\) See Ill. Cent. R. Co. v. P. U. C. of Ill., *supra*; Lambert Run Coal Co. v. B. & O. R. Co., 258 U. S. 377, (1922)—suit by the coal company against the railroad commenced in a West Virginia State court, claiming failure to distribute cars in accordance with an ICC Assigned Car order. The railroad alleged invalidity of the order and removed the case to federal court. *Held,* the West Virginia court had no jurisdiction initially and the federal court had no jurisdiction on removal, this being a suit against the United States to which it had not consented.

\(^{225}\) Northern Pacific R. Co. v. North Dakota, 250 U. S. 135 (1919)—intrastate rate fixed by Director General of Railroads under authority of wartime statute; Dakota Central Telephone Co. v. South Dakota, 250 U. S. 163 (1919) and following cases; MacLeod v. New England Tel. & Tel. Co., 250 U. S. 195 (1919)—intrastate telephone rates fixed by the Postmaster General under a wartime statute.
court to determine whether the officer's statutory authority was exceeded.227

(9) In discussing the sovereign immunity rule as it applies to federal corporations, it should be stressed that the liberality of interpretation of the phrase "to sue and be sued" as applied to these agencies, is due neither to any magic contained in those words, nor in the corporate device, _per se_. For when section 7 of the Organic Act of Puerto Rico stated that the Governor and other constituent officials should constitute "a body politic under the name of the People of Puerto Rico . . . with power to sue and be sued as such," the "be sued" portion of the phrase was judicially construed by the addition of the words "with its consent." For it "must be assumed" that Congress intended to provide Puerto Rico with a government "founded upon the American system", and were "to sue and be sued" given its usual construction here, the form of government would be one in which the legislative power concerning claims is subordinated to the judicial, and the exercise of such judicial power "would be destructive of" the American system.228 Therefore, the liberal attitude with regard to suits against federal corporations must be attributed to the fact that most such corporations are engaged in what are essentially commercial, rather than traditional governmental, activities.

The distinction between the government in business and in its traditional sovereign capacity was recognized by Chief Justice Marshall as early as 1824.229 Three years later, it was recognized that when the United States became a holder in due course of ordinary commercial negotiable paper, its rights and responsibilities with respect thereto were the same as those of any other holder, and lack of due care and diligence with respect to protest and notice of dishonor would discharge prior endorsers.230 States likewise were held to lay down their sovereignty, _pro tanto_, when they embarked upon ordinary commercial ventures.231

227The logical inconsistency involved scarcely requires exposition.
229Bank of the U.S. v. Planters' Bank of Georgia, 9 Wheat. 904, 907 (U.S. 1824) —suit against State bank by U. S. Bank, with plea of State charter and that State was one of the incorporators. "It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. . . ." See Bank of Kentucky v. Wister, 2 Pet. 318 (U. S. 1829) wherein the entire capital stock of the bank was owned by Kentucky —the same rule being applied.
231Darrington v. Bank, 13 How. 12 (U. S. 1851) —banknotes issued by a wholly State-
ningham v. Macon & Brunswick R. Co.\textsuperscript{232} wherein the Court held itself deprived of jurisdiction because the State of Georgia was deemed an indispensable party to a suit to throw a wholly state-owned railroad into receivership, represents a departure from the sound rule expressed in the earlier cases. There, however, the Court looked not to the cases defining the status of the state when it enters into commercial undertakings, but solely to cases dealing with suits against officers of governments, hence the departure may be regarded as unconscious.\textsuperscript{233}

Sloan Shipyards v. U. S. Shipping Board Emergency Fleet Corporation,\textsuperscript{234} was the first of the more recent cases, holding that when Congress incorporated the Emergency Fleet Corporation under the laws of the District of Columbia, giving it enormous powers, it was suable as would be any other corporation—the fact that the United States owned all of the stock being immaterial. The Chief Justice and two associates dissented, principally on the ground of enhanced uniformity and administrative convenience in having all litigation handled in the Court of Claims rather than in numerous jurisdictions throughout the country. Later cases have extended the rule to hold that "sue and be sued" in the case of federal corporations includes attachment of real estate from a state court in a \textit{quasi in rem} proceeding,\textsuperscript{235} liability for costs,\textsuperscript{236} and lack of immunity from garnishment or attachment of employees' wages in the hands of the corporation.\textsuperscript{237} In \textit{Keifer \& Keifer v. RFC}\textsuperscript{238} Congress au-

\textsuperscript{232}109 U. S. 446 (1883).

\textsuperscript{233}See quotation from Mr. Justice Miller’s opinion in the Cunningham case, \textit{supra}, containing the statement, “It is not an easy matter to reconcile all the decisions in this class of cases.”

\textsuperscript{234}258 U. S. 549 (1922).

\textsuperscript{235}RFC v. J. G. Menihan Corp., 312 U. S. 81 (1941).


\textsuperscript{237}FHIA, Region No. 4 v. Burr, 309 U. S. 242 (1940). \textit{Caveat}: The wages in question must be disbursed by the corporation, not the Treasury, as Buchanan v. Alexander, 4 How. 20 (U. S. 1846) forbids garnishment of funds in the hands of a federal disbursing officer. Some insight into the reasoning behind this rule may be provided by the opinion of Pilcher, J., in the recent English case of Lucas v. Lucas, 112 L. J. P. 84, 2 A. E. R. 110 (1943). There a wife held a garnishment order for arearage in alimony against the High Commissioner, for India—the husband's superior—in respect of £30 per month overseas pay received by the husband. It was held that inasmuch as the husband was a civil servant,
The Credit Agricultural plaintiff sued which Congress ing the feed Agentsject. that it was intended to indicative containing to all of could properly on when it suability of factor", deemed was RACC. A subsidiary, so neglected so to do. Hence the suability of RFC was held to flow to its subsidiary, RACC. The fact that the suit here involved was a tort suit was deemed immaterial—were it other than an “irrelevant procedural factor”, the plaintiff could have waived the tort and sued on the feeding contract.

It must be remembered, however, that there are limitations to the suability of these agencies. Congress does not have to make them suable, and it can take away or limit their suability at any time it sees fit. Thus when on February 3, 1936, the Supreme Court held that a national bank could properly be taxed by Maryland upon shares of its preferred stock, all of which was held by RFC,\textsuperscript{239} Congress, on March 20, 1936, enacted a statute forbidding taxation of such shares, which statute was made retroactive in effect. Both the right of Congress so to do and the right so to do retroactively were explicitly upheld,\textsuperscript{240} although it was implied that the retroactive withdrawal of the right to tax such shares could not be construed to authorize recovery of taxes actually paid to the state. The Court stressed the fact that the Congressional power here did not stem from any provision of the Constitution, but from its power to consent to actions against federal instrumentalities, to condition such consent, and to withdraw such consent, prospectively or retroactively, at any time.

When a governmental corporation is liquidated, and the general government handles the winding up of its affairs, despite such broad language

holding office and the right to salary only at the pleasure of the Crown, there was never any “debt due or accruing to” him within the meaning of the applicable statute.

\textsuperscript{239}Maricopa County v. Bank, 318 U. S. 357 (1943).


\textsuperscript{239}Maricopa County v. Bank, 318 U. S. 357 (1943).
in the statute providing for liquidation as "all rights and liabilities are to be assumed by the United States"; "all suits are to be defended"; and "judgments are to be reported to Congress as judgments of the Court of Claims are reported"; still one is not left standing in the same position after the government takes over as he was while the corporation remained in existence. For example, a suit could not be maintained or continued in a state court after the government resumed the reins, and an affirmative judgment on a counterclaim could not be rendered in a pending cause.\footnote{U. S. v. Shaw, 209 U. S. 495 (1940).}

**Conclusion**

With respect to sovereign prerogatives, existing independently of constitutional grant, the basic philosophical conflict would appear to be between the following antipodal points of view:

1. That there is a state entity, wholly separate and apart from, and superior to, the individuals who comprise the state. This entity may be termed "the people", "the government" or "the United States", but in so describing it, one imbued with the entity concept thinks not of individuals scattered over three million square miles of territory, nor of a group of men working in edifices of varying degrees of magnificence, controlling in greater or less degree the activities of a large or small number of their fellows. Rather, an intangible, incorporeal institution is conceived, rising above all this, to which attach certain of the attributes of a deity. This institution is considered as possessing majesty, demanding respect and obeisance, and having a dignity which forbids doing any act with respect to it, or placing it in a position, which will cause it to lose caste in the eyes of others.

2. That the state is nothing more than an aggregate of individuals, some of whom are able, through varying combinations of heredity, intellect, wealth, and personal bearing and demeanor, to influence and dominate others. All notions of sovereign institutions represent merely the results of propagandizing by or at the behest of men, living and dead, who, having achieved a position of dominance among their fellows, are or were determined to perpetuate themselves and their posterity in that position. Consciously or unconsciously, those occupying positions of dominance perceived that the more deeply they could root the established order in the most primitive and elemental portions of the thought processes of those dominated, the more secure became their positions. Trying to sell the divinity of men proving unsuccessful, as their very mortality constituted a most constant and highly observable refutation of the thesis, the incorporeal institution provided a more durable and satisfactory substitute. Selling of the institution then proceeded by employing the "repetition is reputation" credo of the huckster, with the objective of creating to the greatest extent possible a belief in its divine or natural ordination.
It is submitted that all concepts as to the nature of the state will lie somewhere between these extremes. Veering toward the first are believed to have been Mr. Justice Iredell,242 Chief Justice Taney,243 Mr. Justice Davis,244 and Mr. Justice Strong.245 Quotations from opinions of present-day jurists may likewise indicate leanings in this direction.246

As veering toward the second described polar philosophy one may cite writings of Paley,247 Laski248 and Mr. Justice Frankfurter.249

242See Penballow v. Doane, 3 Dall. 54, 93-94 (U. S. 1795), in which Mr. Justice Iredell quite explicitly sets forth his theory that sovereignty resides in the body of the people as an entity, not as an aggregate of individuals, and that practicality alone compels the majority exercise of such power on behalf of the whole. The consistency between this viewpoint and his dissenting opinion in Chisholm v. Georgia is perfect.

243Beers v. Arkansas, 20 How. 527, 529 (U. S. 1857): “It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission.”

244Nicholl v. U. S., 7 Wall. 122, 126 (U. S. 1869): “... every government has an inherent right to protect itself against suits. ... The principle is fundamental, applies to every sovereign power.”

245Dollar Savings Bank v. U. S., 19 Wall. 227, 239 (U. S. 1874): “The rule thus settled respecting the British Crown is equally applicable to this Government. ... It may be considered as settled that so much of the royal prerogative as belonged to the King in his capacity of *pares patriae* or universal trustee, enters as much into our political state as it does into the principles of the British Constitution.”

246Reed, J., in U. S. v. Shaw, 309 U. S. 495, 501 (1940): “The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants. ... As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen. ...”

247Groner, C. J., in International Trading Corporation v. Edison, 109 F. 2d 825, 827 (App. D. C. 1939): “This doctrine has so often been announced by the Supreme Court and by us that more on the subject is unnecessary. It is enough that the doctrine rests upon reasons of public policy which by the nature of things resist the conclusion that a judicial tribunal shall have jurisdiction to declare the State a debtor without its consent. Any other rule would result in paralysis and confusion.”

248Reid, C. J., in Holcombe v. Georgia Milk Producer Confederation, 188 Ga. 358, 3 S. E. 2d 705, 708 (1939): “... it is neither becoming nor convenient that a State, exercising sovereign powers, should be summoned as a defendant to answer the complaints of private citizens, or that the course of its public affairs ‘should be subjected to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests.’”

249*Moral and Political Philosophy*, bk. 6, c. 6: “Sovereignty may be termed absolute, omnipotent, uncontrollable, arbitrary, despotic, and is alike so in all countries.”

250*The Responsibility of the State in England*, 32 Harv. L. Rev. 447 (1919). Speaking of the abolition of the sovereignty doctrine, at page 453: “... there are no arguments
Argument directed toward stating a "proper" or "sound" position at either, or at some intermediate point between, the two philosophical poles involved seems singularly futile, in addition to being extremely presumptuous. The sovereignty theory resolves itself, in essence, into nothing more than one's feeling toward and respect for institutions—something thoroughly inculcated upon virtually all adult intellects, and not subject to appreciable alteration by any amount of exhortation. One can do little more than to suggest avenues of approach toward whatever philosophical goal is desired to be attained. The trend is believed to be toward relaxation of the doctrine, and the following should contribute to that end.

It is submitted that specific distinction might first be made between the international law theory of sovereignty and sovereignty of the domestic government with relation to its citizens. The two are easily separable, and the rules of one need not be applied to the other. Though under more persistent fire from the writers than is the domestic doctrine, it does appear that the stark realities of international politics render it unlikely that international sovereignty principles will soon be abandoned. On the other hand, domestic law is a little more responsive to demands for change.

against it save, on the one hand, the dangerous thesis that the state-organs are above the law, and, on the other, the tendency to believe that ancient dogma must, from its mere antiquity, coincide with modern needs. . . .” Again, at page 466: “. . . certainly the forms of government could in no two countries remain more substantially distinct than those of England and the United States: yet, in each, the attributes of sovereign power admit no differentiation. . . . The fact is that here, as elsewhere, the democratic state bears upon itself the marks of its imperial origin. The essence of American sovereignty hardly differs, under this aspect, from the attributes of sovereignty as Bodin distinguished them three centuries ago. . . . What emerges, whether in England or in the United States, is the fact that an Austinian State is incompatible with the substance of democracy. For the latter implies responsibility by its very definition; and the Austinian system is, at bottom, simply a method by which the fallibility of men is concealed imposingly from the public view.”

Frankfurter, J., dissenting in Kennecott Copper Corporation v. State Tax Commission, 327 U.S. 573, 580, 581 (1946): “… thus while during the last seventy-five years, governmental immunity from suit, as a doctrine without moral validity, has been progressively contracted, the court now takes a backward step by enhancing a discredited doctrine through artificial construction. . . .” After stating that the only way in which the State statute could have more explicitly consented to tax refund suits in federal courts would have been to read, “any court of competent jurisdiction, including a federal court,” Mr. Justice Frankfurter continues: “… but if such a formal requirement be the meaning of the present decision, it runs counter to a long course of adjudication and pays undue obeisance to a doctrine, that of governmental immunity from suit, which, whatever claims it may have, does not have the support of any principle of justice.”
Concerning contract and tort actions against governments *eo nomine* the most which can now be expected of courts is liberal construction of legislation consenting thereto. Inertia having been overcome in completing the transfer of the major portion of claims from the legislative to the judicial branch of government, no great difficulty should be experienced in obtaining interstitial legislation from time to time as required to perfect and extend the remedies.

From suits against officers might well be eliminated the fiction of lack of constitutional or statutory authority as stripping the officers of their official character, and subjecting them to suits as individuals. As Block has stated, this is "little more than a convenient label to express a conclusion. The courts sometimes lean heavily upon it, and sometimes ignore it."\(^\text{250}\) The fact that in the *Banco de Espana* case, its employment continued a wholly senseless distinction between possessory actions against officers for real estate and for tangible personal property, reveals its trouble-making potentialities. It is notable that in *Land v. Dollar* the Supreme Court has apparently wiped out any such distinction.

It is submitted that *Brooks v. Dewar* and *Land v. Dollar* provide a foundation for a sound approach to the immunity problem in its relation to actions and suits against state and federal officers. A suggested *modus operandi* in such cases is: (1) Divest the law of the theory that such litigation against officers, pertaining to official acts and duties, is against the government, or that the government, or some intangible branch, department, board or commission thereof, is an indispensable or necessary party thereto, and the court therefore lacks jurisdiction. The only jurisdictional question in the first instance should be that of personal and territorial jurisdiction over the particular defendants as individuals, irrespective of their official status. (2) If from the pleadings it can be determined that the plaintiff has no cause of action, that the official act or omission complained of is authorized and lawful, then, as in *Brooks v. Dewar*, the plaintiff should be advised to that effect and sent home. The prestige both of public administration and justice suffers when parties with unmeritorious causes are left with judicial opinions susceptible to the interpretation that their cause was just, but the person or persons sued are above the law. (3) If the pleadings indicate, *prima facie*, that the plaintiff has a case, then should the court turn its attention to: (a) the *real* extent to which operations of the government will be hampered by the particular litigation, and prospective quantitative burdens upon

\(^{250}\)Block, *supra*, note 121, at 1074.
the courts and the administration of litigation of its general character. Thus can the extremely rare situation of emergency or genuine public hazard be handled. Thus also can courts continue in their refusal to review what has been characterized as benefactory governmental action. The true ground for dismissing the litigation should be candidly stated, however, without any reference to Sixteenth and Eighteenth Century mumbo-jumbo concerning the sacrosanct character of the sovereign.

(b) If, viewed realistically, neither the particular litigation nor litigation of its general character threaten wholly disproportionate detriment to the public interests, then may it be considered whether the particular officers or agents who have been sued are fairly representative of the government concerned. This may be determined by reference to their rank and authority in the premises, and the scope, local or national, of the policy represented in the particular acts or omissions complained of. Here it is that common law doctrines of misjoinder and non-joinder and equitable rules respecting formal or proper, necessary, and indispensable parties may be put to some good use—not as requiring the joinder of a wholly intangible and fictitious state-entity, department, or commission, but to require that the plaintiff proceed against more representative and responsible officers if there be an issue of policy involved extending beyond the authority of the particular defendants. As a matter of practicality and convenience, it is not considered that this rule should be carried to the extreme extent of requiring joinder of chief executives or legislators, but should stop with required joinder of agency or department heads. As an illustration of application of the rule, in Brooks v. Dewar, had the Court not determined that the plaintiff's bill was, on its face, without merit, then might attention have been given to the argument of the Regional Grazier that the Secretary of the Interior was a necessary party. Application of such a rule as to parties should have the practical effect of preventing state courts from exercising too great a degree of interference with federal policy through suits against local federal officers, thus preserving intact what is perceived to be the chief pragmatic reason for the sovereign immunity doctrine.

(4) If the foregoing tests are satisfied (and courts should be permitted to take evidence toward this end alone, if necessary), then might the matter proceed to a hearing upon the merits. After all of the evi-

See Blachly and Oatman, Judicial Review of Benefactory Action, 33 Georgetown L. J. 1 (1944).
dence is in, application of such standard equitable doctrines as balancing of interests involved between the public and the individual complainants, and inherent difficulties of supervision in attempting to enforce decrees requiring affirmative action, should afford all protection required both for public administration and the courts.

Application of the foregoing sequence of procedure in all mandamus and injunction litigation against governmental officers, is believed to offer a means of preserving everything contained in the sovereign immunity doctrine which is sound, while eliminating its flavor of governmental irresponsibility and despotism. Actions and suits for recovery of specific real and personal property and tangible evidences of intangible property now appear to be virtually eliminated from the sovereign immunity field other than with respect to suits against governments *eo nomine*. To complete the picture there would remain only overruling of *Lankford v. Platte Iron Works*,262 to permit damage actions to be maintained against government officers, as before. In this event, to avoid the *Miller v. Horton*263 situation, recovery should be permitted only in those situations wherein the official action so far exceeds the ambit of authority and discretion as to outrage reason, but the amenability of individuals to the jurisdiction of courts should be governed neither by the color of their official raiment nor by the nature of their employment.

Of the rule that the government is not bound by a statute unless named therein, nothing need be retained other than the flexible principle that the government should not be prejudiced by the negligent acts or omissions of its agents. The necessity for perpetuation even of this principle is by no means beyond doubt, it being based upon what are believed to be largely chimerical fears of widespread fraud and imposition upon the public by and through dishonest and incompetent administrative agents. Albeit, there may be sufficient substance to such arguments to justify this artificial mode of protecting the public, pending the institution of personnel policies and administration which inspire greater confidence. No excuse is apparent, however, for retaining the royal wrappings in which this principle came packed, to add to the existing plethora of "canons of construction".

In conclusion, by permitting the legislative branch of government to continue grappling with sovereign immunity as applied to suits against

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262 See note 134 *supra*.
263 See note 127 *supra*. 
the government *eo nomine*, while judicially modifying the doctrine as above indicated in relation to suits against governmental officers and agents, it is believed that a rational and palatable body of law can be achieved. Nor are the proposals made deemed either so revolutionary or so reactionary as to result in impalement upon the points of those contenders for too great liberty or too much authority.
ADMINISTRATIVE LAW

JUDICIAL-ADMINISTRATIVE RELATIONSHIPS—OLD WINE OR A NEW BREW?

PROBLEMS of administrative law, while comparatively new in terms of the total stream of Anglo-American law, have been before American courts in tremendous volume during the past three decades. Despite the prophets of doom on both sides who saw complete subjection of liberty by an irresponsible bureaucracy on the one hand and an equally complete frustration of governmental processes under the weight of judicial interference on the other, a tortuous course has been picked through a maze of constitutional questions and practical facts of modern economic life.

Through this process, the subject has lost much of its novelty—and a great deal of its mystery. The gristmill of case law, assisted by less frequent legislative pronouncements, has fixed the metes and bounds within which administrative justice may operate without diluting the “supremacy of law”. In this fashion it has become familiar and accepted that delegations of legislative power to administrative bodies must be limited to filling in factual details or consist of a declaration of the legislative will accompanied by an intelligible principle to serve as a standard, that administrative rule-making is not subject to the same procedural requirements as an adversary adjudication, that an interpretative regulation even of long standing will be rejected if it conflicts with a clear and unambiguous statute, that in the adjudicative process “There must be a hearing in a substantial sense”, that orders or decisions of administrative agencies to be conclusive must be based on

1Beck, Our Wonderland of Bureaucracy (1932); Pound, Contemporary Juristic Theory 25-28 (1940).
2Frank, If Men Were Angels (1942); Landis, The Administrative Process (1938).
3A term which has been the center of much debate. Compare Dicey, Lectures Introductory to the Law of the Constitution (1885), with the dissenting opinion of Justice Brandeis in St. Joseph Stockyards Co. v. United States, 298 U. S. 38, 84 (1936) for contrasting definitions framed fifty years apart.
on "substantial evidence", that material considered by the agency as evidence must be introduced as such, that findings stemming from such evidence must include the basic facts essential to support the order, and that the process of reaching a decision must conform generally to the syllogism of basic fact, ultimate fact, from which follows a logical conclusion.

It is therefore an event worthy of note when the Supreme Court is called upon to decide a case which involves more than some variation or facet of one of these principles already firmly established. Securities and Exchange Commission v. Chenery Corp. has the distinction of raising not one, but at least two issues which, although not unforeseen or unforeseeable, had not previously been decided clearly and definitely. That the Court's analysis of the controversy did not result in the isolation and disposition of the issues that hindsight study now suggests may have been due to the long history of the litigation and the sharp differences of opinion among the members of the Court, which are apparent in the four opinions which resulted from the case's two trips to the Supreme Court.

This was a proceeding to secure review of a ruling by the Securities and Exchange Commission which required, as a condition for approving a corporate reorganization plan under the Public Utility Holding Company Act of 1935, an adjustment in conversion of stock so that preferred shares purchased by the corporation's management while previous plans were pending would not participate in the control of the reorganized company. The Commission's decision was announced in an

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9 Consolidated Edison Co. v. NLRB, 305 U. S. 197, 229 (1938).
13 First considered in 318 U. S. 80 (1943); after remand and further proceedings, reconsidered in 332 U. S. 194 (1947).
15 Beginning in November, 1937 and continuing until the recent decision, the Securities and Exchange Commission had been dealing with various reorganization plans submitted by the managers of the Federal Water Service Corporation, a holding company registered under the Holding Company Act. Three such plans were submitted for the Commission's approval under §§ 7 and 11 of the act but were withdrawn prior to final adjudication, the Commission raising objection in each instance to a provision under which existing Class B stockholders would participate in the equity of the proposed reorganized company. During the period of these negotiations (1937-1940), respondents, who controlled Federal through their control of its parent, Utility Operators Company, purchased on the over-the-counter market and at market prices 12,407 of the 159,269 outstanding shares of
opinion\(^{16}\) which rested its action on principles of equity judicially established, i.e. that corporate managers occupy a fiduciary position during the course of a “voluntary” reorganization and would be subject to the same standards of conduct as govern other fiduciaries in dealing with the property which is the subject matter of their trust. From this it was reasoned that a court of equity would not permit management to consolidate its control under the circumstances of the case.\(^{17}\)

On review by the Court of Appeals for the District of Columbia, the Commission’s order was set aside.\(^{18}\) The court, with one judge dissenting, concentrated its attention on the corporation law aspect of the case and held that the judicial authorities cited by the Commission did not sustain its position and that, in the absence of fraud or lack of disclosure, a court of equity would not attach to corporate managers the fiduciary responsibility imposed by the Commission here. Certiorari was granted “because the question presented looms large in the administration of the Act” and by a 4-3 majority the Court of Appeals’ action was affirmed and the case remanded to the Commission “for such further proceedings, not inconsistent with this opinion, as may be appropriate”.\(^{19}\) Those “further proceedings” resulted in a new order by the Commission again denying approval of the reorganization plan as previously proposed.\(^{20}\) As described by the Supreme Court, however, the Commission avoided “the fatal error of relying on judicial precedents which do not sustain it”, recasts its rationale and based its order on the failure of the plan to meet the standards fixed by Congress. The Court of Appeals

Federal’s outstanding preferred stock. A fourth plan of reorganization was filed on March 30, 1940 under which Federal, Utility Operators and a wholly owned inactive subsidiary were to be merged, the Class B common shares of Federal surrendered for cancellation, and the preferred and Class A common shares of Federal converted to common stock of the new company. Approval of the plan would have resulted in respondents, through their holdings of Federal’s preferred shares acquiring more than 10 per cent of the new common stock and they frankly admitted that their interim purchases, which had been made at prices lower than the book value of the new common stock, were designed to protect their interests in the company. As a condition to approval, the Commission required that a formula be devised whereby respondent’s stock should participate only to the extent of the purchase price paid plus dividends accumulated to date.

\(^{16}\) S. E. C. 893 (1941); the Commission’s approval of the amended plan is found in 10 S. E. C. 200 (1941).


\(^{19}\) 318 U. S. 80, 95 (1943).

\(^{20}\) Holding Company Act Release No. 5584 (February 8, 1945).
again set aside the order on the ground that such action was not in accord with the previous ruling of the Supreme Court.\textsuperscript{21} The latter tribunal reversed the lower court and by a 5-2 decision upheld the Commission.\textsuperscript{22}

Viewing this litigation in its entirety, the best that can be said is that it has decided a pending case and has incidentally contributed further to the frustration of those who seek that certainty of expression which permits definite ear-marking and pigeon-holing of isolated issues and precise answers. On the same facts, which were undisputed throughout, the Court has come to precisely opposite conclusions in two hearings, yet the first case is not overruled by the second on any important point. At the same time three of the justices among the majority in the second case had dissented from the holding of the first although some of its reasoning is cited without objection; furthermore, much if not all of the second decision rests under the cloud of doubt created by the sharp dissent registered by the only remaining justices who were among the majority in the first case. This situation indicates quite clearly that the issues involved in the case have not been laid to rest. Any definite shift in the balance of the Court may find them reopened for reversal of one or the other of the decisions.

For the student or practitioner, moreover, analysis is made difficult by the fact that it is impossible to discover in any one of the four opinions a complete statement of the basic issues or their solution. By considering them together, however, and by borrowing from one to supplement another, it is clear that the litigation raised the following new problems:

(1) Do administrative bodies have the authority to declare law by interpreting statutory standards through the \textit{ad hoc} decisional process as distinguished from preestablished rules fixing conduct? and

(2) What will be the effect of the Court's refusal, in deference to administrative independence, to assign a correct rule of law to supplant an invalid one relied upon by the agency?

As previously indicated, these substantive questions divided the Court. The manner in which this conflict of opinion is presented also requires some consideration of the proper place and function of dissent in our jurisprudence.

\textsuperscript{21}154 F.2d 6 (App. D. C. 1946).
\textsuperscript{22}332 U. S. 194 (1947).
Methodology in the Administrative Process

The most interesting question presented by this litigation is that which Mr. Justice Jackson has chosen to term the "power to govern . . . without law", referring to the Commission's promulgation of a rule of conduct through decision rather than through a formal regulation prospectively effective. This question was not directly considered by the majority in the Court's first hearing of the case although, in discussing the basis upon which the Commission had acted, Mr. Justice Frankfurter observed that:

". . . before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the law of some standard of conduct prescribed by an agency of government authorized to prescribe such standards—either the courts or Congress or an agency to which Congress has delegated its authority."

and pointed out that the Commission had not exercised the rule-making powers conferred by § 11 (e) of the Act to establish new standards of conduct. Mr. Justice Black, in dissent, thought this position untenable because:

"In the first place, the rule of the single case is obviously a general advertisement to the trade, and in the second place the briefs before us indicate that this is but one of a number of cases in which the Commission is moving to an identical result on a broad front."

The majority opinion in the second case adopts the latter view when it says:

"There is . . . a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."

It was this ruling that Mr. Justice Jackson considered as inviting "administrative authoritarianism". But this objection is not supported by any judicial precedent and, apparently from necessity, resort is had to a very general and innocuous non-judicial essay by Mr. Justice

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24 Id. at 216; italics in report.
25 Note 19 supra at 92-93. By this statement the Court appears to suggest that § 11 (e) of the act either permits or requires promulgation of substantive rules. When read in context, however, the rule-making provision of that sub-section suggests that procedural or implementing regulations were contemplated.
26 Id. at 99-100.
27 Note 22 supra at 203.
Cardozo restating the almost universally accepted general proposition that law must be known or knowable if it is to serve as a guide to conduct.²⁷ Reliance on such a statement without reference to particular fact situations gives point to Mr. Justice Holmes’ indictment of “general propositions”²⁸ and in the present situation its application is greatly weakened by recollection of what its author (Cardozo) was able to accomplish (presumably in harmony with that philosophy) in the fields of contract,²⁹ torts,³⁰ and substantive equity.³¹ The dissenting Justice was not alone in his predicament, however, since the majority was also probing new territory as is evidenced by the paucity of cited authority.

One of the oldest federal regulatory bodies was involved in what appears to be the earliest case in which the question is suggested. In Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Railway Co.,³² the Interstate Commerce Commission had awarded reparation to shippers who had paid freight rates which the Commission in a subsequent administrative proceeding held to be excessive. As to that ruling, the Supreme Court said:

“The action of the Commission in fixing . . . rates for the future is subject to the same tests as to its validity as would be an act of Congress intended to accomplish the same purpose.”³³

Taken as an isolated statement of a rule, this would seem to invoke the doctrine of Fletcher v. Peck³⁴ forbidding retroactive laws impairing vested property rights. But the real crux of the Arizona case was that the Commission had previously exercised the authority of the Hepburn³⁵ and Transportation Acts³⁶ to fix maximum or named rates through quasi-legislative proceedings and had then attempted, at a later date, to adjudicate “unreasonable” the rates charged by the carrier although they conformed to those previously fixed by the Commission.³⁷ The case

²⁷The Growth of the Law 3 (1924).
²⁸Holmes-Pollock Letters, 13 (1942).
³²284 U. S. 370 (1932).
³³Id. at 388.
³⁴6 Cranch 87 (U. S. 1810).
³⁵34 Stat. 584 (1906).
³⁶41 Stat. 484-488 (1920).
³⁷The Court concluded that “. . . it [the ICC] may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed.” 284 U. S. 370, 389 (1932).
does not, therefore support any contention that regulatory agencies are precluded, in the absence of regulations of general applicability, from administering their particular responsibilities on a case-to-case basis.

Other discussions of the question are at best inconclusive. In *Federal Trade Commission v. Kappel*, it was recognized that "New or different practices must be considered as they arise in the light of the circumstances in which they are employed" when considering whether an individual order of the F.T.C. was reasonably calculated to achieve the statutory goal of eradicating "unfair methods of competition". In all of the agitation, debate and careful study that preceded enactment of the Administrative Procedure Act, scant attention was devoted to this question and it does not appear that any doubt had ever been expressed as to its propriety as an accepted method of operation. It will be recalled that the Attorney General's Committee on Administrative Procedure made extensive studies of the major regulatory agencies, but the monographs and discussions devoted to the methods of the Securities and Exchange Commission and the Federal Trade Commission, reputed to be the outstanding example of case-to-case proceedings as a regular method, make no reference to the use of that device in those agencies.

Insofar as the Committee considered the general question, however, its report supports the position taken by the majority in the most recent *Chenery* case, for it says:

"It is recognized, however, that administrative agencies, like the courts, must often develop their jurisprudence in a piecemeal manner, through case-by-case consideration of particularized controversies. This is so partly because the full variety of circumstances can infrequently be perceived in advance... often an agency has been entrusted with responsible duties in an area in which experience is yet to be won, and where premature rigidifying of policies may prove to be harmful in the extreme..."

The most extensive treatment of the question consists of a scant three pages of comment in a report made to the Congress in 1944 by the Board of Investigation and Research. That study was primarily con-

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38291 U. S. 304 (1934).
39*Id.* at 314.
41*Final Report* (1941), *passim*.
43Note 41 *supra* at 29.
cerned with the methods and procedures of the ICC, but the discussion of "Decisions in Individual Proceedings", has general applicability and it is significant to note that the Kappel case and Mr. Justice Black's dissent in the original Chenery case were the only ones cited to support the statement that the development of administrative regulation through individual case decisions "is the method used by other agencies". Here too, however, the authors raised no serious question concerning the essential validity of the method under discussion. As to its relative advantages and disadvantages, it was pointed out that "proceeding case by case . . . permits policy to be developed slowly, step by step, with each new step taken because of actual demonstrated needs of some concrete situation".46 On the other hand, the disadvantages were held to be numerous and impressive, involving primarily the slowness with which "regulatory principles" would evolve through that process, the limited application which any single decision could have because of factual variations, and the inadequacy of the record which is compiled in an adversary proceeding involving only a few parties. One may of course dissent from the conclusions reached in this evaluation, but the critical fact is that the entire discussion relates to the wisdom, the "oughtness", of the method rather than to its legal sufficiency in satisfying the requirement of fair play as an element in due process of law.

Nor do the states offer much assistance in determining this question. An early Massachusetts controversy has been cited in this general area of legislative versus judicial acts, but there the administrative action was in the nature of a cease and desist order initiated by the agency and the court went off on an excursion to distinguish between "general" and "special" regulations.47 The case has been criticized as being inconsistent with other rulings of that court48 and as having doubtful value as a guide to law on the subject.48 State research into problems of administrative law in New York resulted in a conclusion very similar to that reached by federal investigators.49

Despite a long tradition of theoretical denials that courts, at least under the American concept of tripartitism, possess powers to make law, Justice Holmes exposed the skeleton in the judicial closet by his

46Id. at 80.
4820 Harv. L. Rev. 116 (1906).
49Dickinson, Administrative Justice and Supremacy of Law in the United States (1927).
50The two processes [quasi-legislative and quasi-judicial] are so interrelated that a rigid
frank admission that courts do legislate, even if only interstitially.\textsuperscript{50} This was already apparent to all who cared to weigh the cases and it remains only a subject for academic discussion except as pertinent by analogy to cases such as the present. That it is futile to attempt to draw from decided cases any consistent definition of the scope of "judicial functions" or "judicial power" is amply shown in the scholarly efforts of Professors Pill\textsuperscript{51} and Brown.\textsuperscript{52} Yet it is certain that the power to declare law under proper circumstances is undeniably a part of the judicial process and the whole history of the common law as well as of American constitutional interpretation stands ready to refute those who would say nay. Likewise the term "quasi-judicial" becomes extremely nebulous when an attempt is made to grasp it for purposes of definition. It may be sufficient to designate it as any act which is performed "after a discretion in its nature judicial".\textsuperscript{53} This begs the question by using one uncertain term to describe another, but it serves the present purpose of indicating their close relationship. If a function "in its nature judicial" is to be performed effectively, reason would dictate that the use of judicial methods would be authorized when appropriate, just as judicial standards of fair play are required in the adjudicative process.

The majority opinion in the second Chenery case clearly sustains this power of administrative agencies to formulate policy through \textit{ad hoc} decisions. Yet it rests on such tenuous ground that scarcely five years ago the power was denied; this view has not been categorically overruled and two of the justices who voiced that denial have seen fit to repeat it in a biting dissent. This shadow over the legislative powers of administrative bodies becomes the more surprising when it is recalled that most of them are also vested with quasi-legislative authority—which the courts do not possess. Such jealous protection of prerogative—especially one which the judiciary has assumed to itself—echoes the ghostly wail of \textit{Heath v. Rydley}.\textsuperscript{54}

\textsuperscript{50} Dissent in Southern Pacific Co. v. Jensen, 244 U. S. 205, 221 (1917).
\textsuperscript{51} Administrative Tribunals, 36 HARV. L. REV. 405 (1923).
\textsuperscript{52} Administrative Commissions and the Judicial Power, 19 MINN. L. REV. 261, 275-276 (1935).
\textsuperscript{53} Mitchell v. Clay County, 69 Neb. 779, 793, 96 N. W. 673, 678 (1903).
Judicial Assistance in Law Enforcement

In considering the power of appellate courts to substitute a correct assignment of law for an erroneous one applied by an administrative body, the majority opinion in the first Chenery case drew an analogy between appellate review of administrative rulings and those of inferior courts. While recognizing the general practice of affirming such rulings as a matter of efficiency, the Court said:

"... where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."

The dissenting opinion at that time declined to adopt this view since, in the words of Mr. Justice Black, it was not necessary to suppose as the majority did "that the Commission's rule is not fully based on Commission experience". Moreover, it was forcefully intimated that the Court, in setting aside the order without considering the ultimate question of whether there was a basis for finding it consistent with statutory standards, actually produced the result sought to be avoided by negating an exercise of discretion under which the Commission had determined that it would not condone respondent's trading activities.

For reasons which are not apparent on the face of the published record, however, the majority in the second case adopts the majority ruling of the first case without qualifying its unequivocal language. If anything, it is stated even more categorically as an accepted and unquestioned bench-mark of the law for, in reviewing the course of the litigation, it is observed:

"When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court,\

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Note 19 supra at 88. (Italics supplied.)

The Holding Company Act contains two pertinent guides to the Commission's regulation of securities issuance or reorganization matters. Under § 7 (d) (6) the issue or sale of a security may be prevented if found to be "detrimental to the public interest or the interest of investors or consumers"; approval of reorganization plans is required if, among other items, it would be "fair and equitable to the persons affected by such plan." (§ 11 (e)).

Note 19 supra at 99.
in dealing with a determination or judgment which an administrative agency is
authorized to make, must judge the propriety of such action solely by the
grounds invoked by the agency. If those grounds are inadequate or improper,
the court is powerless to affirm the administrative action by substituting what
it considers to be a more adequate or proper basis. To do so would propel
the court into the domain which Congress has set aside exclusively for the
administrative agency.58

This expression of a “fundamental rule” is not supported by citations of
authority, nor was the Court’s earlier decision of the matter. Happily
for the correct development of the law, a single case does not create
binding precedent, but when one of its rules is repeated as the opinion
of a majority, three of whom dissented from the same rule in an earlier
hearing of the same controversy, the question deserves analysis.

Exactly a decade ago, the Byrne Professor of Administrative Law at
Harvard Law School, Felix Frankfurter, decried vehemently the influ-
ence which Dicey59 and Lord Hewart60 had exerted over the bench and
bar in America. To them he attributed the traditional disregard of
administrative law which restrained its fruitful development. A year
later, Mr. Justice Stone voiced a similar concern when, speaking for the
Supreme Court in the third Morgan case, he emphasized the mutual
responsibility resting upon court and agency alike in executing a statu-
tory mandate and pointed out a lesson of experience:

“Neither body should repeat in this day the mistake made by the courts of
law when equity was struggling for recognition as an ameliorating system of
justice; neither can rightly be regarded by the other as an alien intruder, to be
tolerated if it must be, but never to be encouraged or aided by the other in
the attainment of the common aim.”61

In 1943, however, the professor-become-Justice and the Justice-become-
Chief Justice considered their prior exhortations insufficient to bridge
the gap between the two worlds. Having before it the findings and deci-
sion of a commission that a particular transaction did not meet a gen-
eral statutory standard, the Court applied (in the first Chenery case)
what appears to be a mechanical test in deciding that it must shut its
eyes, ears and mouth lest it be tempted to exceed the proper bounds
of judicial participation in the total public responsibility for law
enforcement.

58Note 22 supra at 196.
148 (1915).
60The New Despotism (1929).
61307 U. S. 183, 191 (1939).
The traditional division of labor between courts and administrative bodies attempts to maintain a line similar to that separating judge from jury—based on distinctions of law and fact. This has long been recognized to be a tenuous standard and certainly constitutes an unsteady foundation upon which to establish any enduring theory of judicial-administrative rapprochement. But recognizing its present existence and the necessity for adhering to it, by what standards is law to be distinguished from fact in the present case?

Early in the development of American administrative law, Chief Justice White observed that this standard must be formulated in the light of "the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power" by an administrative tribunal. He was, of course, there concerned with the problem of fixing some boundaries for judicial activity with reference to weighing the wisdom of administrative determinations. Nevertheless, his statement is a pithy one that merits occasional review by his successors. Shortly thereafter another attempt was made to state a general rule and it was held that: "In determining these mixed questions of law and fact [among which was enumerated 'mistake of law'], the court confines itself to the ultimate question as to whether the Commission acted within its power." Within these concepts of "substance, not shadow" and "ultimate question", the law which courts are free to determine has been held to include the question of "whether the Commission applies the standards validly set up" and establishing the meaning of such phrases as "unfair methods of competition".

With respect to the Holding Company Act, it would appear that the proper sphere of judicial review, as indicated by the ground rules previously worked out, consists of determining whether there is any basis in law for a finding by the Commission that a security issue would be "detrimental to the public interest or the interest of investors or consumers" or that a particular reorganization plan would not be "fair and equitable to the persons affected by such plan." The act does not require that the Commission's orders be accompanied by the elaborate opinions that characterize its more important decisions. Presumably, therefore, if the Commission chose to summarize the evidence before it, announce findings of fact sufficient to meet the requirements of the

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63Dickinson, op. cit. supra note 48 at 55.
earlier cases, and then proceed to make its ruling without explaining the rationale used to proceed from one to the other, the Court would be required to match that ruling against the standards of the statute and either affirm or overrule. Under such a set of facts, failure by the Court to consider that "ultimate question" would be a clear abdication of judicial responsibility.

Yet in this litigation the target of the Court's objection was not that the facts as found by the agency had no reasonable connection with the statutory standard but that the connecting link, the rule of law it applied to those facts, was improper. In the first consideration of the case it was freely admitted by the Court "that officers and directors who manage a holding company in process of reorganization under the Public Utility Holding Company Act of 1935 occupy positions of trust."67 There was on the face of the whole record clear evidence that the Commission had exercised discretion to place upon such fiduciaries a new responsibility, derived from the policy of the act. The Commission's business is to apply that act, not to decide cases in equity. It is submitted that the Court would have done no violence to the Commission's discretion or the policy of the act if it had considered the offending opinion as drawing an analogy, rather than explicitly relying on judicial precedent. In so doing it could have avoided a precedent which puts an artificial barrier between courts and administrative bodies in their joint responsibility for executing public policy.

Advocates of the administrative process have expended much effort in promoting the independence of administrative tribunals, particularly in insulating their sphere against invasion by the courts through a free translation of "law" as the basis of judicial review.68 But to give that vigilance the form of a rule of law requiring the judiciary to maintain itself completely aloof is quite another proposition. In it one sees a serious threat that the statutory obligation of administrative agencies will be made more difficult to discharge by the failure of courts to hurdle formal barriers to get to the "ultimate question" of adherence to statutory standard. It is familiar law that legislative discretion will not be upset if there is any constitutional ground upon which the courts can sustain it. The rule of this case requires a conclusion that the Court regards the breach between judicial and administrative functions to be wider and more sacrosanct than that between the legislature and the courts.

ROBERT M. MANGAN

67Note 19 supra at 85.
68LANDIS, op. cit. supra note 2, Ch. IV.
DISCRETION OF THE NATIONAL LABOR RELATIONS BOARD MODIFIED IN THE DETERMINATION OF AN APPROPRIATE BARGAINING UNIT

THE modern statute framer, like Ulysses of old, has been amply warned of his Scylla and Charybdis when attempting to create an administrative agency. It is now well settled that unless a standard be established in the statute itself which will limit the discretion of the administration agency the courts will declare such statute void for lack of due process, vagueness, or for completely divorcing legislative functions from their proper body. On the other hand experience has taught him that a standard which is too detailed will leave too little room for discretion making it impossible to carry into effect the purposes of an act with such unworkable blue print. But lest it be concluded that once having passed safely beyond these two dangers he is on untroubled waters, this article will demonstrate that there may be a situation where a standard sufficiently definite to satisfy the courts has been established but not specific enough to protect those who are affected by the act, and that the National Labor Relations Act created such a situation. There is no question of good faith nor any abuse of discretion by the National Labor Relations Board. The situation created by the National Labor Relations Act in the determination of an appropriate bargaining unit was an unhappy one simply because of (1) the exercise of personal discretion by each Board member without benefit of a legislative standard; together with (2) the lack of application of the judicial doctrines of stare decisis and res judicata in matters involving appropriate unit determination; (3) the small number of men on the Board; and (4)

"The ideal statute steers a middle course between the Scylla of attempting to anticipate every possible situation and the Charybdis of embodying no policy at all except that contained in an empty formula." Hart, Some Aspects of Delegated Rule-Making, 25 Va. L. Rev. 810, 814 (1939).


49 Stat. 449 (1935), 29 U. S. C. § 151 et seq. (1940); hereinafter referred to as the old act when necessary to avoid confusion.

In re Pacific Greyhound Lines, 9 N. L. R. B. 557, 573 (1938).

Sec. 3 (a) of the old act provided for three members. Sec. 3 (a) of the amending statute, Labor Management Relations Act, Pub. L. No. 101, 80th Cong., 1st Sess. (June 23, 1947); 29 U. S. C. A. 141 et seq. (Supp. 1947), has increased the number of members to five, which will no doubt decrease the effect of the change of any one member.
an occasional change in its personnel. The problems arising may be best exemplified by the treatment of the question of "supervisory employees" by the Board.

The definition of employee under the old act did not refer to individuals employed as supervisors.7 Thus their coverage by the old act was entirely within the discretion of the Board. In 1942, the three members of the Board were Messrs. Gerald D. Reilly, William Leiserson and Henry A. Millis. In the cases of Union Collieries Coal Company8 and Godchaux Sugars, Incorporated9 the Board did allow supervisory employees to be included within the provisions of the act. Mr. Reilly dissented in both of these cases. In 1943, Mr. John Houston replaced Mr. Leiserson as a Board Member and his views agreed essentially with those of Mr. Reilly, resulting in the celebrated Maryland Drydock case10 wherein it was held that no bargaining unit for supervisory employees would effectuate the purposes of the act and be appropriate, unless supported by historical development. Logically, Mr. Millis dissented. However, Mr. Houston later changed his mind and in Packard Motor Car Co.11 we see another complete reversal with supervisors being afforded protection of the act (Mr. Reilly again dissented). Thus we witness a complete turnabout and then return to the original premise in but a short span of time as the result of Board members expressing their individual convictions. This raises the question, What amount of discretion has been allowed in the determination of the appropriate bargaining unit and with what effects?

Our discussion will be limited to an analysis of sec. 9 (b), as it stood in the old act;12 the history of the Board action in relation thereto;13

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7Sec. 2 (3) of the amending statute now expressly excludes any individual employed as a supervisor from the provisions of the Act.
841 N. L. R. B. 961 (1942); approved 44 N. L. R. B. 165 (1942).
944 N. L. R. B. 874 (1942).
1049 N. L. R. B. 733 (1943).
1161 N. L. R. B. 4 (1945); 64 N. L. R. B. 1212 (1945) and affirmed by the United States Supreme Court in the 5-4 decision of Packard Motor Car Co. v. NLRB, 330 U. S. 485 (1947).
12The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 49 STAT. 453 (1935), 29 U. S. C. § 159 b (1940).
13Only general principles and the more outstanding or illustrative cases will be considered in this connection to outline the overall picture. Any attempt to exhaust each problem would be but to repeat what has been so adequately covered by many previous articles.
and the changes brought about by the new act.\textsuperscript{14} Before engaging in a criticism of the old act a word must be said in defense of its framers. It must be realized that they had no Circe to warn them of a future split in the ranks of American organized labor into the C.I.O. and A.F. of L., or further that the very instrument upon which they were working would be a condition if not the cause for such split. It is not that the problem of determination of an appropriate bargaining unit was unknown to the framers, but that they considered the only major difficulty was solved when they provided the Board with the power of determination. "The sponsors knew that neither the predecessor National Labor Board nor the (old) National Labor Relations Board had been expressly given this power and that these earlier bodies had been compelled to derive it by implication from the powers more clearly conferred on them."\textsuperscript{15}

The old act was not long in effect when the latitude of the discretion was realized. This latitude is further guaranteed by sec. 10 (f) of the old act which allows a judicial review only upon a final order, which is only issued in unfair labor practice suits. Said the Supreme Court in \textit{American Federation of Labor v. NLRB}:

\"The conclusion is unavoidable that Congress, as the result of a deliberate choice of conflicting policies, has excluded representation certifications of the

See, Stix, \textit{The Appropriate Bargaining Unit Under the Wagner Act}, 23 \textit{Wash. U. L. Q.} 156 (1938); Cohen, \textit{The \textquoteright \textquoteright Appropriate Unit\textquoteright \textquoteright Under the National Labor Relations Act}, 39 Col. L. Rev. 1110 (1939); Northrup and Dunne, Administrative Discretion, Judicial Review and Discriminatory Bargaining Units, 4 \textit{Law Guild Rev.} 2 (1944); 6 U. of Chi. L. Rev. 673 (1939); 34 Ill. L. Rev. 852 (1940).

\textsuperscript{14}The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." 29 U. S. C. A. § 159 b (Supp. 1947).

\textsuperscript{15}Stix, \textit{supra} note 13, at 157.
Board from the review by federal appellate courts authorized by the Wagner Act . . . ”16

But even when the Supreme Court has reviewed the determination of the Board it has little more than affirmed the broad discretion of the Board, refusing to overturn anything but an abuse of discretion.17

The Labor Management Relations Act18 has narrowed the Board’s discretion in determining the appropriate bargaining unit in three respects, craft units, plant guards, and professional employees.

I. CRAFT UNITS

The first problems which confronted the Board involving disputes among the employees themselves as to the appropriate unit were in the nature of jurisdictional disputes. They were not questions of the appropriate size of the unit but rather which of two units would be allowed to perform the functions or become the bargaining agent for a particular group. Usually these two units were affiliated with the American Federation of Labor so the Board established a hands-off policy, leaving the settlement up to the parent body.19 However, this solution was short lived for with the establishment of the Committee for Industrial Organization there was no longer one parent body to settle these disputes20 and the difference in theories of organization brought up the new problem of whether all the employees in a plant should be in one unit (industrial organization), or whether each craft should be allowed to retain or establish its autonomy (craft organization).

Craft organization versus industrial organization is a problem of no easy solution. The proponents of industrial organization look primarily to the force of numbers, the threat of a general strike, and lack of jurisdictional disputes. They condemn craft organization as an attempt upon the part of employers to divide and conquer by the formation of so-called “splinter units”. The proponents of craft organization, on the other hand, declare that they desire the right to be independent and use their skill as their bargaining power rather than their numbers. They declare that the larger units do not in fact protect their interests but rather

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17NLRB v. Jones and Laughlin Steel Corp., 67 S. Ct. 1274 (1947); Pittsburgh Plate Glass Co. v. NLRB, 313 U. S. 146 (1941).
19Aluminum Co. of America, 1 N. L. R. B. 530 (1936); Axton-Fisher Tobacco Co., 1 N. L. R. B. 604 (1936).
20Interlake Iron Group, 2 N. L. R. B. 1036 (1937).
use their technical skill as a weapon to reap benefits for others. Although this dispute came to public attention with the split in the labor movement in 1935, it is over simplifying the situation to state that it is strictly an AFL versus CIO problem. It is economic and political as well as legal and is one about which the opinions of honest men will differ.

The Board soon determined that it had the broadest discretion in determining this legislatively undefined appropriate unit. From the first it was the policy of the Board to examine the particular circumstances of each case in accordance with certain basic criteria which it deemed controlling. "The list of criteria is long and the precise weighting of each factor is impossible to ascertain. The Board has avoided the formulation of rigid rules which might hamper its discretion and proceeds in each case to examine its particular circumstances." The circumstances given consideration in varying degrees were functional coherence, community of interest, difference in payment of salaries, geographic considerations, separateness of corporate groups, type of employees, eligibility to union membership, skill, length of employment, consideration of immediate need for collective bargaining, and nationality.

The first general rule of application to evolve was the Globe Doctrine, i.e. when the Board considered the foregoing indicia evenly balanced, it would let the employees themselves determine the bargaining unit. This in effect would allow a craft unit to decide for itself whether it should be included in a larger, more inclusive industrial unit or not. However as each Board member added his own particular weight to the various indicia there was no unanimity as to when the Globe Doctrine should be applied. It sank into disuse as the history of bargaining relations and the existence of previous contracts loomed into importance with the establishment of the American Can Doctrine. The effect of this doctrine upon craft units was that the Board would decline to carve out a craft unit from a larger unit where there was no history of separate bargaining for the craft prior to the time the employer was organized on an industrial basis. This doctrine prevailed until just prior to the passage of the amending statute when it was modified by such cases

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21See 6 U. of Chi. L. Rev. 673, 674 to 677 (1939) for a fuller treatment of the split in the labor movement.
22Id. at 678.
23See Cohen, supra note 13, at 1131 to 1137 for a detailed consideration of these criteria.
as *International Minerals*\(^{26}\) where the Board permitted an election to determine whether craft employees desired separate representation, in spite of a long history of bargaining on a plant-wide basis. But it cannot be stated that any of these rules were ever firmly established and not subject to many and varied modifications in many seemingly contradictory cases. To best appreciate the nature of the reason for the distinctions which were made in the various cases it is necessary to note some of the personal views of members of the Board. Probably those of Messrs. Madden, Leiserson, and E. S. Smith are the most appropriate to discuss because of their complete divergence. Mr. Madden was an advocate of the *Globe Doctrine*. Essentially he believed that the employees were entitled to decide for themselves the type of unit they desired. He was quick to de-emphasize the importance of any of the basic criteria and reach a result that none were controlling.\(^{27}\) His views foster craft organization for, when given the opportunity of a vote, craft organizations, jealous of their autonomy, will seek separate representation. Mr. Leiserson advocated a theory that the existence of a contract was binding upon the future rights of employees. In *American Can Company* he stated:

". . . the Board is not authorized by the Act to split the appropriate unit thus established by collective bargaining and embodied in a valid, exclusive bargaining contract. In any appropriate unit it is to be presumed that there will be dissatisfied groups from time to time. To permit such small groups to break up an appropriate unit established and maintained by a bona fide collective bargaining contract against the will of the majority of employees who are bound by the contract would make stability and responsibility in collective bargaining impossible."\(^{28}\)

This theory fosters industrial organization for, while a minority of the employees in a plant may not break away from an established industrial unit, that same minority (or over 50% of it) if organized as a craft unit could become a part of the industrial unit. Later Leiserson modified his original view and allowed a split when the craft unit had been included in a larger unit against its will and had never acquiesced in the inclusion.\(^{29}\) Neither Mr. Madden nor Mr. E. S. Smith ever acquiesced in the proposition that a previous contract was binding upon the parties

\(^{26}\) N. L. R. B. 878 (1946).


\(^{28}\) N. L. R. B. 1252, 1256 (1939).

\(^{29}\) For a discussion of the views of Leiserson, see 34 ILL. L. REV. 852 (1940).
although they accepted it as an element to be considered.\textsuperscript{30} Mr. E. S. Smith favored large plant units for the protection of labor and would favor smaller units only when there was clear bargaining history to support them.\textsuperscript{31}

Clearly the analysis of these views shows that there was a need for some objective standard to control this discretion. With a potential change of one member every two years and the resulting adding or subtracting of many heretofore controlling principles those who were affected by the old act could never feel upon safe ground. Senator Wagner soon after the passage of the bill realized this lack of standard and proposed the following amendment to sec. 9 (b):

"Provided, however, that in any case where a majority of the employees of a particular craft shall so decide, the Board shall designate such craft as a unit appropriate for the purposes of collective bargaining."\textsuperscript{32}

Obviously Congress either did not think the problem demanded settlement at that time or that this amendment was not the standard which it wanted established.

But now a standard has been set up by sec. 9 (b) (2) of the new act and we find that a craft unit can secure a separate election upon demand and no craft unit can be included in a larger unit unless a majority of the group votes against separate election. We now have the \textit{Globe Doctrine} without the consideration of any of the other criteria. Bargaining history and pre-existing contracts no longer control nor are considered as a circumstance. But even further there is now what amounts to a presumption in favor of craft organization. There will be a craft unit unless a majority of those eligible to vote in the craft (not the majority of those who actually vote) do vote for inclusion in an industrial unit. Thus will follow many cases where these craft employees will seek separate representation and petition the Board to be "carved out". Two recent cases involving the Pattern Makers of America, a highly skilled, well recognized craft demonstrate this trend. In both cases the craft units had been represented by a larger unit, but clearly the only question involved was whether each unit desiring separate representation was recognized as a craft.\textsuperscript{33} By not defining craft in the

\textsuperscript{30}Clyde Mallory, 15 N. L. R. B. 1008 (1939).


\textsuperscript{32}S. 2108, 75th Cong., 1st Sess., April 7, 1937.

new act this determination is still within the discretion of the Board which may continue previous determinations or modify them as it sees fit.

II. PLANT GUARDS

Under the old act "Company policemen (were) generally excluded from the bargaining unit without any controversy because they (were) not engaged in production. They were allowed in industrial units on many occasions when desired by the labor organization concerned, or in spite of participating labor organizations or employer when their duties and interests were similar to those of production and maintenance employees. But, if they were details of city policemen, the proper solution was a separate unit. Even when formed into separate units they were allowed to designate as their bargaining agent one who also represented other employees. The argument presented against inclusion was that they might become less diligent in their work, and, if there were a general strike, the factory might go unguarded. Although these pleas had little effect upon the Board, they have been heard by Congress who has not revoked their power of organization but has forbidden the certification of any unit which has both guards and other employees or any guard unit which is affiliated directly or indirectly with an organization that includes other employees. This will probably lead to independent units in each plant with the further possible result of a nationwide, exclusively guard organization. In the recent case of C. V. Hill and Co. the Board recognized that there is now an objective standard with no discretion left to them to include watchmen in units with other workers even though the employer and the two unions in the case have agreed to it. Here the Board ruled that watchmen even though not uniformed, armed or deputized, cannot be included in the same unit as other employees despite the fact that they wear the same badges as other employees and work under the same foremen.

Stix, supra note 13, at 165, see, e.g., Todd-Bath Iron Shipbuilding Corp., 45 N. L. R. B. 1367 (1942).
E.g., Delaware - New Jersey Ferry Co., 30 N. L. R. B. 820 (1941).
Ibid.
III. Professional Employees

The determination of the appropriate unit for professional employees in general was treated as but another craft unit problem with those employees being considered as highly skilled craft employees. However those of particularly high professional standards soon gained special recognition and a set of general rules involving them resulted. Nurses were generally excluded from industrial units, but were allowed protection of the act when formed into a separate unit and were allowed to designate the bargaining agent of other employees as their bargaining agent. But the history of the treatment of engineers reveals that they were sometimes included in industrial units when their duties were found to be an integral part of production work. But generally, engineers were allowed a separate unit, particularly where their training interests and duties were basically different from those of other employees, or were at least allowed a vote for self determination. There was a general dissatisfaction among the professional groups because of the inclusion of their members in these units against their will and they "appeared before the (Senate) Committee to protest against the occasional practice of the Board of covering (sic) professional personnel into general units of production and maintenance employees or general units of office and clerical employees, despite the fact that their interests in common with such groups was (sic) extremely limited. . . ." Now professional employees may not be included in units with non-professional employees unless a majority of the professional employees vote for inclusion. The discretion of the Board was further limited by a definition of professional employees in sec. 2 (12) where it is noted that "the Committee was careful in framing a definition to cover only strictly professional groups such as engineers, chemists, scientists, architects and nurses."

Conclusion

Another chapter in the history of appropriate bargaining unit determination has been written by the amending of sec. 9 (b). We have seen

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40 E.g., Electric Auto-Lite Co., 9 N.L.R.B. 147 (1938).
42 E.g., Bethlehem-Alameda Shipyard Inc., 59 N.L.R.B. 1525 (1945).
45 E.g., Westinghouse Airbrake Co., 4 N.L.R.B. 403 (1937).
46 E.g., Radio Corp. of America, 57 N.L.R.B. 1729 (1944).
48 Id. at 19.
that the broad discretion of the Board has been limited in these respects: craft units and professional employees may now determine for themselves whether they will be represented by their own independent units or be included in industrial units, and now plant guards can only be represented by exclusively guard units.

It is no wonder that sec. 9 (b) of the new act has received much criticism. The determination of an appropriate bargaining unit is a highly controversial subject and any standards established would not satisfy all. Craft units with any degree of organization have always demanded separate representation. Industrial units have always wanted their organizations strengthened by the inclusion of all these smaller units. It is only natural that the criticism of the craft unit standard now comes from the large industrial units.

"Attorneys for the United Steel Workers Union, CIO, and two large steel companies today pleaded with the National Labor Relations Board to refrain from 'carving' small craft units out of the plant-wide industrial units. "They asserted that if the Board approved the petitions of two small bricklayers' units to speak for 113 bricklayers in two Ohio plants where the CIO steel union bargains for more than 14,000 employees, then craft union disputes would break out 'all over the place'."

Clearly this is a criticism of one of the standards set out in the act. In my opinion although there is much current criticism of the actual standards which have been established there is little room for doubt that there was a very real need for the establishment of some standards to control the discretion of the Board. However, the task of Congress is not completed simply by establishing these standards, for possibly other standards must be established and when observed in effect those now established modified or expanded. This is a constant task and must be accomplished as soon as the weakness is determined, and thereby avoid another legislation lag as is revealed by the lapse of twelve years before curative measures were involved to meet an obvious need.

Labor-management relations have been likened to a swinging pendulum. Once Congress has elected to enter the field of labor law, it is its duty to constantly control the arc of swing and to prevent extreme favoritism of employee or employer, of craft or industrial unit.

CARLTON R. SICKLES

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49N. Y. Times, Jan. 9, 1948, p. 9 C, col. 3.
RECENT AGENCY RULINGS AND COURT DECISIONS

FCC—Radio Station May Not Censor a Political Broadcast Although It Contains Defamatory Material.

The Port Huron Broadcasting Company (WHLS) sold time for a series of political broadcasts to three candidates for election to the office of City Commissioner. The script of the first scheduled speaker was found to contain attacks on a member of the City Commission, who, when shown the script, told the station manager that the statements were not true and could be so proved. The management then cancelled all scheduled political broadcasts and refused to sell or give time to any candidate for that office. The candidates whose broadcasts were cancelled submitted complaints to the Federal Communications Commission. On petition for license renewal, held, having once committed itself to permit the use of its facilities by political candidates for any given office in any particular campaign, a radio station may not cancel such broadcasts, although they contain material which the station believes is possibly libelous or might subject the station to an action for damages. In re Port Huron Broadcasting Co. (WHLS), File No. B2-R-976 (January 30, 1948).

The Commission’s decision was based on section 315 of the Communications Act of 1934, 48 Stat. 1088 (1934), 47 U. S. C. § 315 (1946), which provides:

“If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.”

Censorship of a purely political nature is clearly a violation of the provisions of section 315 for which the Commission may refuse to renew a station’s license. In re KVOS, Inc., 8 F. C. C. 159 (1940). However, a more complex problem arises when the purpose of the censorship is not political, but rather to protect the station from an action for libel or slander. See Vold, Defamation by Radio, 2 J. Radio Law 673 (1932). The instant case was the first to require the Commission to apply section 315 to an act of censorship of potentially libelous material.

A radio station is financially responsible for the broadcast of defamatory statements, whether such defamation is considered libel or slander. 36 GEORGETOWN L. J. 249 (1948). Ordinarily it is just that the station bear this responsibility because of the freedom it possesses in the selection of its programs. But under the present interpretation of section 315 when a station once opens its facilities to political candidates it no longer has this freedom of selection.

Although the prohibition in its present form has been a part of radio regu-
lation since 1927 (§ 18 of the Radio Act of 1927, 44 Stat. 1170 (1927), 47 U. S. C. § 98 (1946)), it has been called to the attention of appellate courts only twice. In both of these cases the section was interposed as a defense to suits based on defamatory statements made in political broadcasts. The Supreme Court of Nebraska gave the section a very narrow construction, saying that the prohibition "... merely prevents the licensee from censoring the words as to their political and partisan trend but does not give a licensee any privilege to join and assist in the publication of a libel. . . ." Sorensen v. Wood, 123 Nebr. 348, 354, 243 N. W. 82 (1932). The contrary conclusion was reached in Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787, 788, 38 N. Y. S. 2d 985 (1942) where the court said, "Since this statute creates certain obligations and limitations, it is proper that the owner of the radio station be given corresponding qualified privileges against liability for statements which it has no power to control."

The instant case clarifies a long unsettled part of the law of radio regulation. It is now clear that the prohibition of section 315 does comprehend material which the station "... might reasonably believe to be libelous. . . ." The Commission went further and expressed its opinion that a station is not to be held liable for defamation resulting from compliance with this section. A strong dissenting opinion doubts the authority of the Commission to deal with this subject under the rule making procedure provided by the Act.

Where Congress has condemned an act as unlawful the legal consequences of the condemnation are federal questions. Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173 (1942). The regulation of telegraph companies by this same Communications Act (48 Stat. 1070 (1934), 47 U. S. C. §§ 201-206 (1946)) is so extensive as to confer on the regulated companies a privilege against suits for defamation. O'Brien v. Western Union Telegraph Co., 113 F.2d 539 (C. C. A. 1st 1940). However, prominent writers in the field of radio law have doubted that the same rule would apply to radio. Davis, Law of Radio 166-167 (1927).

If a court of competent jurisdiction determines that the state law as to defamation governs, the result of the instant case will be to place a radio station in the untenable position of losing its license if it does censor defamatory material in a political broadcast, or suffer a suit for damages if it does not. The only alternative left to the station is to refuse all political broadcasts.

This important aspect of the problem was not solved on the appeal of the Sorensen case which the Supreme Court affirmed on a non-federal ground, KFAB Broadcasting Co. v. Sorensen, 290 U. S. 599 (1933); nor is it likely to be solved on an appeal from this decision since the Commission renewed petitioner's license "because of the previously unsettled state of the law."

DANIEL F. MARTINI
FEDERAL LEGISLATION

H. R. 2575—A BILL TO IMPROVE THE ADMINISTRATION OF MILITARY JUSTICE

MILITARY law will be found wherever an army is found, and the success of the campaigns of that armed force will depend upon the discipline maintained. While no written military codes remain from the times of the Greeks or Romans, some of the principal military offences familiar to our present law—e.g., desertion, mutiny, cowardice, the doing of violence to a superior, and the sale or appropriations of arms—were recognized in their armies. Although some of their punishments such as decimation, maiming, exposure to the elements, and taking of meals standing have long since ceased to be known; others, such as dishonorable discharge, expulsion from the camp, labor on fortifications, carrying of burdens, and servile or police duty, have come down to our day without substantial modifications. Among the early Germans, in the absence of written law, justice in general was administered by the chief commanders through the instrumentality of the priests.

The first written military laws seem to have been those embraced in the Salic Code at the beginning of the 5th century, and those revised and matured by the successive Frankish kings. These codes were civil as well as military, the civil and military jurisdictions being scarcely distinguishable.

The date of the first French ordonnance of military law is given as 1378; the first German Kriegsartikel are attributed to 1487. However, the laws of the Franks reached full development in 1532 in the celebrated penal code of the Emperor Charles V., which has been viewed as the model of the existing military codes of continental Europe. The Articles of War of Free Netherlands (1590); the elaborate Articles of Gustavus Adolphus (1621); the Regulations of Louis XIV. (1651 and 1665); the Articles and Regulations of Czar Peter the Great (1715); and the Theresian penal code of Empress Marie Theresa (1768), are among the most noted of the systems of European military law.

In England, after the Norman Conquest and until the establishment of representative institutions in England, the sovereign was regarded not only as the foundation of justice, but also as the ultimate source of

1Winthrop, Military Law and Precedents 17 (2d ed. 1920).
2Munson, Military Law 5 (1923).
legal authority. The king, by suitable decrees or proclamations, established such rules for the regulation of the military forces as seemed to him proper or necessary. These early articles were issued to the army only in time of war and ceased to operate during time of peace. The accumulation of these decrees was known as the Articles of War. One of them, the code promulgated in 1642 by the Earl of Essex, adopted some of the provisions of the Articles of Gustavus Adolphus, which had only the year before been translated in London. In some instances, in our own present articles, there are retained quaint forms of expression identical with terms to be found in this early code as translated.

Primarily because of the mutiny and desertion of the Scotch, who adhered to the cause of the Stuarts, the Mutiny Act was passed in 1689. This act covered the regulations of the armed forces in times of peace as well as war, and made desertion or mutiny punishable by death or other penalty as a court-martial might adjudge. These two bodies of military law, the Articles of War and the Mutiny, were codified by the Army Act in 1881.

The need for military law in this country arose when the second Continental Congress in June 1775 "resolved" that a military force should be raised to join the army near Boston. Two weeks following, they adopted a set of articles which embodied the then existing English code in force. In his writings, John Adams states: "There was extant one system of articles of war which had carried two empires to the head of mankind, the Roman and the British; for the British articles of war were only a literal translation of the Roman. It would be in vain for us to seek in our own inventions, or the records of warlike nations, for a more complete system of military discipline. . . . I was, therefore, for reporting the British articles of war, totidem verbis."

In 1806 Congress adopted the Articles of 1806, which reenacted "with only such modifications as were necessary to adapt them . . . to

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8The code issued in 1642 by the Earl of Essex as Commander of the Army of Parliament is interesting to us because some of its quaint phrases can be noted today in our own articles, and it in turn was obviously influenced by the code of Gustavus Adolphus, . . . which had only the year before been translated at London." MUNSON, MILITARY LAW 6 (1923).

4Army Act, 1881, 44 & 45 Vict., c. 58.

61 JOURNAL OF CONGRESS 82. The enactments of Congress prior to the adoption of the Constitution were in the form of Resolutions.


7Act of April 10, 1806, 2 STAT. 359 (1806).
the Constitution of the United States." The Articles of War of 1874 was a mere rearrangement of the more or less antiquated Articles of 1806 with a few Civil War additions thereto. In 1916, another revision was made for the purpose of "better arrangement and classification." The present Military Code, known as the Articles of War of 1920, "was the fruit of our experience in the administration of military law in World War I, and had for its main object the institution of an ultimate automatic exhaustive review of all general court-martial trial proceedings resulting in conviction of the accused." 

Historically our military law is considerably older than the Constitution. With the Constitution, however, all our public law began either to exist or to operate anew, and this instrument, therefore, was in general referred to as the source of military as well as the other laws of the United States. Thus it was said by Chief Justice Chase in Ex parte Milligan: "The Constitution itself provides for military government as well as for civil government. . . . There is no law for the government of the citizens, the armies, or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution." 

The past World War brought to the attention of the people of this country the idea of military justice. Our nation raised the largest armed force ever to take up arms against her enemies. Within a few years, men and women from all walks of life had changed over from civilians to military-minded people to form what was often called the "civilian army". While in uniform, they were governed by the rules and regulations set out especially for the armed forces. Of these the Army was regulated by the Articles of War.

Realizing that some eighty thousand of its men has been tried by general courts-martial and a far greater number by summary courts-martial, the United States Army directed Col. Phillip McCook, a former New

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6Hearings before the Committee on Military Affairs on H. R. 23628, 62d Cong., 2d Sess. 16 (1912).
9Hearings before the Committee on Military Affairs on H. R. 23628, 62d Cong., 2d Sess. 17 (1912).
12Wall. 2 (1866).
13Id. at 6.
York jurist, to survey the entire court-martial system in the various theatres of operation and to make a report to the War Department. This was done in the closing years of the war.\footnote{17} After the actual cessation of hostilities, the Army, desirous of maintaining its high morale, and acting with the American Bar Association, on March 25, 1946 appointed an Advisory Committee on Military Justice headed by the Hon. Arthur T. Vanderbilt, Dean of the New York University Law School, and ably assisted by Judge Alexander Holtzoff, Walter P. Armstrong, Joseph W. Henderson, William T. Joyner, Hon. Frederick E. Crane, Jacob M. Lashly, Judge Morris A. Soper, and Floyd E. Thompson. Hearings were held and investigation made by the Committee, who made their report to the War Department some nine months later.\footnote{18}

While the Army was considering the report made by the Vanderbilt Committee,\footnote{19} Congressman Durham of North Carolina introduced a bill\footnote{20} in the House of Representatives to amend the Articles of War.\footnote{21}

The salient features of the Durham Bill and many of the changes recommended by the Vanderbilt Committee, duly made public by Robert Patterson,\footnote{22} Secretary of War, were incorporated into a second bill\footnote{23} introduced in the House of Representatives by Congressman Elston of Ohio. This latter bill will be hereinafter referred to as H. R. 2575.

The chief features of H. R. 2575 are threefold: first, it gives the accused the right of counsel at a complete and thorough pre-trial investigation; secondly, it calls for the establishment of a separate Judge Advocate General's Corps; and finally, it provides for the strengthening of review and appellate procedure. There are many other changes set down, all of which are of minor importance when compared with the significance of the three above noted.

As to the first change, Article of War 70\footnote{24} provides:

"At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigat-
ing officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.”

Under this article the accused seemed to have the right to cross-examine the witnesses who were to testify against him, but the War Department’s interpretation was to the effect that it was directory rather than mandatory. Even if this provision had been construed as a mandate, the right was of little use to the accused unless he knew how to conduct such an examination effectively. Then, too, the accused might have found himself faced with a dilemma when one of the opposing witnesses happened to be of a higher rank, as, for example, when the accused is a private and the witness an officer. In such a case the right to cross-examine the witness might not be exercised at all.

Guided by the recommendation of the Vanderbilt Committee, Robert Patterson, Secretary of War, proposed that:

“The Manual for Courts-Martial will be amended to enjoin strict enforcement of the requirements of Article of War 70 that charges be referred for trial by general court-martial only after a thorough and impartial investigation. The employment of trained and mature officers in the conduct of investigations will be emphasized.”

Section 22 (b) of H. R. 2575, taken almost in toto from Section 25 (b) of the Durham Bill, goes further than the recommendations of the Vanderbilt Report and that of the Secretary of War Patterson, and provides:

“The accused shall be permitted, upon his request, to be represented at such investigation by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by counsel appointed by the officer exercising general courts-martial jurisdiction over the command. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. . . .”

26Powell v. Alabama, 287 U. S. 45, 68 (1932). “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law.”
29H. R. 2575, 80th Cong., 1st Sess. 17 (1947).
Particular attention should be paid to the language used in section 22 (b). It says "the accused shall . . ." The subcommittee of the House Armed Services Committee stated that this section would be mandatory, not directory. To this clause the War Department is opposed.\textsuperscript{30}

Now, under competent counsel, the accused may take good advantage of a right not granted under civil law—the right to cross-examine witnesses against him in a proceeding which is analogous to a grand jury proceeding. A competent and minute pre-trial investigation where all the pertinent facts in the case are brought to the attention of the authorities will do much to reduce substantially the number of courts-martial. The evidence brought out by the accused's attorney may be such that the charges will be dropped forthwith; or, the issues will be so narrowed that a swift, but just, trial of the accused will follow. The opposing attorneys will know just what evidence they have and what they will have to supply.

The second of the chief features of H. R. 2575 is directed at what may be considered as the principal defects in the Army system of military justice: first, the power and influence exerted over the court-martial proceeding by the commanding officer or the convening authority; and second, to some extent an outgrowth of the first, the excessive sentences handed down by the court-martial, which relies on the reviewing authorities to reduce the sentence.

Statistics cited by the Vanderbilt Committee\textsuperscript{31} show that the majority of those who appeared before that committee thought that the "command" exercised influence over the court-martial. To the same effect was the testimony of those who appeared before the subcommittee of the House Armed Services Committee. Typical of the cases cited was the instance inserted into the record by Representative Norblad of Oregon, who said:

"I might say that during the course of the war, in an overseas base of the 9th Air Force, I was acting as the defense counsel to a man. I was fortunate in having the man given a very light sentence. Immediately upon the commanding officer of that base—not the judge advocate, but the commanding officer of

\textsuperscript{30}Hearings before the Subcommittee of the House Armed Services Committee on H. R. 2575, 80th Cong., 1st Sess. 2065 (1947).

"Mr. Norblad. May I ask, sir, whether you are opposed to that particular clause being inserted in the bill we are considering?

"General Hoover. I think I must say that the War Department does not consider it advisable."

\textsuperscript{31}Report of the War Department, Advisory Committee on Military Justice 7 (1946).
that base—having knowledge of it, he announced throughout the entire base, by a system of loudspeakers which every enlisted man and every officer heard, that he wanted the court brought into his office the following morning at 9 o’clock. We were brought in and we were severely reprimanded because we had given the man a light sentence. We were told that after a man has been charged with a crime he is very probably guilty and we should, in consideration of the case, have kept that in mind.

“Further along the same line, to bring out the matter, I had acted as a defense counsel, and he pointed at me and said ‘I’ll have no lawyers orating in my court’, meaning that I was precluded thereafter from making a defense statement at the close of the case, in argument, such as any lawyer has a right to argue.”

Another striking example was the Shapiro case. Shapiro, a second lieutenant in the Army was ordered to defend a man accused of rape. As a result of the manner in which he conducted the defense, Shapiro, himself, was court-martialed. At 12:40 p.m. one day he was told that he would be tried by a general court-martial for violation of the 96th Article of War and for effecting a “delay in the orderly progress of the said General Court-Martial”. The trial commenced at 2:00 p.m. the same day and by 5:30 that same afternoon he had been sentenced to a dishonorable discharge, which sentence was later approved by the Secretary of War and the President. In an opinion of the Court of Claims in this case it was said that “a more flagrant case of military despotism would be hard to imagine”.

To the same effect were the findings of the Vanderbilt Committee, which were ably set forth in an article written by Honorable Alexander Holtzoff, District Judge in the District Court for the District of Columbia, who said:

“Although courts-martial are appointed by a commanding officer, they are, nevertheless, intended to perform their functions independently, without pressure or influence on the part of any superior officer, or anyone else. That this is the case appears from the form of the oath, which members of the court-martial are required to take. Nevertheless, it was established by overwhelming testimony before the Committee that many commanding officers, apparently lacking in understanding of the true concepts which must underlie the administration of justice, felt that they were free to influence the decisions of a court-martial appointed by them, especially in respect to sentences. Members of a general court-martial were frequently instructed to impose the highest maximum

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Hearings before the Subcommittee of the House Armed Services Committee on H. R. 2575, 80th Cong., 1st Sess. 1936 (1947).

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sentence possible under the law in every case, and leave it to the reviewing authority to reduce it to a proper figure. . . . Courts were at times rebuked orally, and occasionally even in writing, by the appointing authority because of the imposition of a sentence deemed by the latter to be inadequate."

The question of excessive sentences came in for its share of comment during the hearings of the Vanderbilt Committee and the subcommittee of the House Armed Services Committee. Typical of the many cases cited was the Weber case. On February 2, 1945 Private Henry P. S. Weber was found guilty by a general court-martial appointed by the Commanding General, Infantry Replacement Training Center, Camp Roberts, California, of willfully disobeying a lawful order of a superior officer to join his squad for training on January 11, 1945, in violation of Article of War 64. The court sentenced him to be hanged. Thereafter, on February 5, 1945 the reviewing authority returned the record of trial to the court for reconsideration of the sentence. On February 7, 1945 the court reconvened, revoked its former sentence, and sentenced the accused to dishonorable discharge, forfeiture of all pay and allowances due or become due, and confinement at hard labor for life. The court considered one court-martial conviction, occurring within one year prior to the offense, in adjudging this sentence. The reviewing authority approved the sentence but reduced the period of confinement to five years. The record of trial was examined by a Board of Review in the Office of the Judge Advocate General as required by Article of War 50½, and was held legally sufficient to support the findings and the modified sentence, which became effective on February 2, 1945.

Weber's case was later reviewed by a clemency board in the Office of the Under Secretary of War. As a result of its recommendation the Secretary of War, on February 6, 1946, remitted so much of Weber's sentence to confinement as was in excess of three and one-half years.

At the trial, Weber attempted to show in extenuation of his offense that his political beliefs compelled him to be a conscientious objector. The Selective Service Law defines a conscientious objector as one "who, by reason of religious training or belief, is conscientiously opposed to participation in war in any form". Weber did not come within the provisions of that statute.

In an address before the Judge Advocate General's Conference in May 1945, Major General Myron C. Cramer, then Judge Advocate

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56CM 274903.
5854 Stat. 885, 889 (1940), 50 U. S. C. App. § 305 (g) (1940).
General, related a case that had come to his attention wherein a youth of 18 years of age, in the fifth week of his basic training was court-martialed for willful disobedience to a superior officer and was sentenced to fifty-five years by a general court-martial.

"For the penalty of willful disobedience of a lawful command of his superior officer, he was sentenced to a general court-martial, composed of one colonel, two lieutenant colonels, and five majors to a dishonorable discharge, total forfeitures and confinement at hard labor for fifty-five years. The members of the trial court not only deliberately disregarded the specific provisions of the War Department policy with respect to uniformity of sentences published generally to the Army on March 5, 1943, but they displayed a complete disregard of good judgment and common sense in imposing such an excessive sentence of confinement. Sentences of this nature imposed on a very young soldier who is not in the presence of the enemy, but in a training camp in the country not only stir up the enmity of the other soldiers in the same command, but subject the entire court-martial system of the Army to the indignant and justifiable criticism of Congress and public opinion."39

From one point of view it would seem as though the excessive sentences were tolerated by the Army for the deterring effect they have on all the personnel. If it were known that a "stiff sentence" would be given for a breach of the Articles of War, certainly those who would be contemplating such a breach would think twice before they acted.

On the other hand, it would not be long before every one would know that the excessive sentences would be reduced by the reviewing authorities to fit more closely the crime. The problem involved is one not easy of solution. Should the excessive sentences be tolerated for the deterring effect they have, or should a sentence be imposed by the court-martial that is fair and just and in proportion to the breach committed?

To cure these defects, "command influence" and excessive sentences, the Vanderbilt Committee recommended the creation of a separate Judge Advocate General's Corps to handle all cases that would come before a special or general court-martial.40 The separate Judge Advocate General's Corps would, of course, be composed of Army personnel; they would have their own promotion list, efficiency reports and specific duty assignments in the chain of command of the Judge Advocate General's Corps. Their organization would somewhat compare with the organization of the Medical Corps within the Army. The purpose of the separ-

40_Report of the War Department, Advisory Committee on Military Justice 10 (1946).
rate Judge Advocate General’s Corps would be to divorce the function of command from the administration of justice. Therein it is hoped that some of the glaring defects in the present system would be alleviated. Under this new system there would be very little chance for the command to exercise any influence over the court; the court would be free to decide the case on its merits and the punishment given the guilty would be the punishment of the court, not of the command.

This recommendation of the Vanderbilt Committee was flatly turned down by the War Department. The War Department apparently thought that the changes they had agreed to make would make the creation of the separate Judge Advocate General’s Corps unnecessary.41

Despite the opposition of the War Department, the idea for the separate Judge Advocate General’s Corps was incorporated into the Durham Bill42 and makes up the last four sections of H. R. 2575. The essential ideas in these four sections are:

Section 46. Section 8 of the National Defense Act, as amended (10 U. S. C. 61), is amended to read as follows:

Sec. 8. Judge Advocate General’s Corps.—The Judge Advocate General’s Corps shall consist of one Judge Advocate General with the rank of major general, one assistant with the rank of major general, three officers with the rank of brigadier general, and an active list commissioned officer strength to be determined by the Secretary of War. . . .

Section 47. . . . The names of commissioned officers of the Judge Advocate General’s Corps below the grade of brigadier general shall be carried on the Judge Advocate’s promotion list. . . . The authorized numbers in each of the several grades in the Judge Advocate’s promotion list shall be prescribed by the Secretary of War. . . .

Section 48. The Judge Advocate shall, in addition to such other duties as may be prescribed by law, be the legal adviser of the Secretary of War and of all officers and agencies of the War Department; and all members of the Judge Advocate General’s Corps shall perform their duties under the direction of the Judge Advocate General.

41War Department Press Release 6, 7, February 20, 1947.

"The proposed requirements that legally trained officers be utilized as law members, the provision that the Judge Advocate General should in general control the assignment of judge advocates to a theater, the requirement that trial judge advocates and defense counsel be equally qualified, the powers of appellate review placed in the Judge Advocate General and agencies under his direction, and the prohibitions against criticism of courts, appear to furnish a sufficient check upon possible abuses in the appointment and control of courts by the command power to guarantee adequate, independent judicial control, and to insure efficiency and fairness. In the opinion of the Secretary any tendency to centralize in Washington detailed control of field activities is destructive of the responsibility and efficiency of field commanders and must be avoided."

Section 49 of H. R. 2575, the last section of the bill, provides that the Judge Advocate General shall be appointed by the President with the consent of the Senate from among the officers of the Judge Advocate General's Corps.

The War Department opposes these sections of H. R. 2575 for three reasons. First, in the opinion of the War Department the Secretary of War has recommended certain changes which, if put into effect, will render these four sections unnecessary;43 second, that the bill, especially section 46, runs counter to the Officer Personnel Act of 1947,44 recently made law; and finally, the creation of the separate Judge Advocate General's Corps will take away from the field commander too much of his authority.

The first of the War Department's arguments has been hereinbefore discussed.45 The second point brought out by the War Department has some merit. The Promotion Bill provides that the number of officers shall be a certain proportion of the total strength of the Army, and conceivably the creation of the new Judge Advocate General's Corps may alter to an extent that proportion, but it is still within the discretion of the Secretary of War to make the appointments. Certainly the provisions of the Promotion Bill could be amended to bring them into accord with the provisions of H. R. 2575. The last reason of the War Department for opposing the creation of the separate Judge Advocate General's Corps is the most important one and deserves more than passing comment.

The views of the War Department on this last point, that too much authority is taken from the field commander by H. R. 2575, was presented by General J. Lawton Collins, who said:

"It seems to me that the major point to have in mind in discussing this matter is that there should be no separation of authority and responsibility. The Commander has the definite responsibility for his command and for everyone that is in it. How it performs in action and how it conducts itself is primarily his responsibility and we feel if you take from him any part of his authority over his command you are then definitely weakening his capacity to do his job. I think it would be a serious mistake to set up a chain of judge advocates with responsibility independent of the commanders, and I think it would frequently result in a failure of genuine justice."46

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43See note 36 supra.
45See note 36 supra.
46Hearings before the Subcommittee of the House Armed Services Committee on H. R. 2575, 80th Cong., 1st Sess. 2153 (1947).
The answer to this objection lies in the fact that the convening authority still has the power under H. R. 2575 to order the investigation, and on the result of that finding to decide whether or not to convene a court-martial; he appoints the trial judge advocate, the defense counsel, and the law member of the court. At the completion of the trial he has the full power to approve or disapprove either in toto or in part the sentence of the accused, should he be found guilty.47 Thus it would seem that the convening authority still has abundant power left in him. The summary court is not affected by the bill; so that the commanding officer still has the power to hand out limited punishment for lesser offenses.48

The existing army system has many praiseworthy features, giving to the accused privileges not extended to a defendant before a civilian court. One such privilege is granted by Article 50½;49 namely, that every judgment is reviewed by higher authority, or automatic appeal. However, the article itself is very unintelligible and the report of the Vanderbilt Committee50 recommended that Article 50½ be rewritten and the procedure prescribed be made clearer and more definite. As the appeal should be a check against all mistakes and errors made, it is necessary that the power granted the reviewing authority be definite and clear.

The bill rewrites and consolidates into Article 50 the provisions of Article 50½.51 The new section provides for a Board of Review of not less than three officers of the Judge Advocate General's Department and for a Judicial Council composed of three officers with the rank of general. In time of war or of necessity, additional boards or branch offices of the Judge Advocate General are provided for. This would mean a closer relation to the actual command in foreign countries in times of hostilities.

At the present the Board of Review can only look to the legal sufficiency of each case. If there is sufficient evidence to support the charge, the sentence is confirmed, even if a miscarriage of justice appears on the face of the record.52 The reviewing authority is bound by the record

47Full Committee Hearings on H. R. 2964, 3417, 3735, 1544, 2993, 2575, 80th Cong., 1st Sess. 4425 (1947).
50Report of the War Department, Advisory Committee on Military Justice 9 (1946).
51H. R. 2575, 80th Cong., 1st Sess. 23 (1947).
and is limited only to the legal consideration of the case. The new amendments seek to avoid this by granting all appellate agencies the power to weigh evidence, to judge the creditability of the witnesses and to determine controverted questions of facts. The Board of Review with the confirming action by the Judge Advocate General will have the power to vacate the sentence and transmit the record to the convening officer for a rehearing if it finds that the record is legally insufficient to support the findings of guilty or that errors of law have been committed injuriously affecting the substantial rights of the accused.

In attempting to clear the ambiguity of the former article, the bill has listed the actions to be taken by the Board of Review.

"Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President or confirmation by any other confirming authority is submitted to the President or such other confirming authority, as the case may be, it shall be examined by the Board of Review which shall take action as follows:

"(1) In any case requiring action by the President, the Board of Review shall submit its opinion in writing, through the Judicial Council which shall also submit its opinion in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the Board's and Council's opinions, with his recommendations, directly to the Secretary of War for the action of the President. . . ."

"(3) When the Board of Review is of the opinion that the record of trial in any case requiring confirming action by the President or confirming action by the Judicial Council is legally insufficient to support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, it shall submit its holding to the Judge Advocate General and when the Judge Advocate General concurs in such holding, such findings and sentence shall thereby be vacated in accord with such holding and the record shall be transmitted by the Judge Advocate General to the appropriate convening authority for a rehearing or such action as may be proper."  

This will filter out all unnecessary cases which normally went through the Secretary of War to the President for his action.

The amendments provide that all punishments over six months will not automatically involve a dishonorable discharge, but will make such

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54 H. R. 2575, 80th Cong., 1st Sess. 29 (1947).
55 Id. at 21. "... confirmation is required as follows before the sentence of a court-martial may be carried into execution, namely: By the President with respect to any sentence (1) of death, or (2) involving a general officer. . . ."
56 Id. at 24.
sentence discretionary with the court. However, no sentence involving dishonorable discharge or confinement in a penitentiary will be executed until the appellate review shall be completed. The records of each such case are reviewed first by the Board of Review and then confirmed by the Judge Advocate General if necessary. If the Judge Advocate General does not concur with the board, the record shall be transmitted to the Judicial Council for final determination.

Once the sentence is vacated, it is sent back to the convening authority for a rehearing. Also the confirming action taken by the appellate agencies shall be binding upon all departments, courts, agencies and officers of the United States, subject only to action upon application for a new trial as provided for in Article 53.

Article 51 grants the power to remit or suspend the whole or part of any sentence to the President, Secretary of War and any reviewing authority, except that death sentences may not be suspended. The power of the Judge Advocate General shall be exercised under "the direction of the Secretary of War." As the law stands at the present, the Judge Advocate General is a recommending officer and has no independent authority to exercise the power of clemency. The subcommittee wanted to give the Judge Advocate General this clemency power to the exclusion of the Secretary of War, but both Robert P. Patterson, Secretary of War, and Dwight D. Eisenhower, Chief of Staff, testified strongly before the full committee of the House Committee.

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67 Id. at 8. "That general courts-martial shall have power to adjudge any punishment authorized by law or custom of the service including a bad-conduct discharge."
68 Id. at 9. "That subject to the approval of the sentence by an officer exercising general court-martial jurisdiction and subject to appellate review by the Judge Advocate General and appellate agencies in his office, a special court-martial may adjudge a bad-conduct discharge in addition to other authorized punishment."
69 Id. at 27.
70 Id. at 29.
71 Id. at 32. "Under such regulations as the president may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate the sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review. . . ."
72 Id. at 30.
73 Ibid.
on Armed Services against taking this power away from the Secretary of War. As General Eisenhower stated: "But when it comes to the mitigating of that sentence I say it has got to be in the chain of authority, to be done by someone that has some responsibility for winning the war, and not just sitting on the outside and exercising his authority independent of the Secretary of War."65 The committee finally restored the ultimate power of clemency in the Secretary of War to be exercised by the Judge Advocate General under his direction.

The bill tends to clarify the powers of the Judge Advocate General's Department with respect to appellate review. There is no doubt that its powers are increased, especially the clemency power. Although the latter is exercised under the direction of the Secretary of War, the Judge Advocate General will have discretion in exercising this power.

While the more important features of H. R. 2575 have been discussed in detail, there are other amendments which deserve some consideration. Some comment should be directed to the provision which allows enlisted men to sit as members of the court-martial. "Enlisted persons . . . shall be competent to serve on general and special courts-martial for the trial of enlisted persons when requested in writing by the accused at any time prior to the convening of the court. When so requested, no enlisted person shall, without his consent, be tried by a court the membership of which does not include enlisted persons to the number of at least one third of the total membership of the court."66 The enlisted men who are "best qualified for the duty by reason of age, training, experience, and judicial temperament"67 would be selected by the convening authority. This amendment was approved by the War Department68 and favorably received by the subcommittee of the House Armed Services Committee.69

The members of the subcommittee "seriously doubt that the inclusion of enlisted men as members of the court will benefit enlisted men who are defendants, however, the choice is properly a right of the defendant. Once having exercised that right he must assume the responsibility for the results of his choice."70

65Full Committee Hearings on H. R. 2964, 3417, 3735, 1544, 2993, 2575, 80th Cong., 1st Sess. 4425 (1947).
66H. R. 2575, 80th Cong., 1st Sess. 3 (1947).
67Id. at 4.
69Ibid.
70Ibid.
Since the actual selection of the man is within the power of the convening authority of the court, the enlisted men so selected might become the pawns of that convening authority. Such may well be the result of the bill as it now stands, but this result may be remedied by reducing the opportunity for "Command influence" on the court.\footnote{H. R. 2575, 80th Cong., 1st Sess. 34 (1947). "No person subject to military law shall attempt to coerce or unlawfully influence the action of a court-martial or any military court or commission, or any member thereof, in reaching the findings or sentence in any case, or the action of an appointing or reviewing or confirming authority with respect to his judicial acts."}

Another provision,\footnote{\textit{Id.} at 8. "Special courts-martial shall have power to try any person subject to military law for any crime or offense not capital made punishable by these articles. . . ." $\text{Id.}$ at 10. "Officers shall be trial only by general and special courts-martial. . . ." \textit{Id.} at 3. \textit{Id.} at 8.} which has caused some comment, subjects officers to trial by a special court-martial. "Heretofore, the President has had authority to exempt such classes as he may designate from trial by special and summary courts-martial and under that authority has exempted officers from trial by these two courts. As a result, officers have been triable by general courts-martial only. This resulted in a reluctance on the part of superior commanders to subject officers to trial and possible dismissal for comparatively minor offences. As a result, officers would escape punishment for the same offences for which enlisted men were tried and convicted.\footnote{H. R. Rep. No. 1034, 80th Cong., 1st Sess. 6 (1947). H. R. 2575, 80th Cong., 1st Sess. 35 (1947). H. R. Rep. No. 1034, 80th Cong., 1st Sess. 27 (1947). "The disciplinary punishments authorized by this article may include admonition or reprimand, or the withholding of privileges or extra fatigue, or restriction to certain specified limits, or hard labor without confinement or any combination of such punishment for not exceeding one week from the date imposed; but shall not include forfeiture of pay or confinement under guard; except that any officer exercising general court-martial jurisdiction may . . . also impose upon . . . officer of his command below the rank of brigadier general a forfeiture of not more than one-half of his pay per month for three months."}\footnote{41 Stat. 787, 808 (1920), 10 U. S. C. § 1576 (1940).}

Other provisions of the bill include a lesser punishment than death or life imprisonment for murder or rape;\footnote{H. R. 2575, 80th Cong., 1st Sess. 34 (1947). "No person subject to military law shall attempt to coerce or unlawfully influence the action of a court-martial or any military court or commission, or any member thereof, in reaching the findings or sentence in any case, or the action of an appointing or reviewing or confirming authority with respect to his judicial acts."} warrant officers are authorized to sit as members of a court-martial;\footnote{\textit{Id.} at 8. "Special courts-martial shall have power to try any person subject to military law for any crime or offense not capital made punishable by these articles. . . ." $\text{Id.}$ at 10. "Officers shall be trial only by general and special courts-martial. . . ." \textit{Id.} at 3. \textit{Id.} at 8.} authority to grant a bad-conduct discharge has been granted to the general and special courts-martial;\footnote{41 Stat. 787, 808 (1920), 10 U. S. C. § 1576 (1940).} and the authority of the commanding officers under the 104th Article of War\footnote{H. R. Rep. No. 1034, 80th Cong., 1st Sess. 6 (1947). H. R. 2575, 80th Cong., 1st Sess. 35 (1947). H. R. Rep. No. 1034, 80th Cong., 1st Sess. 27 (1947). "The disciplinary punishments authorized by this article may include admonition or reprimand, or the withholding of privileges or extra fatigue, or restriction to certain specified limits, or hard labor without confinement or any combination of such punishment for not exceeding one week from the date imposed; but shall not include forfeiture of pay or confinement under guard; except that any officer exercising general court-martial jurisdiction may . . . also impose upon . . . officer of his command below the rank of brigadier general a forfeiture of not more than one-half of his pay per month for three months."} has been increased so far as it pertains to officers but not to enlisted men.\footnote{41 Stat. 787, 808 (1920), 10 U. S. C. § 1576 (1940).}
It must be kept in mind that the prime purpose of maintaining an army is to win wars. This cannot be done if discipline of the highest degree is not maintained. But at the same time, it must be taken into consideration that a man, whether civilian or soldier, has a natural right to liberty and is entitled to fairness and justice by civil or military courts. To maintain an effective army, both of these principles must be harmonized. The bill is a step in this direction. A literal interpretation of the Articles of War as amended should give to our soldiers the justice guaranteed by the Constitution.

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The Navy Department is preparing a bill similar to H. R. 2575 to amend their articles for the government of the Navy. It is hoped that in the future there will be a consolidation of these two bills into one so as to achieve uniformity.

H. R. 2575 was passed by the House by unanimous vote on Jan. 15, 1948.
NOTES
STATE AID TO EDUCATION AND THE DOCTRINE OF SEPARATION OF CHURCH AND STATE

The American people have regarded education as essential to good citizenship from the earliest days of our existence as an independent nation. Prior to the adoption of the Constitution the Northwest Ordinance of 1787 proclaimed: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Under the Constitution the Southwest Ordinance of 1791 repeated this policy in identical wording. The same consideration was present in Washington's Farewell Address. Recognizing it as essential to the public welfare, the states have continuously encouraged and compelled education of children by statutes which everywhere enforce a policy of teaching the men and women of tomorrow the basic requirements for good citizenship in state and nation. To provide the facilities public schools are built and maintained by tax-raised funds so that education is offered free of charge to the pupil at least through the secondary grades. But the compulsory system has not been developed in derogation of private schools. Attendance at any other school which meets the state standards will satisfy the compulsory education statutes. Indeed, such a choice is a constitutional right and no state can compel attendance at its schools as long as there is another school which meets the required standards of the state. Among the many schools not under the direct government control but which fulfill the public interest in the education of children are the parochial schools, non-profit institutions affiliated with religions. Such schools derive no support from public funds but are maintained by the contributions of the religious group in general or by the payment of tuition by each pupil. Through their taxes these contributors to private schools also pay their share for the support of public schools, and hence theirs is no light burden in comparison with other taxpayers. Can they be relieved of this burden in whole or in part by payment of the public funds? The Supreme Court of the United States has upheld such payments for text-books and transportation to and from school as constitutionally valid.

To make the public schools easily accessible to all pupils, public transportation is usually provided for children living in outlying districts and in sparsely settled localities. Several states have attempted by legislation to supply free transportation to all school children regardless of school attended in order to protect them from the hazards of the highway as well as to further the public purpose of education. When this involves transportation of children who attend parochial schools, the question whether such statutes result in state aid to particular religious groups becomes involved and has been raised in several states in opposition to transportation legislation as well as to statutes of a related nature. It was raised most recently in the case of Everson v. Board of Education of Ewing Township. The statute challenged was one passed by the State of New Jersey in 1941 permitting district boards of education to pay parents for the transportation of children to and from schools other than public schools, thereby including those of a parochial nature, but expressly excluding private schools operated for a profit. Under authority of this statute the board of education paid parents of twenty-one pupils for transportation to and from parochial schools in Trenton. To this use of public funds Everson objected as a violation of the "due process" clause of the Fourteenth Amendment. One of the liberties protected by that Amendment against state infringement is freedom of religion, which the Supreme Court has interpreted in the case of Cantwell v. Connecticut to be the identical prohibition as applied against the Federal Government by the First Amendment. In that case Mr. Justice Roberts, writing the opinion of the Court, said:

("We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."

The Cantwell case thus paved the way for the Supreme Court to consider in the Everson case whether or not the Fourteenth Amendment prohibited aid to religion.

8330 U. S. 1 (1947); 133 N. J. L. 350, 44 A.2d 333 (1945).
9310 U. S. 296 (1940).
10Id. at 303.
THE FIRST AMENDMENT

To establish in detail the meaning of the freedom of religion aspects of the Fourteenth Amendment it is necessary, in accordance with the opinion of the Supreme Court in Cantwell v. Connecticut, to look to the First Amendment and to the intention of those who were responsible for its adoption. This amendment was one of twelve proposed in the first session of the First Congress by the Resolution of 1789, passed September 29, 1789, and thereafter presented to the states for ratification. By June 1790, the required number of states had ratified. That part of the First Amendment applicable to this discussion is divided into two parts. The first prohibits laws "respecting an establishment of religion", and the second guarantees the "free exercise" of religion. The first clause, the one particularly involved in the Everson case, is not clear on its face as to exactly what was intended by its drafters. It is said to establish the doctrine of separation of church and state. But does it separate religion and state? Does the freedom protected include a freedom from religion? What is the separation, or extent of the separation, that is established? If it establishes any or all of these doctrines, those doctrines can exist only in the manner and to the extent to which the wording and intention allow. Interpretation by analogy is proper only to clarify intention.

The Supreme Court of the United States in the opinion written by Mr. Justice Black in the Everson case considers the meaning of the "establishment of religion clause" to be:

"... at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." 8

Such a broad meaning of the clause is accepted by the Court because a broad meaning has been given in prior decisions to the subsequent

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8See 330 U. S. 1, 8 (1947).
clauses of the First Amendment, including the "free exercise" clause, and because all are interrelated and complementary. Carrying this broad interpretation to a conclusion the Court finds that "That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers," thus in effect saying that it establishes a neutrality between religion and non-religion. Acceptance of such a broad meaning does not appear to have been based on a complete examination of the intention that found expression in the wording used in the "establishment of religion" clause. The fact that related clauses have been given a broad interpretation should be immaterial unless it were otherwise impossible to determine the meaning. An examination of the background of the First Amendment, the circumstances of the times and the debates in Congress will demonstrate that it was the clear intention of the framers to attach to it a more restricted purpose.

The Constitution was ratified absolutely by five states, but the others, although ratifying before the convening of the First Congress in 1789, did so hesitantly and only after promise of a clarification of personal rights. It was in fulfillment of this promise that the twelve amendments contained in the Resolution of 1789 were drawn and offered to the states. All but the first two of these twelve were ratified by the states. As a result Article III of the Resolution of 1789 became the First Amendment.

At the time of the adoption of the Constitution and these Amendments, the members of the Congress and the members of the states were familiar with an established church. Prior to the Revolution, all but three of the states had a state religion to some degree. The Anglican Church was the established church of the majority of the states but was disestablished by most during the War of Independence. This action was more a cutting of bonds with England and with the Loyalists than a separation of church and state. One religion continued in favor, or at least all were not treated equally. Some established church continued after the revolution in several of the other states. Even Virginia

Ibid.

Id. at 18.

11 Stat. 97 (1789).

12Md., S. C., N. C.—all; Del.—all but the 1st; N. H., N. Y., R. I., N. J.—all but the 2d; Pa.—all but the 1st, 2d, 3d. 2 Annals of Cong. 1983 (1791).


14Bassett, A Short History of the United States 355 (1933).
attempted to re-establish a church and it was chiefly through the instrumentality of Madison that the move was defeated.\textsuperscript{16}

It was natural that the advocates of a central government would desire a prohibition of establishment of a Church for the United States as a matter of political expediency. It was necessary to hold the states in the Union. The states with established churches feared dictation to them by some other religion, while states without such establishment simply feared dictation in religious matters. Beneath these reasons was one more basic and common to all, in that it existed for some people everywhere. It was the fear of persecution and domination that the Supreme Court in the \textit{Everson} case\textsuperscript{16} considered "... so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence."\textsuperscript{17}

It may certainly be accepted that such a feeling existed in the ratifying states with respect to an established United States religion, but no such feeling was present in a majority of the states as to the established or semi-established church of the particular state. Such an abhorrence was more the result of jealousy and fear than of more noble motives.\textsuperscript{18}

There continued to be laws which enforced taxation for support of ministers and erection and maintenance of the favored church. The religious schools were likewise the recipients of state aid.\textsuperscript{19}

The cessation of these practices was not sudden but gradual and came with alteration in the numbers of the various religious groups. The support of the religious schools, for example, did not cease generally until the foundation of the public school system in the middle of the nineteenth century.\textsuperscript{20} During this time the school taught religion, and was under the direction of the religious leaders, who controlled the courses and selected the books. There was no sudden rise of a doctrine of separation of church and state within the individual states. This doctrine has been said to be the reason for the "establishment of religion" clause and to have been incorporated thereby into the First Amendment. Separation was forced on the Federal Government but

\begin{itemize}
\item \textsuperscript{15}See \textit{Everson} v. Board of Education of Ewing Township, 330 U. S. 1, 11 (1947); \textit{Billington, The Protestant Crusade} (1938); \textit{Moeelman, School Administration} (1940); \textit{Smith, Sherman M., The Relation of the State to Religious Education in Massachusetts} (1926).
\item \textsuperscript{16}And even then a general Protestantism was taught. \textit{Smith, op. cit. supra} note 17, at 211.
\end{itemize}
the doctrine of separation of church and state had too small a following in practice to establish it as the cause of separation. A conclusion that the separation established by the First Amendment and the doctrine of separation are coextensive is not necessarily correct because the principal motivation of the First Amendment was not the doctrine of separation. If federal separation had been produced by a progressive ideal of freedom, it probably would have had greater following and earlier reproduction in the states. The attitude of the states toward religion and religious sects was contrary to the greater freedom of religion which is the heart of the doctrine of separation. The separation imposed on the Federal Government was a political expedient, and should have been no more extensive than the occasion required. Most people, at the time, did not seek a complete disassociation of all governments with religions but only a neutrality of the federal government toward religious sects.

That the First Amendment as it relates to "establishment of religion" established a policy of federal neutrality toward religious sects and was prompted by considerations of expediency is apparent from the debates of the First Congress on the amendments to the Constitution as well as from the practices and the thought of the times. The debaters were men politically prominent in the states. In many instances they acted pursuant to general instructions given to them by their state legislatures before they departed for Congress, and in the subject of religious protection many of them were instructed. On the whole they were Federalists. With the concept of strong union of the states so predominating among them, their restriction of the federal government in favor of the states indicates the influence of their constituents and makes their words a reflection of the intention of the ratifying bodies. The introduction, alteration and debate of the first ten amendments to the Constitution are reported in the Annals of Congress.

The amendments were offered in the House of Representatives, June 8, 1789 by Mr. Madison.21 Their introduction was not without an opposing voice. It was said in opposition to any consideration of the matter that the time was inopportune; that the Constitution as ratified should be given a trial; that more important matters required consideration; that no amendments were necessary because the states had ratified the Constitution as it then existed and they would not have

21 ANNALS OF CONG. 433 (1789). The Amendments proposed by him were so worded as to change the wording of the document proper and not as additional sections of articles to the Constitution as a whole.
done so if it had not been satisfactory.\textsuperscript{22} Mr. Madison replied that Virginia, as well as other states, demanded the protection at the earliest opportunity.\textsuperscript{23} The introduction thus illustrates the pressure of the state demand, the motive on which Congress acted. Mr. Madison proposed:

"Fourthly. That in article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to wit: The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."\textsuperscript{24}

The wording of this proposal indicates that all but the clause "nor shall any national religion be established" refers to the concept now included in the First Amendment in the words "or prohibiting the free exercise thereof". The words of the proposal which finally took the form of "establishment of religion" in the First Amendment clearly manifest that the purpose was to prohibit the federal government from following the prevalent practice of the states in favoring one religion over all others. In comparison with the broad, all-inclusive expression of the other sections of this fourth proposal, the prohibition of national religion is quite definite and limited. It does not permit as broad a meaning as the remaining clauses of the proposal. The more definite wording of "national religion" was rejected, not because it was inconsistent with the intention of the framers, but because of popular distaste for the type of strong central government that it implied. It should be remembered that the constitutional government just established was to have been a loose federation of sovereign powers coöperating in comity, not subjects of a superior sovereign.\textsuperscript{25}

A committee appointed to consider the amendments reported the first two clauses of the proposed amendment in the words "No religion shall be established by law, nor shall the equal rights of conscience be infringed."\textsuperscript{26} Comparison of this wording with that adopted demonstrates the restrictive application that was intended by these drafters of the amendment. They used "no religion" in the sense of not any religion. Yet discussion of this clause of the committee report demonstrates that it was not acceptable because of a fear of broad interpretation that, in

\textsuperscript{21} Annals of Cong. 429 (1789).
\textsuperscript{22} Annals of Cong. 434 (1789).
\textsuperscript{23} Ibid.
\textsuperscript{24} Ibid.
\textsuperscript{25} Annals of Cong. 731 (1789).
\textsuperscript{26} Annals of Cong. 729 (1789).
the words of Mr. Sylvester, would "... have a tendency to abolish religion altogether."27 His objection arose from the possibility of interpretation of the words "no religion" to be an establishment of non-religion. To rectify such a failing it was proposed that it be worded "that no religious doctrine shall be established by law."28 It is clear that the framers did not intend to arrive at a broad meaning but rather chose words with an idea of thereby arriving at a restricted meaning. Nowhere in the debates is there an intimation of an intention to propose an amendment capable of broader interpretation than the intention of Mr. Madison. His express intention appears to coincide with that of the other members of the First Congress. At least none other appears. If freedom from religion had been the moving force behind the amendment, why was it not argued in Congress instead of or in conjunction with the other argument? If such a view had had proponents it may be presumed that it would have been presented. Furthermore, if that meaning were actually intended proper words could have been used. In speaking of the wording of the committee report of August 15, Mr. Madison clearly discloses the meaning intended by the choice of words:

"Mr. Madison said, he apprehended the meaning of the words to be, That Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."29

This meaning is far less inclusive than the broad meaning adopted by Mr. Justice Black. It need not result in denial of aid to all religions.30

Throughout the debate on the amendments, members of Congress were clear that their's was no intent to "abolish religion altogether,"31 "to patronize those who professed no religion at all",32 or to use words that "might be taken in such latitude as to be extremely hurtful to the cause of religion."33 The Amendment was not aimed at the cause of religion in general but rather at favoring any one religion or religious sect over others. In this sense it was a separation of church and state but not of religion and state as the proponents of a broader interpretation would have it.

27Ibid.
281 ANNALS OF CONG. 730 (1789).
29Ibid.
311 ANNALS OF CONG. 729 (1789).
321 ANNALS OF CONG. 731 (1789).
331 ANNALS OF CONG. 730 (1789).
LEGISLATIVE AND JUDICIAL INTERPRETATIONS

There are other factors that lend strong support to such an interpretation. The men of the period were themselves deeply religious. The Declaration of Independence is evidence of this. The passage of the Northwest Ordinance in 1787 and later of the Southwest Ordinance in the First Congress in 1791 demonstrate the place of religion in the minds of the leaders and in the political concepts of that era. It is to be noted that the Ordinance of 1791 was passed after ratification of the First Amendment. Other acts passed by the First Congress after the Amendment became a part of the Constitution reflect this same religious spirit and in so doing, also show that the restrictive interpretation was intended by the framers and by the states. If the Supreme Court in the Everson case correctly interpreted the Amendment, it would have been unconstitutional for Congress to provide for chaplains in the Senate and House of Representatives; it would have been unconstitutional for Congress to provide for chaplains in the armed forces. But Congress provided for its chaplains. On September 22, 1789, while Congress was considering these amendments, and on the day after the House of Representatives and Senate had reached agreement on the wording of the amendments of the Resolution of September 29th, the pay of the chaplains of Congress was fixed by statute: "... there shall be allowed to each chaplain of Congress, at the rate of five hundred dollars per annum during the session of Congress." Army chaplains were also the subject of legislation by the First Congress and in 1791, after ratification of the First Amendment, it provided by the Act of March 3:

"... that in case the President of the United States should deem the employment of a major-general, brigadier-general, a quartermaster and chaplain, or either of them, essential to the public interest, that he be, and he hereby is empowered, by and with the advice and consent of the Senate, to appoint the same accordingly ... in case a ... chaplain should be appointed, [his] pay and allowances shall be as herein mentioned: ... That the Chaplain be entitled to fifty dollars per month, including pay, rations and forage."

If the states had intended another interpretation of the Amendment,

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See the preamble to "Virginia Bill for Religious Liberty", quoted in Everson v. Board of Education of Ewing Township, 330 U. S. 1, 12 (1947).
See 330 U. S. 1, 15 (1947).
1 Annals of Cong. 83 (1789).
1 Stat. 71 (1789).
1 Stat. 222 (1791).
they would have been the first to object to such a use of public funds. Yet their was acquiescence which continues to this day. Regularly Congress has paid its chaplains and altered provisions of payment by amending acts. Legislation concerning army chaplains has also continued. In the Revised Statutes (1875) the duties of the chaplains and the obligations of their commanders to them are set out.

“All regimental chaplains . . . shall, when it may be practicable, hold appropriate religious services, for the benefit of the commands to which they may be assigned to duty, at least once on each Sunday, and shall perform appropriate religious burial services at the burial of officers and soldiers who may die in such commands.”

“It shall be the duty of Commanders of regiments, hospitals, and posts to afford to chaplains assigned to the same for duty, such facilities as may aid them in the performance of their duties.”

Congress also provided for the method of appointment of chaplains: “from among persons duly accredited by some religious denomination or organization, and of good standing therein. . . .” Certainly Congress has never felt that the states and framers intended more than a prohibition of a favored religion.

Another situation presents itself to support the restricted meaning. Since education was considered so essential to good government in the minds of both the states and the framers of the Amendments, the states must have conceived that the Government of the United States would subsidize education in the territories under exclusive federal control. When, as often happened, schools operated by religious groups and private individuals provided the only available education, it must also have been foreseen that the federal government would contribute to religious schools as the states themselves did. Where it was the duty of the United States to provide education, schools operated by religious groups obtained the federal aid.

Acquiescence in many instances of favor to religion in general upholds a restricted meaning. Recent examples are quite familiar. A taxpayer may give up to 15 per cent of his income to religious purposes and he is free from tax to that extent. Likewise the recipient religious

7 Quick Bear v. Leupp, 210 U.S. 50 (1908).
organization is exempt from tax liability.\textsuperscript{45} Under the National Youth Administration program, students were paid from federal funds for work performed for their school, whether religious or not, without distinction.\textsuperscript{46} Congressional pages are free to attend either public or parochial schools and the schools are paid by the Government to the extent of the charge for education in public schools.\textsuperscript{47} The Veterans Administration pays religious institutions for tuition of veterans under the popular G. I. Bill and there is no restriction to course.\textsuperscript{48} A veteran may pursue a course to qualify him as a minister of the Gospel and both he and his institution are within the class of recipients of federal money. Of a certainty, whatever meaning is to be given to the "establishment of religion" clause, whether a policy of neutrality toward religions or not, it does not include a prohibition against unfavored aid to religion. Neutrality requires no more than equal favor. How equality is to be achieved is a matter of policy. The choice of means is the prerogative of the legislature. Then it is for the courts to say whether equality has been attained in fact.

Courts have been called upon many times to interpret the "establishment" clause of the First Amendment. The decisions of the Supreme Court of the United States have generally been founded, not on a determination that the legislative policy had or had not achieved the neutrality of equal favor, but on the basis that there had not been aid to religion but rather aid to the public. Of this character was the opinion of the Court by Chief Justice Hughes in Cochran v. Louisiana State Board of Education.\textsuperscript{49} The Louisiana legislature had directed the Board of Education to provide school books for all the school children of the state, free of cost to the children, to be purchased from funds derived from taxation. This legislation was attacked on the claim that it aided private, religious, sectarian and other schools. The legislation was Constitutional in the opinion of the Court:

"The legislation does not segregate private schools, or their pupils, as its beneficiaries, or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."\textsuperscript{50}

\textsuperscript{46}Exec. Order No. 7086 (1935); 52 Stat. 810 (1938).
\textsuperscript{49}281 U. S. 370 (1930).
\textsuperscript{50}Id. at 375.
The Court found the furnishing of textbooks in the public interest and not an aid to the schools but an aid to the individuals in a matter with which there is public concern.

Appropriation of funds for hospital construction was likewise found to be public and non-religious in Bradfield v. Roberts. There, a fund was appropriated for the use by the District of Columbia in erection of hospital facilities for private corporations. One of the corporations operated Providence Hospital. From the corporate charter it appeared that it was a hospital corporation for general public use. Actually it was owned by a body of the Roman Catholic Church and was operated by religious members of that Church, but this did not appear in the charter. The Court found the distribution of money to be non-religious by adopting the corporate entity theory and refusing to look behind this fiction. That the Catholic Church was also interested in the hospital was immaterial. Under this theory any public religious corporation could drop its religious character on the surface by amendment of its charter and qualify for aid that previously would have been unconstitutional; a religious sect could incorporate itself for a public purpose without disclosure of the religious aspect and then be established as a state or federal favorite, an established religion. In this way much of the accomplishment of the "establishment of religion" clause could be nullified. It cannot be considered that the Court did other than postpone constitutional interpretation by deciding on this basis.

Somewhat different was the case of Quick Bear v. Leupp. Indian treaties required appropriations by Congress to pay for the schooling of Indians. Since no government schools existed and there were available schools conducted by the Bureau of Catholic Indian Missions, a contract was made with these schools for the education of Indians, at the request of the Indians. Without detailed consideration, the Court held the contract constitutional because the treaty money was trust money to which the Indians had a claim of right. The basis for this holding was the existence of the trust, which, in effect, converted the funds from public to private, and thus removed from consideration the question of government support of non-secular schools.

It appears that the Court, in these cases, recognized that the public interest required the legislation, and that there was aid given to a religion in actual fact but not because it was a religion. The aid was

\[175\] U. S. 291 (1899).
\[id\] at 298.
\[210\] U. S. 50 (1908).
not for the religious aspect but for the common good derived from the particular activity of the institution aided. In the textbook case,\(^6^4\) the Court suggested that it would have been unconstitutional if religious books had also been provided. In the Providence Hospital case\(^6^5\) and the Quick Bear case\(^6^6\) a broad interpretation of the First Amendment could easily have resulted in an opposite decision. In both cases an abstract legalistic concept, remote from reality, justified the decision of the Court. If the First Amendment intended complete denial of aid to religion, subtle distinctions would not suffice to evade its effect. It is important to note that in all of these instances of legislative and judicial dealings with aid to religion, a public purpose and want of discrimination within the class of beneficiaries has always been present.

**The Everson Case**

The same basis of a public purpose sustained the decision of the Court of Errors and Appeals of New Jersey in upholding the action of the school board in the Everson case.\(^5^7\) Its decision was based on the determination that school bus transportation for parochial school children was for the benefit of the pupils and not for the benefit of either the school or the religion. Other states, in facing the same problem, have frequently based their decisions on their own constitutions which are in some cases more precisely phrased than the prohibition contained in the First Amendment. In Oklahoma the State Constitution used the words "directly or indirectly" aiding religion as its prohibition, and thus general public transportation for school children was held unconstitutional.\(^5^8\) Until 1939 the New York Constitution prohibited such transportation and as a result the school bus laws permitting parochial school children to enjoy their benefits were held unconstitutional in Judd v. Board of Education.\(^5^9\) Subsequent to this decision the State Constitution was amended in 1938 to permit valid legislation of this nature.\(^6^0\) Washington and Delaware adopt the view that such transportation is an aid to religion and unconstitutional, holding that the


\(^{6^5}\)Bradfield v. Roberts, 175 U. S. 291 (1899).

\(^{6^6}\)Quick Bear v. Leupp, 210 U. S. 50 (1908).

\(^{5^7}\)Everson v. Board of Education of Ewing Township, 133 N. J. L. 350, 44 A.2d 333 (1945).

\(^{5^8}\)Gurney v. Ferguson, 190 Okla. 254, 122 P.2d 1002 (1941).

\(^{5^9}\)278 N. Y. 200, 15 N. E. 2d 576 (1938).

\(^{6^0}\)N. Y. Const. Art. XI, § 4.
religious school is aided by building it up and making it successful.\textsuperscript{61} Of this argument, which was put forward in the New Jersey case and accepted by the dissenting Justices of the Supreme Court of the United States,\textsuperscript{62} Justice Robinson, dissenting in the Washington case, \textit{Mitchell v. Consolidated School District},\textsuperscript{63} said:

\begin{quote}
"... [it] has no validity unless it be assumed that, if there be no busses, there will be no pupils; but can any one doubt but that parents who pay taxes to support the public schools, and yet share in the heavy expense of maintaining parochial schools, will contrive in some way or another to send their children to those schools, as they have heretofore sent them, whether bus service is available or not? No pupils, no school, is in no way involved."\textsuperscript{64}
\end{quote}

Any incidental benefit to religion renders the legislation unconstitutional to the same extent as the incidental benefit to parochial schools derived from police and fire protection makes the existence of these forces unconstitutional. It is at least a valid exercise of the police power.\textsuperscript{65} Such use of public funds is also merely complementary to the compulsory education statute.\textsuperscript{66}

When the subject came before the Supreme Court in the \textit{Everson} case,\textsuperscript{67} the Court, in a five to four decision, rejected the argument of unconstitutionality of public transportation for parochial school pupils. It held that the tax-raised funds in question were used for a public purpose and not for a religious one. The question of equality of use as applied to the facts of the case was not considered although the statute treated all non-profit parochial schools equally.\textsuperscript{68} The basis of the decision of the Court is found in the words of Mr. Justice Black:

\begin{quote}
"This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. ... These parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general
\end{quote}

\textsuperscript{61}State \textit{ex rel.} Traub \textit{v.} Brown, 36 Del. 181, 172 Atl. 835 (1934); Mitchell \textit{v. Consolidated School District}, 17 Wash. 2d 61, 135 P.2d 79 (1943).
\textsuperscript{62}See \textit{Everson v. Board of Education of Ewing Township}, 330 U. S. 1, 18, 28 (1947).
\textsuperscript{63}17 Wash. 2d 61, 74, 135 P.2d 79, 83 (1943).
\textsuperscript{64}Id. at 75, 135 P.2d at 85.
\textsuperscript{65}See 51 HARV. L. REV. 935 (1938).
\textsuperscript{66}Board of Education of Baltimore County \textit{v.} Wheat, 174 Md. 314, 199 Atl. 628 (1938).
program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.”69

Mr. Justice Jackson, dissenting, reads the statute as applying to Catholic schools alone. However, the statute was not so worded and it is well known that the Catholics are not the only ones who have parochial schools. The Methodists, Lutherans, Episcopalians, and others maintain their own parochial schools. The statute would apply equally to them. The fact that Catholic parochial schools were the only ones receiving pupils from Ewing Township has no bearing on the matter. There may be no Catholic parochial school pupils in some other section under a different board of education where at the same time there may be non-Catholic parochial schools and pupils.

Although the constitutional prohibition of the “establishment of religion” clause should extend only to discrimination in aid to religion, it could not be seriously contended that such aid could be given solely for a religious purpose because the subsequent clause which guarantees “free exercise” of religion would then be offended. The “free exercise” clause qualifies and restricts the “establishment of religion” clause. However, it is difficult to see how a taxpayer is offended by a law in the furtherance of a public purpose, which incidentally may also be in furtherance of a religious purpose. In education, for example, the taxpayer who must bear the burden of the cost required by the compulsory education statute is theoretically liable for his proportionate share of the total cost for the education of all children eligible under the statute. If some pupils attend schools other than those supported by taxes, the actual total cost and the actual liability of the individual taxpayer is reduced. But how has he a right to object up to his share of the total theoretical cost? After all, parochial schools are recognized by the state as having attained academic standards equal to the public schools. To be so rated, the schools must include the same minimum material and obtain the same results as the public schools for the satisfaction of the public interest requirements of education. Anything more is additional to the public school requirements. Of this character is the religious training in the parochial schools. The parochial school achieves the same result as would be obtained from the conduct of a school by a religious group or groups in a building adjacent to that of the public school, and where religious instruction would be given to the children after their public school classes were finished. This religious instruc-

69 330 U. S. 1, 18 (1947).
tion in the parochial schools is additional to that instruction for which the taxpayer is liable under the education statute. In both public and parochial schools the taxpayer would be called upon to pay only his share of the total cost of the public purpose aspect which the schools have met by their conformance to the state requirements. Since the religious instruction is additional to these requirements, the only remaining religious aspect in which the parochial schools differ from the public schools is in the matter of ownership, control and supervision, and this religious character is merely incidental to the public purpose. The additional teaching of religion does not make the whole a teaching of religion.

That it does so is the assumption made by Mr. Justice Rutledge in his dissent when he said:

"... it is precisely because the instruction is religious and relates to a particular faith, whether one or another, that parents send their children to religious schools under the Pierce doctrine. And the very purpose of the state's contribution is to defray the cost of conveying the pupil to the place where he will receive not simply secular, but also and primarily religious, teaching and guidance."\(^{70}\)

This quotation indicates how the religious aspect of the education in parochial schools is magnified in the eyes of Mr. Justice Rutledge and others. The fact that the religious training is additional to the secular training was not considered.

**Conclusion**

The "establishment of religion" clause of the Constitution is not violated because a state provides transportation for its children to a parochial school. The contribution of the state is not to the religion that conducts the school but to the individual in furtherance of the public interest. The aid given by the state is not directed to the religion and any incidental aid which is received by the religion is only of the same class as exists under many of the laws of the state. This conclusion is reached by the Supreme Court. It was therefore unnecessary for the Supreme Court to discuss the scope of the "establishment of religion" clause in order to reach its decision. Nevertheless, it did enter into this discussion of the First Amendment and these dicta were specifically adopted by the Court and formed the basis for the holding in *Illinois ex rel. McCollum v. Board of Education.*\(^{71}\)

\(^{70}\)330 U. S. 1, 46 (1947).

\(^{71}\)16 U. S. L. Week 4224 (U. S. Mar. 8, 1948). In this case objection was raised to the
It is difficult to understand the Court's opinion in these two cases that the "establishment of religion" clause alone prohibits aid to "all religions".\textsuperscript{72} If it had stated that this was the combined effect of the "establishment of religion" and "free exercise" clauses, the conclusion would have better foundation.

If bus transportation is an aid to religion, it is also in furtherance of a public purpose for which the state may legislate. Such legislation does not contravene the Constitution because the "establishment of religion" clause permits aid to religion equally given, and the "free exercise" clause does not prohibit such aid when not in derogation of the rights of any individual. These individual rights are not violated by legislation which serves primarily a public purpose although there may result some incidental aid to religion. Education being a public purpose, and transportation an aid to education, legislatures may validly provide both for children attending parochial schools without violating constitutional rights of any individual; and if the legislation does not discriminate among the various religious sects, the public aid to the parochial schools is constitutional.

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system of religious instruction voluntarily adopted by the school authorities upon the instigation of an interdenominational group known as the Champaign Council on Religious Education. The system, adopted for all public schools of Champaign, Illinois, was a variation of the "released time" plan. The instruction was conducted by representatives of the various religious sects during regular school hours. Children attended these classes after submission of a request card furnished to the parents, and those who did not choose to take religious instruction were required during this period to be present in other classrooms for what was apparently a "study hour" in connection with their regular secular subjects. The instruction and materials were at no expense to the school authorities, but attendance reports were made as for any other class and the religious instructors were subject to the approval and supervision of the superintendent of schools.

The Court held, in an opinion again written by Mr. Justice Black, that these facts showed a use of tax-supported property for religious instruction and that this was "beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith" and thereby falls under the ban of the Fourteenth Amendment. After quoting from the opinion in the \textit{Everson} case, 330 U. S. 1 (1947), the Court concluded that "Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State."

\textsuperscript{72}\textit{Everson} v. Board of Education of Ewing Township, 330 U. S. 1, 15 (1947).
MUST THE ADMISSIONS OF AN AGENT, MADE WITHIN THE
SCOPE OF HIS AUTHORITY, BE PART OF THE
RES GESTAE BEFORE THE PRINCIPAL
IS BOUND BY THEM?

THE rule of law is entirely well settled that when an agent is vested with authority to perform any business for his principal, his words, his verbal acts, in conducting that business and in relation thereto, are the acts of the principal and may be proved as against the latter. Yet, while the foregoing principle is usually accepted without question, there has been a strong tendency on the part of courts to add to the requirements already set out, the further necessity that the agent’s statement be part of the res gestae.

Such a requirement would seem not only a superfluous addition to the recognized substantive principle of agency just mentioned, but introduces confusion and uncertainty into the law. As is said by Professor McKelvey,

4"He who sets another person to do an act in his stead as agent is chargeable in substantive law by such acts as are done under that authority; so, too, properly enough, admissions made by the agent in the course of exercising that authority have the same testimonial value to discredit the party’s present claim as if stated by the party himself. . . . The question, therefore, turns upon the scope of authority." 4 WIGMORE, EVIDENCE § 1078 (3d ed. 1940). Of course, under this doctrine, the agent’s authority must first be established by the party alleging it. MECHEM, AGENCY § 112 (3d ed. 1923). But cf. Buist v. Guice, 96 Ala. 255, 11 S. 280 (1892). Neither agency nor authority can be proved by the hearsay statements of the alleged agent himself. Brownell v. Tide Water Associated Oil Co., 121 F.2d 239 (C. C. A. 1st 1941).

5Hupfer v. National Distilling Co., 119 Wis. 417, 96 N. W. 809 (1903); Note, 95 CENT. L. J. 298 (1922).

6Raffetto v. Warner Bros. Theatres, Inc., 121 N. J. L. 333, 2 A.2d 595 (1938). "An admission of an agent may be received in evidence against his principal, where the agent, in making the admission, was acting within the scope of his authority, and the transaction or negotiation to which the admission relates was pending at the time when it was made." 22 C. J. § 440 at 367 (1920).

"Res gestae are events speaking for themselves, through the instinctive words and acts of participants, but are not the words and acts of participants when narrating the events. What is said or done by participants under the immediate spur of a transaction becomes thus part of the transaction, because it is then the transaction that thus speaks. In such cases it is not necessary to examine as witnesses the persons who, as participants in the transaction, thus instinctively spoke or acted. What they did or said is res gestae; it is part of the transaction itself." WHARTON, CRIMINAL EVIDENCE § 492 (11th ed. 1935). Cf. 2 MECHEM, AGENCY § 1781 (2d ed. 1914); Note, 32 CORN. L. Q. 115 (1946).

7MECHEM, OUTLINES OF THE LAW OF AGENCY § 482 (3d ed. 1923); Thayer, Bedingfield’s Case—Declarations as Part of the Res Gestae, 15 AM. L. REV. 71 (1881).
"In the agency cases, there is ordinarily no question of res gestae. The question is one of admissions. If the declaration of the agent is receivable, it is to be determined on the principle governing the subject of an agent's power to bind his principal by his statements. If he has power his statement becomes an admission of the principal. If the circumstances shown are not such as to give him that power, his declarations will be excluded."

It would seem that if the doctrine of res gestae is to be introduced in these circumstances, it should apply not only to agents but also to third persons whose declarations meet the requirements of the res gestae rule. That is, if the agent's admission is deemed part of the res gestae, there is no need to refer to the substantive law of agency and its requirements. Even the declarations of a bystander, if part of the res gestae, are receivable into evidence.

An examination of the cases, however, reveals that courts, especially in considering the admissions of an agent in tort actions, where the principal is sought to be charged with the negligence of his employee, frequently fuse the separate doctrines into one.

Apparently the reason for the requirement of res gestae is that originally that requirement was imposed in connection with the agent's statements as to his authority to bind his principal, or designating the scope of employment. Res gestae was a term used to designate the business pending. It has not been, of course, confined to that meaning. The reason for the subsequent misapplication of the term is almost as obscure as the legal history of the Latin phrase itself. Professor Greenleaf has been accused of using res gestae with great lack of preciseness in his work on evidence, which has been quoted with approval in many early cases (including the Vicksburg case). Perhaps the real reason for its misapplication is that res gestae, although capable of a variety of meanings, is rarely defined in agency cases, but is simply included as a traditional requirement.

\*2 Chamberlayne, Modern Law of Evidence § 1344 (1911); Thayer, Bedingfield's Case—Declarations as Part of the Res Gestae, 15 Am. L. Rev. 71, 81 (1881). But since the term also has been used by the courts to classify a spontaneous declaration, admissible for entirely different reasons; and since the two principles have been frequently discussed as one principle (especially in tort cases), the confusion has resulted.
\*See note 17 infra.
An example of this fusion of the doctrines of agency and res gestae is shown in *Warner v. Maine Central R.R.*,\(^{11}\) concerning a fire in which the plaintiff's building was burned. The report of the Railroad's station agent to his superior declared that the fire was caused by sparks from a locomotive. The court, in holding the agent's declaration inadmissible as a narration of a past transaction, said:

"It is to be observed that the rule admitting the declarations of the agent is founded upon the legal identity of the agent and the principal, and therefore they bind only so far as there is authority to make them. Where this authority is derived by implication from authority to do a certain act, the declarations of the agent to be admissible must be a part of the res gestae."\(^{12}\)

This court seems to hold that even if authority to make the statements is established, the statements of the agent cannot be introduced into evidence to bind the principal, unless also a part of the res gestae. While the decision is fair, it having been found as a fact that the agent had no authority to write the letter, the rule stated by the court incorporating the res gestae phase of the transaction, and making it a requirement for receiving the admissions of an agent into evidence,\(^{13}\) is an example of the unfortunate fusion of two entirely different principles of law.

However, this case does not stand alone. In the New York case of *White v. Miller*\(^{14}\) the court, in holding the agent's statement inadmissible to bind the principal, stated the rule thus:

"...in cases of agency, the declarations of the agent are not competent to charge the principal, upon proof merely that the relation of principal and agent existed when the declarations were made. It must further appear that the agent, at the time the declarations were made, was engaged in executing the authority conferred upon him, and that the declarations related to, and were connected with the business then depending, *so that they constituted part of the res gestae.*"\(^{15}\) (Italics supplied.)

In deciding the case the declarations of the employee were excluded as not constituting part of the res gestae, though in discussing their

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\(^{12}\)Warner v. Maine Cent. R. R., 111 Me. 149, 152, 88 Atl. 403, 404 (1913).

\(^{13}\)*Accord,* 13 Rose's Notes 633. "It is frequently said that the declarations of an agent affect the principal only when they are 'part of the res gestae'. ..." 22 C. J. § 442 (citing cases) at 377.

\(^{14}\)71 N. Y. 118 (1877).

\(^{15}\)Id. at 135.
admissibility the court treated the question as one of authority on the part of the employee to bind his principal.16

It is an undisputed fact that the United States Supreme Court set a strong precedent more than sixty years ago for those courts which make the res gestae an indispensable requirement for the admissions of an agent to bind the principal. The leading case on this proposition is Vicksburg & Meridian R.R. v. O’Brien.17 Here a train wreck was involved in which the plaintiff, Mrs. O’Brien, was injured while riding as a passenger in one of the cars. One Roach, the witness whose testimony was in question, asked the engineer, between ten and thirty minutes after the accident occurred, how fast the train had been moving. The engineer replied, “Eighteen miles an hour.” The admissibility of the engineer’s statement to bind the principal, defendant Railroad, was a major issue in the case. A majority of the court decided it was to be excluded, saying:

“The acts of an agent, within the scope of the authority delegated to him, are deemed the acts of the principal. . . . But it must be remembered . . . that the admission of the agent cannot always be assimilated to the admission of the principal. . . . The admission . . . of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending, et dum ferveat opus. It is because it is a verbal act and part of the res gestae that it is admissible at all. . . . 1 Greenl. § 113.”18

Here the Supreme Court demonstrated a willingness to admit the agent’s statement if made during the continuance of the agency, if the purpose of the agency was then being carried out, and if the statement was part of the res gestae! The dual requirements of agency and res gestae not being met under the circumstances of the case, the engineer’s statement was excluded.19

Mr. Justice Field, dissenting in the instant case, was willing to admit the engineer’s statement into evidence as part of the res gestae, because of the excitement surrounding the occasion. He reasoned that as the statement was made between ten and thirty minutes after the accident, in the midst of the confusion surrounding the scene of the wreck, it

17119 U. S. 99 (1886).
18Id. at 104.
19Id. at 105.
was an excited utterance and admissible as such. He further pointed out that:

"The modern doctrine has relaxed the ancient rule, that declarations, to be admissible as part of the res gestae, must be strictly contemporaneous with the main transaction."20

It would be conceded, undoubtedly, even by Mr. Wigmore,21 that the dissent shows the clearer understanding of the res gestae doctrine. Mr. Justice Field found sufficient basis in that doctrine alone to justify admitting the engineer's statement into evidence. Although he did recognize the peculiar competence of the engineer, as agent, to estimate the speed of the moving train, the authority of the agent to speak did not enter decisively into his discussion.

The Vicksburg case has never been overruled,22 and has been distinguished only once by a federal court23 on the basis that the employee in the latter case was still suffering from shock (having had both legs severed by a passing train) when he made the statement in question.

As a final and very notable example of the confusion of the two principles—agency and res gestae—there is the case of Snipes v. Augusta-Aiken R. Elec. Co.24 Here the defendant company was charged with the negligence of its agent. The issue was whether the employee at the time of the collision was acting within the scope of his authority or on a frolic of his own. To prove that the employee was acting within the scope of his authority, the plaintiff offered in evidence two conversations which he had with the employee's superior, one taking place forty-five minutes after the accident, the other a month later.

The court admitted the statements on the theory that, though not a part of the res gestae as to the immediate transaction, it was part of the res gestae as to the general transaction in its entirety. Ignoring the substantive rule of agency altogether, the court made it the basic requirement that the declaration of an agent, to be admissible, must be part of the res gestae. Apparently from the facts, the agent had no authority to speak and was not involved in the accident, and obviously the occasion when the superior (agent) spoke, was not an exciting one. As the dissenting opinion25 points out, it is not easy to accept the majority's reasoning in admitting the declaration as part of the res gestae.

20Id. at 108.
21Cf. 4 Wigmore, Evidence § 1078 (3d ed. 1940).
22Roth v. Swanson, 145 F.2d 269 (C. C. A. 8th 1944).
23Chesapeake & Ohio Ry. v. Mears, 64 F.2d 291 (C. C. A. 4th 1933).
24151 S. C. 391, 149 S. E. 111 (1929).
25Id. at 403, 149 S. E. 111, 113 (1929).
While the separation of the doctrine of res gestae and the rule of agency, in regard to the admissibility of agents' statements, has been recognized by a minority of jurisdictions, there is ample evidence that the problem is clearly understood by many legal writers. A notable example of the recognition of the problem is found in Wigmore's *Evidence*, where that author comments:

"... since the much abused phrase 'res gestae' has been commonly employed to suggest the limitations of that Hearsay exception [spontaneous declarations], and has also been employed (though having nothing in common) to designate the scope of an agent's authority, it is natural that judges should sometimes have discussed the two principles, in their application to personal injuries, as if there were but one principle. That there are two distinct and unrelated principles involved must be apparent; and the sooner the Courts insist on keeping them apart the better for the intelligent development of the law of Evidence."

Undoubtedly the foregoing statement describes the problem as precisely as it can be done. It is perhaps regrettable that a larger number of the courts fail to see the distinction—as is apparent after a careful examination of the cases. Yet there are courts which do make the distinction and avoid the pitfalls which have been alluded to previously in this note. An instance of careful judicial reasoning in the matter is the majority opinion of Woodbury, J., in *Semprini v. Boston & M. R.R.*

There the cases involved the alleged negligence of the defendant's train engineer in running over a child. Immediately after the accident, in response to a question by the child's mother, the fireman on the locomotive said, "It wasn't my fault, I told the engineer to stop and he wouldn't." In holding the statement inadmissible, the court adhered to the general rule that an agent's admissions are not evidence against the principal unless the agency includes authority to make them. In the instant case the fireman spoke without such authority.

Then, answering the defendant's contention that even if the words were admissible as part of the res gestae, they should still be excluded because the fireman was not authorized to speak for his employer, the court held:

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Supra note 9.


2887 N. H. 279, 179 Atl. 349 (1935).

29Id. at 280, 179 Atl. 349, 350 (1935).
"Statements which form part of the res gestae, if made by an agent for either party, are admitted, not because of agency, but regardless of it. . . . On the other hand, an admission may only be received in evidence if made by a party or by his agent authorized to speak for him in that regard. Whether or not an admission conforms to the requirements of the res gestae rule is wholly immaterial. The two exceptions are quite distinct, and to hold that a statement must conform to both rules before it becomes admissible is obviously erroneous."30 (Italics supplied.)

This is perhaps as clear a statement of the problem as can be found among the decisions. Other jurisdictions have not failed to make the distinction, and their holdings consider the statements of an agent and those which are part of the res gestae as separate topics. Thus, in *Lambert v. La Conner Trading & Transportation Co.*,31 the court considered the admissibility of the declarations of defendant's shipmaster made immediately after the ship rammed a drawbridge. Holding that while inadmissible as an admission, since the agent was without authority in that regard, the statement was nonetheless admissible as part of the res gestae.32 Conversely, it has been held by a Missouri court33 that although a statement by an agent is found not to be part of the res gestae, it may still be admissible as within the scope of the agent's authority.

The foregoing courts discussed the admissibility of an agent's declarations on the dual basis of res gestae and scope of authority. There are other courts notably those of Massachusetts,34 which restrict their discussion of the point to the agent's authority to speak. This latter

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30 Id. at 281, 179 Atl. 349, 350 (1935).
31 50 Wash. 346, 70 Pac. 960 (1902).
32 Compare with the statement of the court in *Oil City Fuel Supply Co. v. Boundy*, 122 Pa. 449, 461, 15 Atl. 865, 866 (1888), as follows: "It is imperative in cases of alleged tortious conduct, such as negligence, unless the act is specially authorized, that the admissions of the agent must be part of the res gestae, otherwise they are hearsay." But see, *Havens v. R. I. Suburban Ry.*, 26 R. I. 48, 58 Atl. 247, 249 (1904). For a foreign view of the problem, see *Black v. Bank of Nova Scotia*, 21 N. S. R. 448 (1889).
procedure, while it safely avoids the fusion of the principles as shown in cases supra, obviously fails to expressly draw the distinction.

That there is a necessity for courts to keep the two concepts separate (and concomitantly a widespread failure to do so), has found judicial recognition. Mr. Justice Cothran, dissenting in Snipes v. Augusta-Aiken R. Elec. Co., supra, points to the confusion which has resulted from the failure of courts to make a distinction between the declarations of an agent which are part of the res gestae and those which are made in the course of his employment. He explains the distinction thus:

"The declarations of an agent, which are shown to have been a part of the res gestae, are admitted, not because he was an agent, but because they come within . . . the res gestae rule; the declarations of one not an agent would be received under the same conditions. The declarations of an agent made within the course of his employment and while the matter in controversy was pending, are admitted, not because they were made as part of the res gestae, but because they were made under the circumstances stated . . . . It is misleading and incorrect, manifestly, to hold that, before the declarations of an agent can be received, they must be shown to have been a part of the res gestae and within the course of his employment. They may have been either or both, and admissible for that reason."

However, it is regrettable at this point, after a careful examination of the cases, to have to conclude that a majority of the courts have failed to make the distinction. They hold, as did the Supreme Court in the Vicksburg case, that the admissions of an agent bind his principal only when they are made during the continuance of the agency in regard to a transaction then depending, and form part of the res gestae.

Nearly three hundred cases have cited the Vicksburg case on the point since that decision was handed down sixty-two years ago, none disapproving. It is undoubtedly the majority rule in this country. It is impossible to estimate the influence of the leading writers on the subjects of agency and evidence, who make a sharp distinction between the admission of an agent and statements forming part of the res gestae. Certainly in Semprini v. Boston & M. R. R., there was demonstrated a very lucid understanding of the problem, and it is to be hoped that, however gradually, courts will in greater numbers begin

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\[\text{\textsuperscript{35}}\text{See note 22 supra.}\]

\[\text{\textsuperscript{37}}\text{Havens v. R. I. Suburban Ry., 26 R. I. 48, 58 Atl. 247 (1904).}\]
to concede that res gestae is one thing, and scope of authority another—and nowhere do they fuse.58

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JUDICIAL SCRUTINY OF DOCUMENTS IN THE CUSTODY OF GOVERNMENTAL DEPARTMENTS AND AGENCIES

A LTHOUGH the problem of judicial scrutiny of departmental records is not new, it demands attention because of the rapid and extensive growth of administrative agencies. Today the judiciary refuses to require submission of documents which are in the possession of governmental departments if the latter are unwilling to produce them, regardless of the fact that they might be of great benefit in properly settling litigation. The rule has application to papers which, if published, might cause embarrassment to the nation, in regard to either its domestic and foreign affairs, or those which might be harmful to citizens as individuals, thereby curtailing freedom of access to all official communications. On the grounds of public policy the government officer holding them in his custody determines whether to permit or forbid their use.

In order to maintain the desired control of their records, the agencies commenced to issue intra-departmental regulations under authority of Rev. Stat. § 161,1 first enacted July 27, 1789, which granted permission to the head of each department:

"... to prescribe regulations, not inconsistent with law, for ... the custody, use, and preservation of the records, papers, and property appertaining to it."

This statute was designed to provide the power necessary to regulate the performance of the business of the office.2 However, it has been expanded to such an extent that it is now the basis for issuing regulations which stipulate that a particular document or class of documents is to be considered a state secret and therefore confidential. These regulations are respected by the courts, regardless of whether any rea-

58"Statements Admissible Under General Rules of Evidence: Evidence of statements of agents, whether or not such statements are authorized is admissible in favor of and against the principal, if admissible under the general rules of evidence as to the admissibility of such statements by persons not agents." Restatement, Agency § 289 (1933).

son for so classifying the paper is given. As a result, it is held that if a statutory right to make classification regulations exists, and if this right is exercised, the document classified is privileged. On the other hand, if there is neither regulation nor statute prohibiting their availability to the public, papers of the United States will be as susceptible to production for use in court as are those of private parties. The net result is that today courts will recognize as final an order of a government official indicating that a particular report or class of them is confidential. The official prevents active meddling with the papers of his agency by merely issuing a regulation to that effect. It is generally held that:

"Courts will not interfere with the exercise of the discretion vested by statute in administrative officials, in the absence of clear and convincing proof of improper conduct on their part, or unless the powers conferred upon them are clearly transgressed."

The courts have considered "public policy" sufficient reason for failure to produce records despite the fact that the term is amorphous in meaning. This can be explained by the fact that compulsory production would mean disclosure of information derived through a person's official capacity, thereby destroying that secrecy required for the administration of justice and government; it would likewise tend to destroy efficient, candid and unbiased reports, for government officials would be hesitant to disclose the complete truth in writing if they knew such documents would be subject to publication in court. A third expla-

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8 These regulations are not to be questioned by this court, but must be upheld and enforced, and they must be regarded by all as having the same force as an act of Congress." In re Huttman, 70 Fed. 699, 701 (D. Kan. 1895); accord, Boske v. Comingore, 177 U. S. 459 (1900); Ex parte Sackett, 74 F.2d 922 (C. C. A. 9th 1935), wherein it is held that regulations made under authority of Rev. Stat. § 161 are valid.

9 In re Lamberton, 124 Fed. 446 (D. C. Ark. 1903).


11 Contra: 47 W. Va. L. Q. 338, 340 (1941) wherein it is stated, "The privilege of state secrets ... is one which at the discretion of the judge may be disregarded."


13 Peden v. Peden's Adm'r, 121 Va. 147, 92 S. E. 984 (1917).


nation given by the courts is that any attack on the doctrine would mean interference with the division of powers established by the Federal and State Constitutions. These three grounds may be embodied in one broad principle, viz., that the interests of the government as a whole far outweigh those of an individual involved in litigation. It was so stated by Baron Pollock in Beatson v. Skene when he wrote:

“If the production of a state paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor. . . (this) must be determined not by the Judge, but by the head of the department, having the custody of the paper. . . .”

Although the doctrine in the United States now rests on administrative regulation issued in accord with statute, it has not always been so based, but rather has undergone a transition from the common law theory to its present status.

The American courts first faced this question in 1803 in the famous case of Marbury v. Madison. When the Attorney General contended that transactions occurring in the office were confidential and therefore cloaked with a privilege to which administrative agencies were entitled, Chief Justice Marshall denied his right to secrecy by holding that the information “. . . certainly could not be of a confidential nature.”

On the occasion of Aaron Burr’s trial four years later, Marshall again had occasion to consider the problem when the defendant sought permission to read two letters which had been sent by General Wilkerson to President Jefferson. The President forwarded these letters to the prosecuting attorney authorizing him to determine whether or not they should be submitted in conformity with Burr’s request. When the prosecutor decided to withhold portions of both letters and forbid disclosure, the Chief Justice interfered and permitted Burr to read the entire contents, although he did deny release to the general public. In making this decision, he stated that the President’s wish was entitled to reliance, but since the discretionary power was left with the prose-

11Appeal of Hartranft, Governor of the Commonwealth, 85 Pa. 433, 445 (1877).
12Cf. 56 Harv. L. Rev. 806 (1943). Professor Wigmore states in regard this matter: “As if the public interest were not involved in the administration of justice! As if the denial of justice to a single suitor were not as much a public injury as is the disclosure of any official record!” 8 Wigmore, Evidence § 2378a (3d ed. 1940).
135 H. & N. 838, 853 (1858).
141 Cranch 137 (U. S. 1803).
15Id. at 143.
17The president may himself state the particular reasons which may have induced him
cuting attorney, discovery was permitted. Although the request of the subordinate of the executive branch was not recognized, the inference is present that the wish might have been granted had the President himself requested non-disclosure.

The apparent willingness to accede to the top executive's wishes more readily than to those of a lesser official was likewise encountered in state decisions which treated the problem more fully. In Gray v. Pentland,\textsuperscript{18} a libellous deposition, charging Pentland with inability to perform his duties as prothonotary of the court of common pleas, was sent to the governor by Gray. The plaintiff, suing for libel, sought production of the deposition. The Supreme Court of Pennsylvania pointed out that such a proposition should be the subject of a statute, but in absence of any provision it would hold that the matter was solely one of executive discretion.\textsuperscript{19} This was categorically stated in Thompson v. German Valley R. R.:

"The governor will not be compelled to produce in court any paper or document in his possession; he will be allowed to withhold it, or any part of it, if, in his opinion, his official duty requires him to do so."\textsuperscript{20}

It is important to note that the reasons of the executive for concluding that documents should be withheld on the ground of public policy are not subject to investigation by the courts.\textsuperscript{21}

Any indication that this doctrine was to be limited to chief executives was negativized in 1877, when Attorney General Charles Devens specifically declared that communications made in the course of official duties were "confidential under all circumstances", if the official, having custody of the papers, objected to their production on the grounds of


\textsuperscript{18}It must be a matter within his discretion, to furnish or to refuse it; and this, on ground of public policy." 2 S. & R. 23, 28 (Pa. 1815). In a similar situation, in Howard v. Thompson, 21 Wend. 319 (N. Y. 1839), it was inferred that the decision of the Secretary of the Treasury would likewise have been entitled to such weight had he not given the libellous letter to the plaintiff. In fact the department head is criticized for his act in doing so: "Had all the circumstances of this case been disclosed to the Treasury Department, I can hardly believe that its upright, able and sagacious head would have voluntarily surrendered these letters to be used as evidence." Howard v. Thompson, supra at 335.

\textsuperscript{19}Thompson v. German Valley R. R., 22 N. J. Eq. 111 (1871).

\textsuperscript{20}Appeal of Hartranft, Governor of the Commonwealth, 85 Pa. 433 (1877).
detriment to the public interests.22 This alone would be sufficient justification for his refusal to deliver. Devens stated:

"... where the production of an official paper would be injurious to those interests, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice."23

This expansion of the doctrine was sanctioned by the courts when they approved the right of the executive branch, guided solely by the requirements of public welfare,24 to exercise absolute discretion in determining what documents should be considered secrets of state.25

Consequently, the theory has steadily developed from its foundation solely on stare decisis to the present point where agency regulations classifying documents are given the binding force of law.26

The problem is by no means peculiar to the United States, for there have been numerous cases on the subject in England, Australia and Canada. Their decisions do not rest on statute, as the American decisions do, but rather on common law principles. The famous case of Beatson v. Skene27 is frequently cited as authority for the English viewpoint which recognizes a privilege of secrecy for government documents and a right existing in the officer involved to ascertain whether or not public interest demands prohibition of disclosure. Significant in this opinion is the reservation of the theoretical power of the judiciary to overrule the decision of the official:

"Perhaps cases might arise where the matter would be so clear that the Judge might well ask for it, in spite of some official scruples as to producing it."28

2215 Ops. Att'y Gen. 415 (1877).
2315 Ops. Att'y Gen. 378, 379 (1880). See 25 Ops. Att'y Gen. 326, 331 (1905), wherein Attorney General Moody reiterated that stand in an opinion to the Secretary of Commerce and Labor: "... you may properly decline to furnish official records of the Department... whenever in your judgment the production of such papers... might prove prejudicial for any reason to the Government or to the public interest." Accord, 40 Ops. Att'y Gen. No. 8 (1941).
26United States v. Haugen, 58 F. Supp. 436 (E. D. Wash. 1944), in which Mr. Justice Schwellenbach states at 438: "The right of the Army to refuse to disclose confidential information, the secrecy of which it deems necessary to national defense, is indisputable." Accord, Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 Fed. 353 (E. D. Pa. 1912).
However, there was no indication of the circumstances which must prevail before the prerogative would be exercised.

Whether a reason for withholding the document is given to the court has been held to make no difference; objection on the broad ground of prejudice to the public interest is sufficient. Nor is it necessary that the court regard each paper individually as long as it is a member of a class to which objection has been made. Any degree of harm to the public will prevent disclosure as long as the paper falls within a particular class of documents, even though the judge may believe no harm would be done.

These principles were reaffirmed in a celebrated case which developed over the sinking of the submarine Thetis while on a trial run before its acceptance for war-time duty. The plaintiff, Duncan, a dependent of one of the employee-victims, sued the shipbuilding firm for negligent construction of the submarine, and during the course of trial attempted to gain access to building records in the possession of the defendant. Disclosure was forbidden by the First Lord of the Admiralty who submitted an affidavit protesting that any publication would result in irreparable injury to the public interest. Duncan's contention that the privilege of discretion should rest in the judge was denied. Even if the English courts still maintained that they had a theoretical capacity to ascertain whether or not damage would occur from production, they refused to exercise it.

Although Canada has with complete unanimity adopted the approach and rationale of the English judiciary, Australia, in 1931, in the case of Robinson v. State of South Australia, deviated from this doctrine and initiated the principle that the courts not only have a theoretical but also a practical right "to require some indication of the nature of the injury to the State which would follow its production." Involved in this action was the attempt by the government to prevent disclosure of commercial documents compiled in 1892, in spite of the fact that

[31] Ibid.
[34] [1931] A. C. 704.
[35] Id. at 716.
the department which had original custody of the records had been disbanded. Although it was stipulated that information should not be revealed if it would tend to injure public interests, the court recognized its power of investigation and actually exercised it by looking at the documents themselves to determine whether their production would be sufficiently detrimental to the public welfare to warrant non-disclosure. This was the first positive step of a high court changing a doctrine that seemed firmly settled.

But before analyzing the position of the Australian Court, a position, incidentally, supported by Professor Wigmore, it may be helpful to treat briefly the power of the judiciary in relation to the problem under discussion, since support for the present doctrine rests, partly at least, on the theory that judicial compulsion would constitute interference in a matter properly within the scope of executive discretion.

Beyond doubt the judiciary may declare an act of Congress unconstitutional though the presumption is, of course, that a statute is constitutional. The Supreme Court may check executive action beyond the scope of that department’s authority. However, as analysis of the prior cases demonstrates, the argument can well be made that in the field of confidential documents at least the judiciary has shown undue deference to the executive branch.

An analysis of Rev. Stat. § 161, which is deemed to give the executive branch authority to determine when a government document is confidential, does not by its terms attempt to grant any such powers. It is merely a routine grant of power for the issuance of regulations for the normal control of the records of the government. The scope of executive discretion in declaring state papers confidential and immune from judicial scrutiny must rest on larger considerations of public policy and the doctrine of separation of power. There is, however, another approach to the problem, advocated by Professor Wigmore, adopted by the Australian Court in Robinson v. State of South

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36 Id. at 714.
37 Wigmore, Evidence §§ 2378, 2379 (3d ed. 1940).
38 Marbury v. Madison, 1 Cranch 137 (U. S. 1803).
42 Wigmore, Evidence § 2379 (3d ed. 1940).
and by the American Courts in several cases of which the *Doheny and Fall* cases\textsuperscript{44} are probably the most important.

In that "cause célèbre" a certain Captain Robison of the United States Navy was called as a witness. On direct examination by defense counsel he revealed that he was in possession of a written communication from Secretary of the Navy Wilbur stating that the disclosure of any official government records or other confidential information which had come to him in the course of his official duties would be prejudicial to the public interest and was, therefore, forbidden. Nevertheless, the Supreme Court of the District of Columbia forced the witness to testify stating:

"... his obligation as a witness in this case is to the Court; and if, in the opinion of the witness, some inquiry be made of him which, in his judgment, and for reasons of public safety, interest and concern, are privileged, and, therefore, should not be publicly disclosed; the claim in that regard can be asserted by the witness; and *then the responsibility is upon this Court to consider and dispose of the privilege so claimed.*..."\textsuperscript{45} (Italics supplied.)

In the *Doheny* case the witness was on the stand in the presence of the presiding judge. As a consequence, the court was able to control the interrogation and to prevent the revelation of any actual state secrets. Obviously, a far more delicate problem is presented where whole documents or sets of documents are sought to be discovered, some of which may be genuinely confidential while others are not. Nevertheless, the same considerations should prevail in both instances. Under this rationale it is the court, not the executive branch, which must weigh the possibility of harm to the public interest against the need to do justice to the individual litigant seeking the disclosure. This theory is predicated on the supposition that leaving the decision to the head of the government department\textsuperscript{46} often has the effect of making him the judge in an action in which he himself has an interest; a unique situation which is at variance with the whole tradition of Anglo-Saxon law. Naturally enough, this discretionary power has, on occasion, been abused. It affords too excellent protection against embarrassing disclosures of in-

\textsuperscript{43}Australia,\textsuperscript{43} and by the American Courts in several cases of which the *Doheny and Fall* cases\textsuperscript{44} are probably the most important.

\textsuperscript{44}See **Morgan and Maguire, Cases on Evidence** 208 (1934) for this citation from the stenographic record taken during the trial.

\textsuperscript{45}Generally this decision is left to a subordinate who is bound by a mandatory departmental regulation requiring him to refuse all requests for papers in the custody of the department.
efficiency or corruption within the department. On the other hand, the judge approaches the issue with an open mind. As a member of the judiciary he is obliged to serve the nation to the best of his abilities in the discharge of his high office. This obligation includes the protection of the public interest. However, he is also concerned with the rights of the individual. Though a government servant, his outlook is not concentrated on one particular aspect of the national welfare, as is so often the case with members of government agencies or departments.

There is another reason why it is preferable to place the discretion with the court. Traditionally, the law has acted as a bulwark against attempts by the government to encroach on the rights of the individual. Consequently, it is to the law courts that the ordinary person looks for justice. Under the prevailing doctrine the courts may be checked in their attempts to do justice by the mere fiat of an administrator over whom the litigant has no control and on whom he can make no legal demands, a situation scarcely calculated to encourage confidence in our judicial system. These and other arguments have convinced Professor Wigmore that when the problem of disclosure of documents in government custody is before the court, the final decision on their production should always rest in the presiding judge.

However defensible this proposition might be in theory, it would necessarily be difficult of application in practice. On many technical and scientific points, it might well be that the ordinary judge could form no reasonable opinion as to the need for secrecy. Furthermore, any argument over the matter in court might well divulge important information even where the final decision was against disclosure. Nevertheless, some check on the possibility of arbitrary executive action seems necessary. Perhaps the best solution to the problem would be for the courts to insist that the executive branch make a prima facie showing of the necessity for failure to disclose. This showing need not be absolute. Only broad grounds for refusal to disclose need be stated, e.g., that the documents refer to delicate international negotiations. If the reasons adduced for the claim of privilege are deemed insufficient, the court should require the documents to be presented for its own inspection, and should then decide for itself on the need for secrecy. A powerful argument can be made that the courts are abdicating when they allow the papers to be withheld without any showing of the necessity for non-production. If the court decides that the documents should be produced in court because of the failure of the government to show any valid ground for non-disclosure, the court can issue a writ of mandamus to enforce its decision.
The most recently reported case on this issue, *Bank Line, Ltd. v. United States,*\(^4^7\) seems to indicate that some such procedure as the one suggested here may be adopted in the future by the courts. In that case a ship belonging to the libellant Bank Line had been damaged off Casablanca in a collision with a merchant ship belonging to the United States Government. The Navy Department had made an investigation into the matter because ships of the Navy were involved as escorts. Libellant sought to force the production of the records of the investigation and also certain maps and charts relating to Casablanca harbor. The district court granted libellant's request for mandamus. Thereupon, the Navy Department sought a writ of prohibition in the circuit court to prevent the district court from enforcing its writ of mandamus. Prohibition was denied on the ground that it was not the proper remedy. The court, however, took the opportunity to render an advisory opinion for the benefit of the district court. That opinion suggests that the mandamus was improperly issued; but it also implies that there is a duty on the government to show a real need for secrecy before any claim of privilege can be successfully advanced. This notion is strongly present in the brief concurring opinion of Mr. Justice Clark in the same case.

From the facts stated it seems that the district court was overhasty in granting the petition for mandamus. So far as can be determined the need for secrecy was not even discussed before the district court. Consequently, the writ of mandamus must be construed, in this case, to be an attempt to enforce the performance of a discretionary act, and, as such, was improperly issued. Nevertheless the case may serve to re-open the whole question of judicial scrutiny of documents in administrative custody and may thus be the means of encouraging the courts to take a more affirmative and enlightened stand than that to which they have been dedicated in the past.

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\(^4^7\)163 F.2d 133 (C. C. A. 2d 1947)
THE EFFECT OF THE MERGER OF LAW AND EQUITY ON THE RIGHT OF THE JURY TRIAL IN FEDERAL COURTS

The right to trial by jury is generally regarded as applying to actions at law, but not to suits in equity.¹ So long as law and equity were treated as two separate and distinct systems of jurisprudence, the right to trial by jury presented no serious problem. Today, however, the Federal Rules of Civil Procedure, and the procedural codes of many states have abolished the distinction between actions at law and suits in equity, with the result that in those jurisdictions there is but one form of civil action.² When both legal and equitable issues are involved in the same action, this merger of law and equity presents a most perplexing problem in so far as the right to trial by jury is concerned.

The general rule is that the right to trial by jury as guaranteed by the Federal Constitution and the constitutions of the several states shall remain inviolate in those cases where it had application at common law at the time of the adoption of the Constitution. The right exists also in cases which would have been triable by a jury had such cases been known to the common law. That the right does not exist in cases not in the nature of common law actions is apparent from the words of Chief Justice Hughes in National Labor Relations Board v. Jones & Laughlin Steel Corp.,³ where he says:

"The Seventh Amendment provides that 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved'. The Amendment thus preserves the right which existed under the common law when the Amendment was adopted. (Citations omitted.) Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. (Citations omitted.) It does not apply where the proceeding is not in the nature of a suit at common law."

Generally, therefore, in the absence of statutes expressly defining the types of cases wherein jury trial may be had, the question is a historical one. If the factual situation presented by the pleadings is one which, at the time the Constitution was adopted, would have been tried by

¹It is generally recognized, however, that equity having once obtained jurisdiction may dispose of the issue and give complete relief, legal as well as equitable. Imperial Shale Brick Co. v. Jewett, 169 N. Y. 143, 62 N. E. 167 (1901); Phez Co. v. Salem Fruit Union, 103 Ore. 514, 201 Pac. 222 (1921); White v. Kelly, 85 W. Va. 366, 101 S. E. 724 (1920).
²Fed. R. Civ. P., 2. For citations to state statutes, see Clark, Code Pleading 82 n. 24 (2d ed. 1947).
³301 U. S. 1, 48 (1937).
courts of law sitting with a jury, then the right to trial by jury exists, and may as of right be claimed by either party. If the pleadings present a cause unknown to the common law, the right does not exist and cannot be claimed by either party to the action.

Rule 38 of the Federal Rules of Civil Procedure provides in part as follows:

"(a) **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by statutes of the United States shall be preserved to the parties inviolate.

(b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury. . . .

(d) **Waiver.** The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

It will be noted that Rule 38 provides for the automatic waiver of jury trial unless it is affirmatively claimed within the period prescribed by the rule. Under the Federal Rules the problem here under discussion arises only in cases where legal and equitable issues are joined and an affirmative demand for jury trial has been made by either of the parties litigant. When the Rules were first adopted, and for several years thereafter, the solution of the problem was far from clear. The passage of time and judicial decisions have helped to clarify the clouded details, and it now seems that a reasonably clear picture of the problem and its solution can be presented.

Generally the problem will arise where the case falls within one of the following five situations:

1. Where the plaintiff brings an action for both equitable and legal relief and the claims are plainly different and not dependent one upon the other, although arising from the same wrong.

2. Where the plaintiff brings an action which is primarily equitable in nature but incidentally seeks legal relief.

3. Where the plaintiff brings an action which is primarily legal in nature but incidentally seeks equitable relief.

4. Where the defendant interposes an equitable defense to an action which is primarily one at law.

"... the constitutional question, where unaffected by statute, is the simple inquiry, Was the issue now to be decided one which an equity court would have decided without a jury at the time of the adoption of the state constitution, or would it have been passed upon only by a jury in a court of law?" CLARK, op. cit. supra note 2, at 92.
5. Where the defendant interposes a legal counterclaim to an action which is primarily one in equity.

**WHERE PLAINTIFF COMBINES INDEPENDENT LEGAL AND EQUITABLE CLAIMS ARISING FROM THE SAME TRANSACTION**

In cases of the first type listed, the rule today in the federal courts is that the plaintiff as well as the defendant may as of right affirmatively claim a jury trial of the legal issues presented, and this even though it requires that the legal issues be tried first and that such will be determinative of the whole suit. In the case of *Bruckman v. Hollzer,* the defendant in a suit in a lower court petitioned for a writ of alternative mandamus to compel the respondent judge to strike the demand for a jury trial and to hear and determine, as a suit in equity, the claim of the plaintiffs below, wherein the plaintiffs in separate counts, all grounded on an alleged copyright infringement, asked for money damages, an accounting, and an injunction. The court dismissed the petition, ruling that the Federal Rules give a party having a claim triable by jury at common law the power to preserve such right even when such claim is joined with equitable claims.

Illustrative of the results produced where overemphasis is placed on the form of pleadings rather than on the issues involved is the case of *Di Menna v. Cooper & Evans Co.* In that case the plaintiff sought to foreclose a mechanic's lien and also to recover a personal judgment in the event the lien failed. Speaking of the plaintiff's right to demand a jury trial, Mr. Justice Cardozo said:

"The fact that the plaintiff has combined with a prayer for equitable relief an alternative claim for a money judgment cannot deprive the defendant of the jury trial assured to him by the Constitution. But a different question is presented where it is the plaintiff who seeks a jury. The form of action in such a case is that of his own selection. The law does not require him to demand a personal judgment in the event of the failure of his lien. The rule is fundamental that where a plaintiff seeks legal and equitable relief in respect of the same wrong, his right to trial by jury is lost. If any right remains, it is the right of the defendant."

The better and more consistent rule would appear to be that set down in *Bruckman v. Hollzer* because it guarantees the right to trial by jury of all issues of fact triable by jury at common law. It is not based

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*152 F.2d 730 (C. C. A. 9th 1946).*

*220 N. Y. 391, 115 N. E. 993 (1917).*

*Id. at 395, 396, 115 N. E. at 994.*
on the "form of action" as presented by the pleadings, but rather on
the issues of fact presented by the pleadings. If such issues were prop-
erly tried by a jury at common law, then a jury trial may be claimed by
either the plaintiff or the defendant. 8

WHERE PLAINTIFF'S ACTION IS PRIMARILY EQUITABLE IN NATURE
BUT LEGAL RELIEF IS SOUGHT INCIDENTAL THERETO

The cases of Bellavance v. Plastic-Craft Novelty Co., 9 Fraser v.
Geist, 10 Williams v. Collier, 11 and Fitzpatrick v. Sun Life Assurance
Company of Canada, 12 will serve to illustrate the problem presented
where the nature of the cause of action is primarily equitable and the
legal relief sought is incidental to the equitable relief prayed for.

The Bellavance case was an action for the alleged infringement by
the defendant company of patents belonging to the plaintiff. The suit
was brought under Rev. Stat. § 4921 (1875), 35 U. S. C. § 70 (1940),
which conferred on the court the power to grant an injunction and
award damages for injuries already sustained. The plaintiff sought both
the injunction and damages and demanded a jury trial on the issue of
damages. In granting the defendant's motion to strike the action from
the jury calendar and transfer it to the court trial calendar, the court
said:

"It has long been settled law that where suit is brought under the statute
providing equitable relief, the fact that the plaintiff also seeks damages for past
infringement will not entitle the plaintiff to a jury trial on the issue of damages.
Barton v. Barbour, 104 U. S. 126, 133. . . .

"The distinction between Law and Equity, abolished by the new rules, is a
distinction in procedure and not a distinction between remedies. The distinction

8See Bercovici v. Chaplin, 3 F. R. D. 409 (S. D. N. Y. 1943). Plaintiff sued in three
counts alleging breach of contract, for compensation as a co-author, and literary piracy.
In ruling on defendant's motion to strike plaintiff's demand for a jury trial, the court
held that the first count stated a cause cognizable in law, and thus the plaintiff was
entitled to a jury trial of such cause, even though the other two counts stated causes
cognizable only in equity. In United States v. Connolly, 3 F. R. D. 417 (D. Mont. 1943),
an action brought by the government to restrain defendants from trespassing on govern-
ment property, and for damages, the court granted both without a jury trial. In dis-
missing the defendant's appeal the court admitted the existence of such right in so far as
the question of damages was concerned, but held that since defendant had failed to claim
it on trial the right was lost by waiver as provided under Rule 38 (d).

121 F. R. D. 713 (D. N. J. 1941).
still remains between jury action and non-jury actions; what was, before the adoption of the new rules, an action at law is a jury action, and what was a suit in equity falls into the category of a non-jury action."

The controlling factor in cases where legal and equitable issues are joined is the essential nature of the action. The question to be answered in all such cases is simply, "Is the basic issue one formerly cognizable in law, or was it properly before an equity court?" If it is one formerly cognizable in law, the right to jury trial remains, but if it was formerly triable in a court of equity, no such right exists.

In the Fraser case the problem and the question to be answered is well stated by the court:

"Where the complaint states one cause of action giving rise to alternative remedies in law or in equity, and where the complaint similarly prays for relief in the alternative, what is the rule as respects the right of trial by jury?"

"The decision as to whether or not the plaintiff is entitled to a jury trial as 'of right' must rest upon a prior determination as to whether the action, in its essence, is one at law or in equity. If it is in law, the plaintiff is entitled to a jury trial; otherwise he is not."

The Williams case was an action brought by a trustee in bankruptcy against Bertha Collier and others, based on the alleged fraudulent acquisition and disposition of certain assets of the bankrupt estate. The plaintiff had demanded a jury trial and in granting the defendant's motion to strike this demand the court held that although a claim for money damages only would give the plaintiff a right to trial by jury, an additional claim for equitable relief precludes the plaintiff from such right. At first blush this appears to be in conflict with Bruckman v. Hollzer, but a further analysis of the opinion in the Williams case dissolves the apparent conflict. The court says that such actions, as where a trustee seeks equitable relief in addition to money damages, were generally held to be equitable in nature and that equity can award the damages prayed for on the old equity principle that once equity takes jurisdiction it will do complete justice. Speaking of the joinder of the legal and equitable remedies, the court said:

"These additional prayers for relief strengthen the conclusion already reached that, in its essence, the complaint states a case formerly cognizable in equity.

and the money judgment demanded can be viewed merely as incidental to the equitable relief sought."

Perhaps *Fitzpatrick v. Sun Life Assurance Company of Canada* best illustrates the rule that where legal and equitable causes are joined and where both legal and equitable relief are prayed for but the action is primarily equitable in nature and the legal nature of the action incidental thereto, the right to trial by jury does not exist. That was an action brought by the executors of the will of one Ida Moody Palmer, deceased, on a life insurance policy. In the first count the plaintiffs declared on a cancelled contract of life insurance, and sought recovery thereon. The third count prayed for a rescission of the new contract which had replaced the contract declared on in the first count, and for a recovery on the old contract as reinstated. As was held by the court, it is apparent that any relief granted under the first count is dependent upon the disposition of the third count.

"If the cause of action is legal in its nature and formerly remediable in a court of law, the right of trial by jury cannot be denied; if, however, the cause of action is equitable in its nature and formerly remediable in a court of equity, trial by jury should not be allowed. The common law distinction between the province of the jury and that of the court remains intact. . . . The issues of the controversy are essentially equitable and are fully stated under the third count. The legal issues are merely incidental and are so interwoven with the equitable issues as to require a determination of both on the trail of this count."


38 Speaking of cases where the action is primarily equitable in nature, that is, the issues devolved from the pleadings present issues historically cognizable in equity, Professor Clark says: "So an action to reform a contract and to recover on it as reformed might be considered an action for money on a contract and triable to a jury, but in the light of history it is held to be triable to the court, as was the old equitable action of reformation. The same result is reached in actions for money damages, involving also accounting, cancellation, foreclosure, and so on, and in actions for the possession of specific realty where not limited to the issue triable in the old action of ejectment." *Clark, op. cit. supra* note 2, at 99, 100.

31 F. R. D. 713, 716, 717 (D. N. J. 1941). In his opinion in the *Bruckman* case, Justice Denman distinguished that case from *Fitzpatrick v. Sun Life Assurance Company of Canada* and *Pallant v. Sinatra*, 59 F. Supp. 684 (1945), on the ground that in both the *Fitzpatrick* and *Pallant* cases recovery on the legal claim could be had only if recovery was allowed on the equitable claims.
WHERE PLAINTIFF'S ACTION IS PRIMARILY LEGAL IN NATURE WITH AN INCIDENTAL CLAIM FOR EQUITABLE RELIEF

The next class of cases worthy of consideration are those wherein the basic issue of the action is legal in nature and the primary relief sought is legal but where there are equitable issues incidental thereto, and in addition equitable relief is prayed for. The rule governing such cases is well applied in *United States Process Corporation v. Fort Pitt Brewing Company.* This case involved an action for breach of a royalty contract where, in addition to damages, the plaintiff sought an injunction restraining the defendant from denying to the plaintiff's agents access to the defendant's plant. It was held by the court that the plaintiff could not deprive the defendant of his right to trial by jury of the legal question of breach of the contract and damages merely by adding a claim for equitable relief, when in fact the plaintiff's cause of action was primarily legal in nature.

In *Ransom v. Staso Milling Company,* which was an action brought for damages caused by blasting operations and for an injunction restraining future blasting, the court, in denying the defendant's motion to strike the plaintiff's demand for a jury trial said:

"Where the plaintiff seeks to recover on a purely equitable theory and joins an incidental claim for damages it is well settled that the case is in equity and the Court will take jurisdiction of the incidental law action. But where the gist of the action is for money damages, which at common law would fall within a well recognized form of action, such as an action of tort for damage to property, or person, the case is for the jury, if demand for jury is made, even though there has been added an incidental prayer for equitable relief."

WHERE DEFENDANT INTERPOSES AN EQUITABLE DEFENSE TO AN ACTION AT LAW

In cases where the defendant interposes by his answer defenses which are equitable in nature, the clash is most pronounced. Take, for instance, a case where the defendant pleads fraud in the inducement of a contract sued upon. That defense was not cognizable at law. The question is presented as to whether the defendant may plead this de-

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23 Id. at 131. Where the plaintiff has joined legal and equitable causes and prayers for relief, a waiver or abandonment of the equitable issues does not deprive the plaintiff of his right to jury trial of the legal issues. *Frazier v. N. E. Newspaper Pub. Co.,* 1 F. R. D. 734 (D. Mass. 1941); *see Comfy Mfg. Co. v. Dyer-Gruen-Jackson, Inc.,* 2 F. R. D. 293 (E. D. Pa. 1942).
fense and have it tried by the court, or is it to be considered as mixed with the legal issues presented by the plaintiff and triable by a jury as a legal defense. The vast majority of state courts hold that such defenses, since they interpose equitable issues cognizable only in a court of equity prior to the adoption of the codes, are triable by the court.\textsuperscript{23} The rule in the federal courts is expressed in \textit{Liberty Oil Co. v. Condon National Bank},\textsuperscript{24} where the Supreme Court said:

"Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then if an issue at law remains, it is triable by jury. . . . The equitable defense makes the issue equitable and it is to be tried to the Judge as a chancellor."\textsuperscript{25}

\textbf{WHERE DEFENDANT INTERPOSES A LEGAL COUNTERCLAIM TO AN EQUITABLE CLAIM}

In that class of cases wherein the defendant pleads a legal counterclaim to an equitable action by the plaintiff, the defendant retains the right to trial by jury of the counterclaim.\textsuperscript{26}

\textbf{SUMMARY}

Throughout the foregoing analysis of the rules which govern cases of the type under consideration, there has been interwoven one phrase which is the key to the whole situation—"basic nature of the issue". In cases where legal and equitable issues are joined but are plainly separate, distinct and independent one from the other, the right to jury trial of the legal issues presented exists and may be claimed by either party as provided by Rule 38.\textsuperscript{27} Where equitable defenses are interposed to a legal action, the rule is that the equitable defenses are triable by the court.\textsuperscript{28} In those cases where legal counterclaims are interposed

\textsuperscript{23}\textsuperscript{23}... and whenever an issue formerly equitable is injected into the case, it is held that such issue is to be tried to the court." \textit{Clark, op. cit. supra} note 2, at 103. See cases cited \textit{id.} at 103.

\textsuperscript{24}\textsuperscript{24}U. S. 235 (1922).

\textsuperscript{25}\textit{Id.} at 242.

\textsuperscript{26}\textit{U. S. Fidelity and Guaranty Co. v. Janich, 3 F. R. D. 16 (S. D. Cal. 1943); Hartford-Empire Co. v. Glenshaw Glass Co., 3 F. R. D. 50 (W. D. Pa. 1943).}

\textsuperscript{27}Bruckman v. Hollzer, 152 F.2d 730 (C. C. A. 9th 1946); United States v. Connolly, 3 F. R. D. 417 (D. Mont. 1943); Bercovici v. Chaplin, 3 F. R. D. 409 (S. D. N. Y. 1943).

\textsuperscript{28}See note 23, \textit{supra}. Some attempt has been made to distinguish between cases where the equitable issue has been interposed merely as a defense to the action at law, and those cases wherein it has been injected as a counter-claim for affirmative relief. This minority view is sustained by courts in Minnesota, Missouri, and New York. \textit{See Hauser
to an equitable action, the defendant retains his right to trial by jury of the counterclaim. The cases wherein the "basic nature of the issue" is the determining factor are those in which legal and equitable issues are joined and both legal and equitable remedies are sought, but either the legal issues are incidental to the equitable ones, or the equitable ones are incidental to the legal issues. Although not decided under the Federal Rules, the case of *Norback v. Board of Directors of Church Extension Society* very succinctly states the rule which pertains even in the federal courts:

"If the issues are legal or the major issue legal, either party is entitled upon proper demand to a jury trial; but, if the issues are equitable or the major issues to be resolved by an application of equity, the legal issues being merely subsidiary, the action should be regarded as equitable and the rules of equity applied."31

The problem of jury trials under the Federal Rules in cases where legal and equitable issues are joined is readily capable of solution. If a party claims a jury trial, the court must then apply the historical test to determine whether the right exists or not. The problem arises only where the case falls within one of the five general types discussed above, but application of the rules enunciated in the discussion of the particular type will dispose of the question with no great difficulty.

Speaking of the distinction between law and equity as it affects the right to trial by jury under the Federal Rules, Mr. Justice Arnold said:

"Only in cases where a timely demand for a jury has been made and refused does the distinction between law and equity have any procedural relevance. In all other cases the court must give the relief to which the parties are entitled on the facts, applying the rules of both law and equity as a single body of principles and precedents.

v. Murray, 256 Mo. 58, 165 S. W. 376 (1913); Susquehanna S. S. Co. v. A. O. Andersen & Co., 239 N. Y. 285, 146 N. E. 381 (1925). Courts have had difficulty in determining just when the defense interposed is equitable and when it is not, and in applying the rule set forth in the text this difficulty must be borne in mind. However, this note deals not with the problem of what constitute equitable defenses, but rather with the effect of such defenses upon the right to trial by jury. For a good treatment of what constitutes equitable defenses, see *Walsh, Equity* 99 et seq. (1930).


*84 Utah 506, 37 P.2d 339 (1934).

*Id. at 519, 37 P.2d at 345.*
"No doubt it is convenient to refer to some of these principles and precedents as 'law' and to others as 'equity' because they have different historical origins. Further than that, the idea that equitable principles supplement and modify the strict logic of the 'law' is part of our legal philosophy and, therefore, useful in presenting arguments and distinguishing cases. But the distinction between law and equity has no procedural significance whatever except where the right to a jury trial has been affirmatively denied, after a timely demand, in an action which historically would be considered as arising at 'law'."32

It is not denied that there is much to be said for the argument that the inherent and fundamental difference between actions at law and suits in equity cannot be ignored,33 yet it must be remembered that equity arose, so far as Anglo-Saxon jurisprudence is concerned, only to correct those deficiencies of the common law which existed because of man's own inability to dispense justice in all cases under the rigid universal rules of the common law. Basically, the distinctions are matters of form and historical accidents, and, as to substantive rights, equity may be regarded as a great body of extensions and corrective exceptions to the common law. When, as under codes such as the Federal Rules, the basic distinctions and inherent defects in form may be overcome and reconciled, there appears to be no further reason for treating law and equity as strange bedfellows. As to the great impediment—trial by jury—a partial solution is accomplished by statutes providing for the automatic waiver of the right unless affirmatively claimed, and only when such right is so claimed need any particular attention be paid to the procedural differences between law and equity.

EDWARD T. HOGAN, JR.

^Jackson v. Strong, 222 N. Y. 149, 118 N. E. 512 (1917).
JOHN BUYER wishes to purchase certain property from Thomas Seller. Having only enough money to make a down payment, Buyer approaches officials of a Building and Loan Association for a loan to be secured by a mortgage on the property he wishes to purchase from Seller. They agree on a loan and, at the same time the property is deeded by Seller to Buyer, Buyer executes a mortgage on the property to the Building and Loan Association to secure the money advanced by them for its purchase. At the time Buyer purchased the property, a properly docketed judgment was outstanding against him. Does this judgment lien take priority over the mortgage?

It is settled law, that if the vendee had given the vendor a mortgage to secure that part of the purchase price remaining unpaid after the conveyance, the mortgage would be prior in right to the recorded judgment lien.1 In the District of Columbia, it is so provided specifically by statute.2

Such a transaction is commonly known as a purchase money mortgage.3 It is predicated on the theory, that since execution of the deed and mortgage are simultaneous, title passes through the hands of the purchaser as though he were a mere conduit, reverting immediately to the vendor so that liens arising through acts of the purchaser cannot attach to his transitory seisin.4 Obviously, such a theory, though technically satisfactory in a title theory state where title passes at least theoretically to the mortgagee, offers apparent difficulties in the majority of states holding that a mortgage creates only a lien and the mortgagee gets no title.5 Tiffany suggests that the priority of the mortgage has been retained in the lien theory states because it would be inequitable to permit a vendor who has parted with his property, believing he has a first lien for the unpaid purchase money, to be subordinated to other liens against the pro tanto purchaser.6

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3 Emery v. Ward, 68 Colo. 373, 191 Pac. 99 (1920); 1 Jones, Mortgages § 584 (8th ed. 1928); 2 Pomeroy, Equity Jurisprudence § 725 (5th ed. 1941).
5 Ladd and Tilton Bank v. Mitchell, 93 Ore. 668, 184 Pac. 282 (1919); 1 Jones, Mortgages § 582 (8th ed. 1928).
7 Tiffany, Real Property § 1462 (3d ed. 1939).
8 Ibid.
Will the reasoning that supports the priority of a vendor's lien apply when a third party, such as the Building and Loan Association, advances the money with which to pay the purchase price? Jones, in holding that the purchase money mortgage may apply in the case of third parties as well as vendors, says that, when all the acts of the parties appear to be parts of one transaction in its legal effect it is the same as though the purchaser had executed a mortgage to the vendor for the purchase money and he had assigned it to the party advancing the money. This theory is supported only by implication in the cases. Certainly the great majority of courts have extended the benefits of the purchase money mortgage beyond the vendor in whose interest it was originally formulated, and made it applicable to third persons who have furnished the whole or part of the money used in the purchase of land. The same result has been reached where a deed of trust was involved, since a deed of trust is considered in this instance at least the same as a common law mortgage.

The courts of only two states, in construing ambiguous statutes, have declared that only as between the vendor and the purchaser can a purchase money mortgage exist. The rationale is that as between the purchaser and a third party, money advanced is simply borrowed money and third parties are not privy to the transaction of purchase and sale. Other courts have said that the same equitable considerations that require protection of the vendor, require protection of third parties.

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7 Jones, Mortgages § 586 (8th ed. 1928).
8 Western Tie and Timber Co. v. Campbell, 113 Ark. 570, 169 S. W. 253 (1914); Protestant Episcopal Church v. Lowe Co., 131 Ga. 666, 63 S. E. 136 (1908); Butler v. Thornburg, 131 Ind. 237, 40 N. E. 514 (1891); Vigars v. Hewins, 184 Iowa 683, 169 N. W. 119 (1918); Price v. Davis, 15 Ky. L. 120, 22 S. W. 316 (1893); Clark v. Munroe, 14 Mass. 351 (1817); Jacoby v. Crowe, 36 Minn. 93, 30 N. W. 441 (1886); Pearl v. Hervey, 70 Mo. 160 (1879); Adams v. Hill, 29 N. H. 202 (1854); New Jersey Building, Loan and Investment Co. v. Bachelor, 54 N. J. Eq. 600, 55 Atl. 745 (1896); Syracuse Savings and Loan Assn. v. Hass, 134 Misc. 82, 234 N. Y. S. 514 (1929); Moring v. Dickerson, 85 N. C. 466 (1881); Ladd and Tilton Bank v. Mitchell, 93 Ore. 668, 184 Pac. 282 (1919); Cowardin v. Anderson, 78 Va. 88 (1883); Carey v. Boyle, 53 Wisc. 574, 11 N. W. 47 (1881).
9 Hurst v. Dulaney, 87 Va. 444, 12 S. E. 800 (1891).
11 Heusler v. Nickum, 38 Md. 270 (1873); Stansell v. Roberts, 13 Ohio 148 (1844). But see, Mutual Aid Building and Loan Co. v. Gashe, 56 Ohio St. 273, 46 N. E. 985 (1897); Ward v. Carey, 39 Ohio St. 361 (1883); 1 Jones, Mortgages § 583 (8th ed. 1928).
12 Pomeroy, Equity Jurisprudence § 725 (5th ed. 1941); Hopley v. Cutler, 34 Atl. 746 (N. J. Eq. 1896).
The Maryland Court in *Heuisler v. Nickum* in deciding whether the Maryland statute allowed the purchase money mortgage to third parties said that the language of the statute was susceptible of two constructions, one construction embracing every one to whom the vendee may choose to mortgage his interest in the land but

"Such a construction is decidedly against the tenor of our decisions. . . ."

What, then, might be expected of those jurisdictions such as the District of Columbia where priority of the purchase money mortgage is a statutory matter but where the statute does not designate the specific parties to whom the purchase money mortgage may apply.

We have seen that the majority of American jurisdictions extend the purchase money mortgage to embrace third parties. The principle is considered by the textwriters and many of our judges to be well settled in our equity jurisprudence. There are two courts that hold to the contrary in construing their state statutes, but these courts, in interpreting the statutes, lean heavily on prior adjudicated cases within their own jurisdictions. It would seem therefore that where there has been no prior pronouncement in the jurisdiction on the subject, as in the District of Columbia, that the courts would be inclined to follow the weight of authority and hold that third parties are contemplated in purchase money mortgage statutes.

ARTHUR W. MOORE

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RECENT DECISIONS

CORPORATIONS—Shares in a Newly Formed Corporation Cannot Be Considered a “Reduction” of the Shares in an Old Corporation Merged with the New. The Forfeiture of Accumulated Dividends by Corporate Merger.

On June 29, 1943 plaintiffs owned 320 shares of seven per cent preferred stock in the Vadsco Sales Corporation, a Delaware Corporation. On that day Vadsco merged with its wholly owned subsidiary, Delletrez, Inc., also a Delaware Corporation. Vadsco had paid no dividends since 1930 and the unpaid accumulated dividends on the preferred stock totaled $1,839,156.67. Each share of Vasco preferred had a par value of $100. Under the terms of the merger for each share of preferred in Vadsco an exchange was made of one share of preferred and five shares of common in the new corporation. Common stock was exchanged at a rate of one share for one-tenth of a share. The new preferred had no par value, but had a stated value of fifty. The accumulated dividends on the old preferred, $88.67 per share, were wiped out, and the new preferred was assigned cumulative dividends of $2.50 per year. (Emphasis added.) Plaintiffs, seeking money damages plus interest to the amount of $46,518.40, cited, in attempt to establish a creditor status toward the new corporation, Article IV (g) of the Vadsco charter which provided that in the event of any reduction of the preferred stock either as to number or as to par value, the holders of the preferred be entitled to “not less than one hundred and ten per cent (110%) of the amount of reduction.” Held, the court was bound to follow Delaware law and the merger did not constitute a “reduction” as that term was used in Vadsco's charter nor could plaintiff be considered a creditor. Langfelder et al. v. Universal Laboratories Inc., 163 F.2d 804 (C. C. A. 3d 1947).

Upon receipt of notice of merger, plaintiff, by Rev. Code of Del. § 2093 (1935), as a dissenting stockholder, had the election of accepting the merger and losing his accumulations or receiving the value of his stock as of that day. In the event the value was disputed an appraiser would be appointed by each party; these in turn would appoint a third, and the three would ascertain the value. But their conclusion could result in greater loss to the plaintiff than would occur in acceptance of the merger, depending upon the appraisers' investigation of not only the market value but also on the net asset value, prospects of the corporation, its earning capacity and other economic factors. Cf. The Chicago Corp. v. Munds, 20 Del. Ch. 142, 172 Atl. 452 (1934); see also 45 Harv. L. Rev. 233 (1931); 15 Corn. L. Q. 420 (1930); 32 Col. L. Rev. 60 (1932). An indication of the complete freedom of appraisal is well illustrated in Root v York Corp., 56 F. Supp. 288 (1944) where the majority and minority report arrived at values differing by $107.50 per share! And in that same case it was pointed out the entire cost of appraisement, a by-no-
means minute expense, could be taxed to the dissenting shareholder. Thus the avenue open to plaintiff in the instant case, in lieu of accepting the merger, was an unpredictable evaluation by appraisers which could not be set aside by the courts. Root v. York Corp., supra.

With intimated reluctance, the circuit court wrote, “We construe the law of Delaware as we think it is, not as we think it should be.” Although recognizing that if the merger were fraudulent, unfair, or inequitable a different decision would be proper, the court thought the doctrine of Erie R.R. v. Tompkins, 304 U. S. 64 (1938) required it to follow the decision of the state court in Porges v. Vadsco Sales Corporation, 32 A.2d 148 (Del. 1943), a decision on the same merger wherein a complaint of constructive fraud was dismissed. The court stated: “It must be assumed of course that the conversion is not unfair, inequitable or fraudulent since that was decided expressly by the Porges decision. This latter decision was itself based on the Havender and Hottenstein cases, infra.

In finding for the defendant the court reviewed the recent Delaware decisions in point. In Keller v. Wilson & Co., Inc., 21 Del. Ch. 391, 190 Atl. 115 (1936), the court recognized the contractual right of a shareholder to accumulated dividends. Coombes v. Getz, 285 U. S. 434 (1932); Vanden Bosch v. Michigan Trust Co., 35 F.2d 643 (C. C. A. 6th 1929); Yoakam v. Providence Biltmore Hotel Co., 34 F.2d 533 (D. C. R. I. 1929); 7 FLETCHER, ENCYCL. CORP. 3680, 3681 (rev. ed. 1931). The Keller opinion was held to be mere philosophy in Federal United Corp. v. Havender, 24 Del. Ch. 318, 11 A.2d 331 (1940) and that all stockholders were on notice that merger with a reconciliation of cumulated dividends was possible under the statute, Rev. Code of Del. § 2091 (1935), which is written into all corporate charters. The element of laches prevented appraisal in that case and creditors rights were denied the plaintiff. This doctrine was stretched to its extreme limit in Hottenstein v. York Ice Machinery Corp., 136 F.2d 944 (C. C. A. 3d 1943). There a subsidiary was formed for the sole purpose of merging with the parent. By the merger, back dividends on 56,371 preferred shares amounting to $88.25 per share were obliterated and each share of preferred was given a trade value of 15 shares of common. The court admitted that, in following the Havender case, it followed a doctrine that “astounded the corporate world,” but in the absence of a showing of bad faith it had no choice. With the exception of the abrogated Keller case the plaintiff in each instance has been denied his right to the back dividends accumulated.

The court in the instant case in refusing to recognize the merger as a reduction held “... the principle enunciated by Mr. Chief Justice Layton in the Havender case would apply...” and that a transfer of a $100 par value share for one of a stated value of $50 with an obliteration of $88.67 of back dividends was not a “reduction” of old shares. Thus, the plaintiff was denied the status of a creditor toward the corporation.
Is it reasonable to say that a stockholder when he purchases his share realizes that the company may accumulate unpaid dividends for a period of time and then simply wipe them out through the technique of merger? If such is the case, preference shares will soon fade into oblivion. And yet such are the results of the decisions mentioned above. In the Porges case the state court noted that restitution would lie if bad faith or reckless indifference were shown, but it found to the contrary as a matter of law, and the federal court in the principal case had to follow along.

It will be interesting to see if the Supreme Court will accept this ruling or whether they will give recognition to the inequities involved. It is inconceivable that Justice Brandeis intended the opinion in the Erie R.R. case to give forced condonation to such nefarious manipulations as this merger. Unless remanded, the case will make the advantages of preference shares highly illusory and discourage investments in them, to say nothing of the dangerous implications arising from sanctioned destruction of vested rights.

WILLIAM F. RAGAN

CONSTITUTIONAL LAW—A Confession Obtained from a Fifteen Year Old Murder Suspect After Four and One-Half Hours of Questioning Followed by His Being Held Incommunicado for Three Days Will Be Deemed to Have Been Obtained by Means Violative of the Fourteenth Amendment.

One John Harvey Haley, a colored boy of 15 years and a high-school senior, was arrested at midnight on Friday, October 19, 1945, as a suspected participant in the fatal shooting of a Canton, Ohio, storekeeper five days before. He was booked at police headquarters at 12:30 a.m., and from that time until approximately 5:00 p.m. he was questioned in relays. At no time during the inquisition was any friend or counsel of the boy present. Around 5:00 a.m.—after having been shown confessions alleged to be those of his accomplices—Haley confessed. He was not advised during the question period of his right to counsel nor of his right to remain silent. However, a preliminary statement in the typed confession did inform him of the latter right. The preliminary statement was read to Haley by the sergeant of detectives, and Haley himself read the entire confession prior to signing. Subsequent to the signing of the confession, Haley was held incommunicado until Tuesday, October 23, 1945.

An attorney retained by Haley's mother was not permitted to see him nor was his mother allowed to visit him until October 25, 1945. At the trial, Haley's testimony was that he had been mistreated physically in such a manner that he was coerced into making the confession. The testimony of Haley's mother was that the clothes he wore when arrested were torn and bloodstained when she exchanged them for clean clothes. On the other hand, the police who were present at the time of questioning and the newspaper photographer who took Haley's picture immediately after the signing of the confession directly
contradicted any evidence as to the involuntary nature of the confession. It should be noted that there was sufficient evidence upon which to base a verdict of guilty whether or not the confession was admitted. The jury found the accused guilty as charged but recommended mercy. After an appeal to the Supreme Court of Ohio was dismissed, the United States Supreme Court granted certiorari. Held: the events subsequent to the signing of the confession, when taken in connection with the length of the questioning period and the comparative youth of the accused, led to such strong inferences as to the nature of the circumstances under which the confession had been obtained that the entire confession must be held to have been acquired by means violative of the due process requirements of the Fourteenth Amendment. Haley v. State, 68 Sup. Ct. 302 (1948).

Two basic issues run through both the majority (five to four) and minority opinions: (1) measured by the time factor alone, when does the routine of police questioning of a suspect become a third-degree inquisition, and (2) when are happenings subsequent to the obtaining of a confession relevant to the circumstances under which the confession was acquired?

The courts have shown an increasing propensity to narrow the limits of police discretion as to means and methods of extracting confessions. Exemplary of the conservative attitude of the courts of a half-century ago is the decision in People v. Kurtz, 42 Hun. 335 (N. Y. 1886), wherein it was held that the detention of the accused in the district attorney’s office with an excited crowd in the city coupled with the failure of authorities to inform the accused of his right to counsel plus the psychological exertion of these same authorities to induce a confession did not make the confession “one made under the influence of fear produced by threats.” But even the more conservative courts drew a line when there was added to the consideration of the length of the questioning period other more obvious evidence of coercion. In State v. Ellis, 294 Mo. 269, 242 S. W. 952 (1922), it was held that questioning the accused for 18 hours, refusing him food, not permitting him to sleep, and making him touch the corpse, in addition to evidence of assault upon him by the police, rendered the confession so obtained inadmissible. The judicial trend was to frown upon this practice of persistent police interrogation but not to go so far as to invalidate the confession on that ground alone. State v. Thomas, 250 Mo. 189, 157 S. W. 330 (1913). See also Bram v. United States, 168 U. S. 532 (1887). From the beginning, the age, size, schooling, experience, and mental capacity of the accused were of primary consideration in legal evaluation of the circumstances under which the confession was made. State v. Nave, 283 Mo. 35, 22 S. W. 744 (1920). Gradually the duration of the questioning period has become of greater importance. Less aggravated circumstances are required in addition to protracted inquisition in order to discredit the confession. The permissible duration of questioning is apparently being shortened. Rounds v. State, 171 Tenn. 511, 106 S. W.2d 212 (1937); Ziang Sun Wan v. United
States, 266 U. S. 1 (1924). These cases involved interrogations of four and one-half days and one week respectively, and in both, lack of sleep and similar factors were considered. The length of the grilling in Purpura v. United States, 262 Fed. 473 (C. C. A. 4th 1919), was only 24 hours, exclusive of the time the accused slept, but was sufficient to cause the court to hold it error to admit in evidence a confession so obtained in consideration of the fact that the accused was not allowed to get in touch with friends or counsel. There appears in People v. Quan Gim, 23 Cal. App. 507, 138 Pac. 918 (1913), the following statement by the court: "While no physical force was used, and neither threats nor promises made, there can be no doubt at all but that the repeated questioning of the officers, like the constant dropping of water upon a rock, finally, wore through his (accused's) resolution to remain silent." In the more recent case of Chambers v. Florida, 309 U. S. 227 (1940), the suspects had been spirited away to the county jail to escape an enraged mob and at the jail were subjected to continued questioning for five days prior to confessing. The Court, holding the confessions to be involuntary, said: "The very circumstances surrounding their confinement and their questioning without any formal charges having been brought, were such as to fill the petitioners with terror and frightful misgivings."

The second element in appraising the validity of the decision in the Haley case is the importance of facts subsequent to the confession. The majority of state courts have held that mere delay in arraignment does not vitiate a confession per se even when the delay precedes the confession. People v. Vinci, 295 Ill. 419, 129 N. E. 193 (1920); People v. Alex, 265 N. Y. 192, 192 N. E. 289 (1934); Cates v. State, 118 Tex. Crim. Rep. 35, 37 S. W.2d 1031 (1930). And although the federal courts hold counter to those of the states, McNabb v. United States, 318 U. S. 332 (1943), it must be remembered that the McNabb decision was based on violation of a federal rule of procedure and not upon constitutional grounds. In United States v. Mitchell, 322 U. S. 65 (1944), it was held that statements made eight days prior to arraignment and while in police custody were admissible in evidence since the act of illegal detention, happening subsequent to the making of the statements, did not have the retroactive effect of altering the circumstances under which the disclosures were made. The general rule is that what happens after a confession is extracted is immaterial as bearing upon the question of volition. Brindisi v. People, 76 Colo. 244, 230 P. 797 (1924). The qualifications of this rule have generally been confined to those instances in which the post-confessional happening directly evidenced the circumstances under which the confession was rendered. State v. Nagle, 326 Mo. 661, 32 S. W.2d 596 (1930); People v. Barbato, 254 N. Y. 170, 172 N. E. 458 (1930). It has been held proper to exclude, as not having sufficient probative force in respect to the question of the voluntary nature of the accused's confession, evidence of violence alleged to have been administered to a fellow prisoner after the accused had confessed.
State v. Genese, 102 N. J. L. 134, 130 Atl. 642 (1925). Nor does being held incommunicado after the confession was made have a bearing upon the question of volition. Brindisi v. People, supra. However, in Garrett v. State, 52 Tex. Crim. Rep. 255, 106 S. W. 389 (1907), it was held error to exclude the testimony of a third party as to an admission of the district attorney that he had exerted force to extort the confession. And the court in People v. Mummiani, 258 N. Y. 394, 180 N. E. 94 (1932), went so far as to say that the fact that defendant did not complain to the prison physician, district attorney, or magistrate that he had been beaten was a circumstance to be considered by the jury, but was not conclusive.

The closeness of the decision and the strength of the dissent shows that the situation in the Haley case was interpreted by the entire Court as being very near the uncertain line which, in the matter of confessions, separates legitimate efforts to solve murders from acts of police brutality which apparently persist despite short-lived bursts of popular indignation.

EDWARD E. OPPENHEIM

CONSTITUTIONAL LAW—Discrimination in Party Primaries Against Qualified Electors on the Basis of Race or Color Is State Action Under the Fifteenth Amendment Even Though the Party Primary Is Not Directly Controlled by State Statute.

Suit brought by George Elmore, negro, qualified elector under the Constitution and laws of the United States and the laws of the State of South Carolina, to test the legality of the action of the defendants, who had general charge and supervision of the conduct of the Democratic primary in Richland County, in not permitting him and other qualified negro electors to vote in the Democratic Party primary held for the purpose of nominating candidates on the Democratic ticket for the House of Representatives of the United States, and for various state offices. Action is based upon the rights of plaintiff under the Constitution of the United States and particularly under Article 1, §§ 2 and 4, and the Fourteenth, Fifteenth and Seventeenth Amendments.

On the ground that the primary is no longer controlled by statute in South Carolina, the defendants allege that the Democratic Party of South Carolina must be treated as a private business or social club with which the State and National Governments have no concern, and as such is free to choose its own membership. Held, "... no election machinery can be upheld if its purpose or effect is to deny to the Negro ... any effective voice in the government of his country or the state or community." Rice v. Elmore, C. C. A. 4th (1947); certiorari denied, 16 L. W. 3312.

The right to vote for members of Congress is not derived from the state's constitution and laws, but has its foundation in the Federal Constitution.
Minor v. Happersett, 21 Wall. 171 (1875). The Supreme Court of the United States has consistently held that it would not sustain any state electoral process which would permit, directly or indirectly, discrimination against qualified electors, based on race or color, in the election of Federal Congressmen. Lane v. Wilson, 307 U. S. 268, 275 (1939); Ex parte Yarbrough, 110 U. S. 651, 662 (1884). To circumvent these decisions, many states have tried to exercise racial discrimination in the party primary. This action has been justified on the ground either that the party primary is not a part of the election or that the political party, being a private organization, is free to choose its own membership and to exclude from its primary those who are not white persons if they so desire. Grovey v. Townsend, 295 U. S. 45 (1934).

The primary method of nomination of candidates was not known when the constitutional provisions involved in the instant case were passed. The Supreme Court of the United States was slow to realize the role played by the primary in our electoral process. Cf. Newberry v. United States, 256 U. S. 232 (1920). As a result it has taken a long line of decisions to cut down discrimination against negroes who are qualified electors and who wish to vote in party primaries.

In Nixon v. Herndon, 273 U. S. 536 (1927), a Texas statute specifically excluding negroes from participating in a Democratic primary election was held to be unconstitutional under the Fourteenth Amendment. Next, an act of the Texas legislature, which authorized the party Executive Committee to determine the qualifications of its members, was held to constitute a delegation of the state's power; thus when the Executive Committee of the Democratic Party acted to discriminate between white and black citizens, their action was held unconstitutional. Nixon v. Condon, 286 U. S. 73 (1932).

Prior to 1941 there was some doubt as to whether or not the primary was part of the "election" subject to federal control under the Constitution of the United States. The Supreme Court in that year held that the authority of Congress given by Article I, §§ 2 and 4, included the authority to regulate primary elections when they are a step in the exercise by the people of their choice of representatives in Congress. United States v. Classic, 313 U. S. 299 (1941). (Emphasis supplied.) Two tests were laid down in the Classic case for determining whether any particular party primary was so identified with the electoral process as to come within the constitutional protection: "[1] Where the state law has made the primary an integral part of the procedure of choice, or [2] where in fact the primary effectively controls the choice." Id. at 318. (Italics and numbers supplied.)

In Smith v. Allwright, 321 U. S. 649 (1944), directly overruling Grovey v. Townsend, 295 U. S. 45 (1935), the Court held that due to the statutory control of the primaries, the State of Texas "endorsed, adopted and enforced" discrimination against negroes, practiced by a party entrusted by Texas law with determination of the qualifications of participants in the primary. Such
action was held to be state action within the meaning of the Fifteenth Amendment.

The opinion in the Allwright case, supra, with its emphasis on state action and statutory control, suggested the next dodge which might be employed by a state legislature intent on exercising racial discrimination. If the Supreme Court objected to discrimination in primaries controlled by statute, it was thought that it couldn't object to such discrimination if the primary was not controlled by statute since the stigma of state action would thereby be obviated. Within eighteen days after the Allwright decision was handed down, the South Carolina legislature succeeded in repealing every statutory provision regulating the primary, with the avowed purpose of completely abdicating its control over the primary in order to nullify the effect of the decision. See 47 Col. L. Rev. 76 (1947). The Democratic Party of South Carolina continued to exercise discrimination against negroes in the party primary now controlled entirely by the private political party. The instant case was brought to test the validity of such discrimination.

But the legislators had overlooked one aspect of the problem. The primary in South Carolina had become, in fact, an integral part of the election machinery. Tracing back the history of the Democratic Party in that state, the trial court found that since 1900, every Governor, and all members of the General Assembly, and also all United States Representatives and United States Senators, elected by the people of South Carolina in the general election, were the nominees of the then existing Democratic Party of the state.

Since the election is a two step process, i.e., the primary and the general election, the Circuit Court of Appeals decided that the state laws relating to the general election placed the primary part of the election under statutory control. Consequently, when party officials participate in the primary, "... they are election officers of the state de facto if not de jure, and as such must observe the limitations of the Constitution." Their actions therefore become state actions under the Fourteenth and Fifteenth Amendments. See, Hodges v. United States, 203 U. S. 1, 14 (1906).

The Allwright case, supra, ended racial discrimination where the primary is under statutory control. The instant case, by forbidding discrimination in those states where the primary is free from direct statutory control, should end legal discrimination against qualified electors in party primaries, based on race or color.

JOHN T. MILLER, JR.
CONSTITUTIONAL LAW—Tracing the Odor of Burning Opium to a Particular Room Does Not Authorize Federal Officers to Enter Under Color of Office to Search and Arrest the Accused.

Federal officers, without a warrant and acting on a tip, entered the Europa Hotel, smelled burning opium in the hallway, whereupon they traced the odor to the door of a room whose occupants were unknown and secured entry under color of their office. The ensuing search turned up incriminating opium and smoking apparatus, the latter being warm, apparently from recent use. The government, seeking to admit their findings in evidence, contended that the search was justified as an incident to the arrest. Held, the facts may have justified issuance of a search warrant by a magistrate, but the entry by the federal agents under color of their office was illegal and the subsequent arrest and search could not be justified by any observations thereafter obtained. Johnson v. United States, 68 Sup. Ct. 367 (1948).

As a result of the abuses which may result from general warrants and writs of assistance, safeguards have been provided for in the Fourth Amendment of the U. S. Constitution and in the constitution or laws of every state of the Union. See Agnello v. United States, 269 U. S. 20 (1925). Although the purpose is to preserve for all the people a guaranty against the invasion of their rights of privacy, the majority of state courts remain opposed to the federal rule as first expressed in Boyd v. United States, 116 U. S. 616 (1886), that evidence illegally secured is inadmissible. It is significant to note that as late as 1920, the federal rule, while not being explicitly rejected, had received the support of only one state. People v. Marxhausen, 204 Mich. 559, 171 N. W. 557 (1919).

The Supreme Court, after one temporary reversion wherein it refused to bar evidence obtained by an unlawful search upon the ground that the issue could not be collaterally raised, Adams v. United States, 192 U. S. 585 (1904), sustained the rule of Boyd v. United States, supra, and then began to build upon it by maintaining that the fruits of an illegal search in a criminal prosecution could not be retained for purposes of evidence where an application for their return had been made before the trial, Weeks v. United States, 232 U. S. 383 (1914); or when such application was made promptly upon the first notice the accused had that the government was in possession of the evidentiary matter. Gouled v. United States, 255 U. S. 298 (1921); Amos v. United States, 255 U. S. 313 (1921).

Search of a dwelling without a warrant is never reasonable except when incidental to a lawful arrest. Agnello v. United States, supra. Where a warrant is required, positive evidence must support the application for it, and if granted in too sweeping terms a search or seizure under it will likewise be termed "unreasonable" and therefore unconstitutional. Hale v. Henkel, 201 U. S. 43 (1906). For example, a warrant calling for the seizure of one thing does not authorize the seizure of something else, Byars v. United States, 273 U. S.
28 (1927); nor can it be used as a pretext for a general search for evidence to convict the accused. United States v. Lefkowitz, 285 U. S. 452 (1932). However, evidence obtained which was a part of the outfit or equipment actually used to commit the offense for which the warrant issued, or was within the accused’s immediate possession and control, may be admitted and is not within the provision of a general or exploratory search. Cf. Marron v. United States, 275 U. S. 192 (1927). Exploratory searches have frequently been resorted to by enforcement officers, but the court has been quick to deny the legality of the evidence produced whether it was obtained by means of an invalid warrant, Go-Bart Importing Co. v. United States, 282 U. S. 344 (1931), a valid one, United States v. Lefkowitz, supra, or in pursuance of a lawful arrest. Agnello v. United States, supra. The present Supreme Court has not departed from the above rule as to the inadmissibility of evidence resulting from exploratory searches and seizures, but rather has limited its application. Cf. Harris v. United States, 331 U. S. 145 (1947); see, 36 Geo. L. J. 256 (1948).

The mobility of an automobile has led to a distinction between a search for contraband in a dwelling house and a similar search in an auto or other vehicle with the result that evidence will be admitted in the latter case where the searching officer had “probable cause” to believe that the vehicle was conveying articles in violation of law. Carroll v. United States, 267 U. S. 132 (1925). The recent case of United States v. Dire, 68 Sup. Ct. 222 (1948), however, has taken care to point out that Carroll v. United States, supra, by no means establishes the doctrine that, without legislation such as the National Prohibition Act, automobiles are subject to search without a warrant incident to the enforcement of all federal statutes.

The Court has recently made use of a distinction long ago recognized in Boyd v. United States, supra, between property to which the government is entitled and property to which it is not. In Davis v. United States, 328 U. S. 582 (1946), the Court, in holding that a search and seizure incidental to an arrest was reasonable, limited the scope of the doctrine of implied coercion which renders a subsequent seizure invalid when government officials without a warrant demand admission to make a search under government authority, Amos v. United States, supra, by explicitly stating that such coercion cannot be implied where the objects of the search are in the nature of quasi-public documents, e.g., gasoline ration coupons, which may be inspected without invading any rights guaranteed by the Fourth Amendment.

In Harris v. United States, supra, where a lawful entry and legal arrest were involved, the subsequent seizure of government property, the possession of which was a crime, was held to be admissible even though such property had no bearing upon the crime for which the warrant issued. The decision was not in conflict with the existing law. See, 36 Geo. L. J. 256 (1948).

The instant case comes at an opportune time. It should serve to quell the
doubts of some of those who feared that because of the *Davis* and *Harris* cases the Fourth Amendment was fast becoming a dead letter. The Supreme Court, in declaring that a warrant remains a priceless thing, and that regardless how indicative of a crime odors may be, *Taylor v. United States*, 286 U. S. 1 (1931), a party will not be stripped of his constitutional guaranties against an unreasonable search, has clearly shown that there has been no departure from the principles of *Boyd v. United States*, *supra*.

ALBERT L. McDERMOTT

DAMAGES—When a Student Fails to Complete a Correspondence School Course, the School Can Recover for Its Actual Losses, Including Profits, to the Extent It Proves Them.

One Rine undertook a correspondence school course in refrigeration and air conditioning, agreeing to pay $172 for the course. The school agreed that in addition to providing the lessons, it would provide his transportation to Chicago, two weeks of intensive shop and laboratory training there, and assistance in procuring employment. When he had completed 39 lessons, Rine dropped the course. He had paid $23 and refused to pay more. On the action by the school to recover the balance owing on the contract price, the trial court awarded nominal damages. The appellate court affirmed and *held* that the measure of damages for such breach is not the contract price but the actual loss sustained by the school, measured by its expenditures, including: (1) reasonable value of its services and goods furnished; (2) expenditures made toward further performance; and (3) amount of profits lost. Its failure to prove losses limits its recovery to nominal damages. *Refrigeration & Air Conditioning Institute v. Rine*, 75 N. E. 2d 473 (Ohio 1946).

The traditional common law measure of damages for breach of contract is the loss actually suffered by the innocent party, who is, "so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed." Per Parke, B., in *Robinson v. Harman*, 1 Ex. 850, 855 (1848). To be recoverable, however, the damages must be such as might naturally be expected to result from the breach, or, if they are of such nature as would not normally follow the breach, the defendant must be shown to have had knowledge of such special facts as would apprise him that such "unexpected" loss would follow. *Hadley v. Baxendale*, 9 Ex. 341, 23 L. J. Ex. 179; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718 (1858). If no actual loss accrues from the breach, the plaintiff is entitled to nominal damages only. *Horton v. Bauer*, 129 N. Y. 148, 29 N. E. 1 (1891).

While there is general agreement that the plaintiff under fact situations similar to those of the instant case should be "made whole", there is fundamental conflict between the different courts in the manner of arriving at the
measure of damages, particularly as to which of the parties should carry the burden of establishing the extent of the damages. *International Correspondence School, Inc. v. Crabtree*, 162 Tenn. 70, 34 S. W. 2d 447 (1931).

It will be readily apparent that a school would have difficulty in proving that the loss of one student affects it materially, the amount it saves on not having to furnish him with instruction being difficult to relate to the already existing overhead of the institution. This difficulty was recognized in *La Salle Extension University v. Thibodeaux*, 155 So. 53, 56 (La. App. 1934) where the defendant contended that since the claim was for damages for breach of contract, the loss should be the actual loss to the plaintiff in an amount to be proved by him. The Court of Appeals of Louisiana dismissed this argument, accepting the plaintiff’s evidence that the “volume of business is so great that the cost of furnishing this instruction to one additional student is negligible. Thus where one student who has contracted for the course of instruction refuses to accept it, the actual loss is represented by the amount which is due by the student.”

Massachusetts avoids the difficulty and awards the school the full contract price on the theory that the promise by the school to furnish instruction and the promise by the student to pay for it are independent covenants. It follows that the non-performance of the school is no bar to a suit by it to recover the full contract price as though it had performed fully. The remedy of the student is by cross-action to prove the amount of the saving to the plaintiff by its non-performance. *International Text-Book Co. v. Martin*, 221 Mass. 1, 108 N. E. 469 (1915). Wisconsin is in accord, holding to the rule stated in 9 Cyc. 642: “In contracts containing executory considerations or mutual promises, that is to say, in which a promise on one side is given in consideration of a promise on the other, the mere promise, and not the performance of it, constitutes the consideration . . . and the obligation of the one promise may be quite independent of the other . . . a full performance [is not] a condition precedent to any right of action unless it is expressly so stipulated or is strongly implied . . .” *Alexander Hamilton Institute v. Hart*, 180 Wis. 90, 192 N. W. 481 (1923).

The court in *Allemon v. Augusta National Bank*, 103 Va. 243, 249, 48 S. E. 897, 899 (1904) observed that, “Courts construe agreements so as to prevent a failure of justice, and hold dependent covenants to be independent when the necessity of the case and the ends of justice require it. . .”

The movement appears, however, to be away from this theory, as demonstrated by the case under discussion. The Supreme Court of Alabama, although one of the first to recognize the English and Massachusetts rule in *Bailey v. White*, 3 Ala. 330 (1842), has pointed out that the present tendency of the courts both generally and in Alabama is against the construction of promises as independent covenants—in the absence of express language to the contrary, and promises which form the consideration for each other are held

The Nebraska courts, without troubling to employ the theory of independent covenants, permit the school to recover the contract price placing the onus on the student to show such facts as will mitigate damages. *International Text-Book Co. v. Martin*, 82 Neb. 403, 117 N. W. 994 (1908). This decision follows the general rule under which the defendant has the burden of establishing matters asserted by him in mitigation of the plaintiff's damages. 17 C. J. 1025; 1 Sedgwick on Damages § 227 (9th ed. 1913); *Jones v. Jones*, 2 Swan 431 (Tenn. 1853). Wisconsin agrees that the burden of proof should be placed on the student. *Alexander Hamilton Institute v. Hart*, supra. "The contract is entire and indivisible and plaintiff ought to recover full contract price, subsequent to maturity, unless the defendant can prove facts 'reasonably and definitely' tending to mitigate the plaintiff's damages." *International Text-Book Co. v. Martin*, 82 Neb. 405, 117 N. W. 994 (1908). "Similar rulings have been held in every jurisdiction where the question has arisen, as far as we have been able to find, excepting in Michigan." *Alexander Hamilton Institute v. Hart*, supra.

The Michigan rule proceeds on the theory that the plaintiff school is entitled to damages in the amount of its actual losses and that, inasmuch as the cost of performing the contract is peculiarly within its own knowledge, it will be precluded from recovering more damages than it actually proves. *International Text-Book Co. v. Schulte*, 151 Mich. 149, 114 N. W. 1031 (1908). The measure of damages due the school is the difference between the contract price and what it would have cost the school to give the course. The school must prove its losses. *Walton School of Commerce v. Stroud*, 248 Mich. 85, 226 N. W. 883 (1929).

In *International Text-Book Co. v. Jones*, 166 Mich. 86, 131 N. W. 98 (1911), the plaintiff school specifically renounced a claim for breach of contract and elected to rest its claim on the theory acceptable in Massachusetts, that the student had promised to pay a certain sum for which he became liable on his promise. The Michigan court denied this argument, declaring: "The contract price is recoverable only upon the theory of performance, never upon the theory of inability to perform. That the contract was not fully performed by plaintiff is obvious. . . ." *Id.* at 88, 131 N. W. at 99.

The basic rule on which the Michigan court relies is expressed in *Mechem, Sales* § 1091, where it is said that the law is well settled that a party to an executory contract may always stop performance on the other side by an explicit direction to that effect, though he thereby subjects himself to the payment of such damages as will compensate the other for the loss he has sustained by reason of having his performance checked at that stage in its progress. See also *Wigent v. Marrs*, 130 Mich. 609, 90 N. W. 423 (1902); *Butler v. Butler*, 77 N. Y. 472 (1879); *Clause v. Bullock Printing Press Co.*, 2
EQUITY—In a Suit to Prevent Continued Exclusion from Enjoyment of the Benefits of a Nonstock, Nonprofit Corporation, Plaintiff Need Not Show That She Has Even a Nominal Property Interest to Protect.

Plaintiff sued for an injunction against the exclusion of herself and other members of the National Woman’s Party from the Party’s headquarters. The National Woman’s Party is a nonstock nonprofit corporation organized under the laws of the District of Columbia. The exclusion was the result of an ouster action performed by certain members of the Party purporting to act as the National Council of the Party. Plaintiff contends she had no notice of the resolution which excluded her from the party’s headquarters. The District Court for the District of Columbia denied the petition on the ground that equity had no jurisdiction to grant such an injunction because it “can interfere only to protect property rights”. On appeal the United States Court of Appeals held: the real question is whether plaintiff has been injured, and a personal injury may by itself give equity jurisdiction. Berrien v. Pollitzer, 165 F.2d 21 (App. D. C. 1947).

Courts here and in England have for some time protected mere personal rights by the use of the injunction. But they have hardly ever supported their decisions by the theory that the relief could be granted where only personal rights are involved. Cf. Baird v. Wells, 44 Ch. D. 661 (1890); Rigby v. Connol, 14 Ch. D. 482 (1880). Usually personal rights are protected under the guise that a property right is involved. See Long, Equitable Jurisdiction to Protect Personal Rights, 33 Yale L. J. 115 (1923); Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640 (1916); Bricklayers P. and S. Union v. Bowen, 183 N. Y. S. 185 (Sup. Ct. 1920); Ryan v. Cudaky, 157 Ill. 108, 41 N. E. 760 (1895). As a general rule it is not too difficult for the court to find a suitable property right upon which to hang the sought for jurisdiction. The real difficulty arises when the defendant is a social club or, as in the instant case, a nonstock society, which excludes a member from the association. Here there is no economic injury in prospect for the plaintiff. The injury is to his personality and is in the nature of hurting his reputation or social standing. It would be to the contrary were it a labor union or a stock organization, for in exclusion from these,
an injury to property may be inferred. The courts have been reluctant to force an injunction upon groups such as the National Woman's Party because (1) to do so would be to interfere with the internal affairs of a voluntary association, or (2), an equally compelling reason, the court could not force people to associate if they themselves have no desire to do so. Since the early concept of equity excluded the protection of mere personal rights, early courts rejected such a concept and insisted upon an injury to property. The decision of the lower court was, then, in strict conformity with early law and with what is still the majority in the United States today; viz. no property right; ergo, no injunction. Allee v. Jane, 68 Misc. 141, 123 N. Y. S. 581 (Sup. Ct. 1910); Mesisco v. Giuliano, 190 Mass. 352, 76 N. E. 907 (1906); Mead v. Stirling, 62 Conn. 586, 27 Atl. 591 (1892). See Chappell v. Steward, 82 Md. 323, 33 Atl. 542 (1896).

However, latter day courts have been more desirous to do equity. The solution to the protection of such rights was determined to exist in the basic equitable doctrine that there was an injury for which there existed no adequate remedy at law. In searching for a rationale upon which to base jurisdiction over cases such as the present the courts have followed three lines of thought: (1) the court would grant the injunction under the guise of a hidden property right; or (2), as some courts have effectively done, by granting the injunction under the guise of specific performance of the contractual relationships between the society and its members the desired effect was attained. Krause v. Sander, 66 Misc. 601, 122 N. Y. S. 54 (Sup. Ct. 1910); Lawson v. Hewell, 118 Cal. 613, 50 Pac. 763 (1897); (3) but the principal theory, and the one which in reality supports the contract theory, is "natural justice", based upon the fairness of the corporation's proceedings which produced the expulsion. The courts declare they will not interfere with the activities of the organization unless the rules of the association are contrary to natural justice, or, these being fair rules, they were not correctly observed in that the plaintiff either was not informed of the expulsion proceedings, or in some manner was not given a fair hearing. Dawkins v. Antrobus, 17 Ch. D. 615 (1881); Fisher v. Keane, 11 Ch. D. 353 (1878). A close inspection of all these theories reveal that some technical property right is being protected. In the instant case although the plaintiff alleged an irregularity in the proceeding the court did not use this as the basis for its decision, insisting instead on the fact that no property right was required.

The court here relied heavily upon academic authorities and little upon actual case law. An attempt is made to substantiate the opinion by citing, as authority for the fact that this doctrine has been recognized in the District of Columbia, three cases: United States ex rel. Johnson v. First Colored Baptist Church, 56 App. D. C. 324, 13 F. 2d 296 (1926); Taylor v. Jackson, 50 App. D. C. 381, 273 Fed. 345 (1921); De Yturbiode v. Metropolitan Club, 11 App. D. C. 180 (1897). All these cases were decided on the basis of the theory of
“natural justice”, and while the De Yturide case and the Johnson case denied relief, there was dictum to the effect that had the expulsion proceedings been irregular the court might have allowed the suit. None of the opinions, however, two of which were actions for writs of mandamus, are definite on the point that equity does not require a property interest in order to protect personal rights. The principal case develops more importance when it is realized that not since the Johnson case has a local court had the opportunity of deciding the question here presented. It not only bridges the gap of twenty-two years but it fortifies, if it does not expand, the minority doctrine on this type of injunction.

This minority view finds little support elsewhere in the United States. Only two jurisdictions have enunciated the doctrine of equity protecting personal rights. Cf. Vanderbilt v. Mitchell, 72 N. J. E. 910, 67 Atl. 97 (1907); Itzkovich v. Whitaker, 115 La. 479, 39 So. 499 (1905). Recently the Massachusetts court enunciated the same doctrine as in the instant case in a different factual situation. Kenyon v. City of Chicopee, 320 Mass. 528, 70 N. E. 2d 241 (1946). This case is heavily relied upon by the court in the present case.

There can be no doubt that Berrien v. Politzer represents a departure from recognized equitable principles. From one point of view, namely, the fact that it frees the plaintiff from an archaic and time-worn restraint which is not always just and which forces the court to resort to legal fictions to conjure up property interests in order to be just. On the other hand, the question is bound to arise as to just how far the court may extend itself in the protection of personal rights without requiring an accompanying property interest. Future litigation is sure to raise this point, and it would not be surprising if the barrier to extension were subsequently lowered when the requirements of natural justice are satisfied.

JOHN J. O'TOOLE, JR.

INSURANCE—Where a Contract of Lease Provided That the Lessor Should Repair in Case of Fire and the Lessee Was Also Protected from Fire by an “Improvements and Betterments” Policy of Fire Insurance, the Lessee Could Recover the Value of the Fire Damage from the Insurance Company Even Though the Lessor Had Already Repaired All Damage.

Plaintiff carried on a restaurant business in a building which he occupied under a lease. The lease provided that the lessor would repair in case of fire and all improvements made to the realty by the lessee would become property of the lessor at the end of the lease. A fire occurred and, in compliance with the lease, the landlord restored the premises, including improvements, to their original condition. At the time of the fire the lessee also held an “improvements and betterments” policy of fire insurance with the defendant company,
and after the lessor repaired the lessee sued defendant for $3,954.89, which represented the value of the burned improvements less depreciation. The court allowed recovery. *Alexandra Restaurant Inc. v. New Hampshire Insurance Co. of Manchester*, 71 N. Y. S.2d 515 (1st Dept. 1947), affirmed, New York Court of Appeals (March 1948).

The real question involved is: Does public policy prevent the parties from making a fire insurance contract which, when considered with collateral protection contracts of the landlord (the insured having recovered all fire damage under such collateral contracts), constitutes a "gambling" enterprise and will encourage the insured to burn his property? In an old case, *Foley v. Manufacturers Insurance Co.*, 152 N. Y. 131 (1897), a somewhat similar issue arose. The plaintiff had fire insurance and also a contract with the builder whereby the latter was required to repair in case of fire. In this case, unlike the plaintiff in the *Alexandra Restaurant* case, *supra*, the insured sued on his insurance policy before the builder repaired. The court allowed recovery, saying that a fire insurance company's liability becomes fixed upon the happening of the physical loss to the property and is not affected by the fact that the repairs cost the owner nothing, or that he may compel another person to replace the building without expense to him, or that he may recover his loss by resort to a contract liability of a third person. The court laid great stress on the fact that the plaintiff could not be sure that the builder would fulfill his contract and repair in case of fire and hinted that perhaps the plaintiff should not receive double compensation. It was not clear who would be entitled to the insurance money after the plaintiff had definitely secured performance of the repair contract, as in the *Alexandra* case, *supra*: "It is possible that if the defendant is compelled to pay the policy the plaintiffs may, if they insist upon their rights against the contractor, get double compensation, unless they should be adjudged to hold the fund recovered for the contractors."

In a later New York case, *Larner v. Commercial Union Assurance Co.*, 215 N. Y. Supp. 151 (1926), the facts were virtually the same as in the *Alexandra Restaurant* case. The insured sued on his insurance policy after the premises were completely restored under a contract between the insured and the landlord. The court denied recovery, saying that the insured paid for indemnity and had received this in addition to the insurance contract.

In *Ramsdell v. Insurance Co. of North America*, 197 Wis. 136, 221 N. W. 654 (1928), the lessees restored the building after fire and the court held that the lessors could not recover on their fire policy because they suffered no loss.

In an English case, *Castellain v. Preston*, 11 Q. B. D. 380 (1883), the plaintiff took out fire insurance and then made a contract with a third party to sell the insured property to the latter. A fire occurred and plaintiff recovered insurance from the insurance company and the price of the property from the vendee under the contract to sell. The insurance company then brought a
successful action to recover the amount the insured vendor had received from the third party, up to the amount of the insurance paid to him. The court said that the insured can derive no profit from the fire and allowed subrogation by the insurance company against the vendee named in the sales contract even though the vendee was not responsible for the fire and the insurance company was not in privity with the vendee.

In *Warren Co. v. Hanson*, 17 Ariz. 252, 150 P. 238 (1915), the plaintiff had fire insurance and also a contract with a third party whereby the third party, a water company, would furnish water in case of fire. A fire occurred and the water company failed to furnish water. The court refused to allow the plaintiff to receive double compensation but ordered the insurance company to pay the insurance money to the water company to reduce damages for breach of its contract. It was reasoned that the parties intended only actual compensation for loss approximately flowing from the breach of the water contract.

*Tiemann v. Citizens' Insurance Co.*, 76 App. Div. 5, 78 N. Y. Supp. 620 (1st Dept. 1902), on the other hand, is authority for the insured. In that case the insured owner had contracted to sell property at a certain price. Before the sale was completed, a fire occurred and the plaintiff was allowed to keep the insurance money and the money received under the contract to sell. The court reasoned that the loss insured against occurred when the premises burned and from that moment on the insurance company became liable to pay. Further, since the insurance company was not a party to the contract to sell, it had no interest in money plaintiff received under this contract.

What, then, is the majority view on this matter? Apparently, as the cases discussed show, most jurisdictions which have considered the problem have decided against the conclusion in the principal case. Where the exact facts of a collateral contract of protection overlapping the insurance protection were not involved, many courts have not hesitated to say that there can be no profit on fire insurance. *Liverpool & London & Globe Insurance Co. v. Bolling*, 176 Va. 182, 10 S. E.2d 518 (1940); *St. Paul Fire & Marine Insurance Co. v. Scheuer*, 298 Fed. 257 (C. C. A. 5th 1924); *Tabbut v. American Insurance Co.*, 185 Mass. 419, 70 N. E. 430 (1904). If insured is not legally damaged he cannot recover on his insurance policy, *Patterson v. Durand Farmers Mutual Fire Insurance Co.*, 303 Ill. App. 128, 24 N. E.2d 740 (1940). A fire policy is a contract of indemnity for loss actually sustained and insured is only entitled to be put in the same condition pecuniarily as he would have been if there had been no fire, *Kingsley v. Spofford*, 298 Mass. 469, 11 N. E.2d 487 (1937). The term "indemnity" in the statement, "insurance is a contract of indemnity", excludes all idea of profit to the insured, *Davis v. Phoenix Insurance Co.*, 11 Cal. 409, 43 P. 1115, 1117 (1896). But with the passage of the valued policy laws the above statements are not invariably true. These
laws have limited the public policy rule that in no case can there be a profit on fire insurance and allow the parties in good faith to agree on the value of the interest of the insured in the property concerned. If they overestimate this interest and there is a total loss by fire the insured can recover the full amount of insurance, and the insurance company cannot show his actual interest, therefore his actual loss. Ciolekewicz v. Lynn Mutual Fire Insurance Co., 212 Wis. 44, 248 N. W. 778 (1933); Bright v. Hanover Fire Insurance Co., 48 Wash. 60, 92 P. 779 (1907); King v. Phoenix Insurance Co., 195 Mo. 290, 92 S. W. 892 (1906). Thus by an honest mistake as to amount of insurable interest, the insured may recover in excess of his actual loss. With the tendency of modern day courts to let parties make their own contracts, even to the extent of letting them avoid fairly pronounced public policy by contract, perhaps the courts will allow another inroad on the English doctrine of no profit on fire insurance. The valued policy acts have, as pointed out, already made a modification in prior rulings, and perhaps the scheme of carrying fire insurance coupled with collateral contracts of protection, as exemplified in the Alexandra case, may be generally recognized.

JOE FRANCIS

LABOR LAW—The Employer's Refusal to Bargain with the Union as to Merit Wage Increases During Negotiations for a New Contract Was an Unfair Labor Practice Under the National Labor Relations Act § 8 (5).

For several years there had been harmonious agreement between the employer and the union representatives. The current contract of employment specified minimum wages but was silent as to maximum wages. The employer, apparently in the utmost good faith as to his right to do so, granted wage increases to certain deserving employees based entirely on individual ability and meritorious production. The employer then refused to accede to the demands of the union for a list of such increases. A renewed demand at the time of negotiating for a new contract was likewise rejected. The employer's position was based on his belief that individual ability of workers could not be the subject of collective bargaining but was the exclusive prerogative of the employer. The union appealed to the National Labor Relations Board. The Circuit Court of Appeals supported the Board's decision. Held, that the employer's refusal to bargain with the union as to merit wage increases during negotiations for a new contract was an unfair labor practice under the National Labor Relations Act, § 8 (5). NLRB v. Allison & Co., 165 F.2d 766 (C. C. A. 6th 1948).

By the National Labor Relations Act, 49 Stat. 449 (1935), 29 U. S. C. § 151 et seq. (1940), Congress expressly intended to prevent industrial strife and to promote industrial peace. The provisions of the NLRA were of sweep-
ing proportions, almost limitless in possibilities of protecting the union. The courts have gone far to extend this mantle of protection.

In the instant case the court decided that an employer violates the policies of the NLRA by granting merit wage increases to his employees without first bargaining with the union. Such unilateral action is a denial of collective bargaining concerning an integral part of the wage scale. It is an unfair labor practice, even where it technically does not violate the current wage contract, since public policy does not permit the union to bargain away statutory protection of its rights.

The act made it incumbent on the employer to bargain collectively only with the duly recognized or accredited representative of the employees. NATIONAL LABOR RELATIONS ACT, supra § 8 (1). Any other conclusion would violate an essential principle of collective bargaining. J. I. Case Co. v. NLRB, 321 U. S. 332 (1944). A further provision of the act made the agent chosen by the majority of the employees the exclusive agent of all the employees in the unit. NATIONAL LABOR RELATIONS ACT, supra § 9 (a). This seems clear enough. The legislative intent that employers shall not interfere with the right of collective bargaining “by bargaining with individuals or minority groups in their own behalf, after representatives have been picked by the majority to represent all,” is found in the Congressional committee reports. SEN. REP. No. 573, 74th Cong., 1st Sess. 13 (1935).

In the very first case involving the interpretation of the NLRA to reach the Supreme Court, Chief Justice Hughes inadvertently gave the impression that employers might be allowed to contract with individual employees in some matters. “The provision of § 9 (a) . . . imposes upon the respondent only the duty of conferring and negotiating with the authorized representatives of its employees for the purpose of settling a labor dispute.” NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1, 44 (1937). The Chief Justice then cited the opinion in Virginian Ry. v. System Federation, 300 U. S. 515 (1937), that negotiations were prohibited with any other representative than one chosen by the group but did not preclude individual contracts between the employer and individual employees. “We think this construction also applies to § 9 (a) of the National Labor Relations Act.” NLRB v. Jones & Laughlin Steel Corp., supra at 45.

Subsequent decisions have gradually whittled down the concept that individual contracts of employment can exist along with a collective contract. Individual contracts obtained as a result of an unfair labor practice, i.e. refusal to bargain collectively, were set aside in National Licorice Co. v. NLRB, 309 U. S. 350 (1940). The right to collective bargaining cannot be ignored by the employer even when the employees consent. NLRB v. Newport News Co., 308 U. S. 241, 251 (1939). This is especially true where the employer is in a position to secure an advantage. H. J. Heinz Co. v. NLRB, 311 U. S. 514, 519 (1941). There is no more obvious way of interfering with the rights of
employees than by grants of wage increases with the understanding that the employees will then leave the union. *International Association of Machinists v. NLRB*, 311 U. S. 72 (1940). Favors bestowed by employers are simply a more subtle method of interference than threats. *NLRB v. Falk Corp.*, 308 U. S. 453, 460 (1940).

On the other hand the courts have found that under some circumstances individual contracts of employment should be enforced, as where a collective agreement expires and is not renewed, or where a majority of employees refuse to join a union or legitimately abandon the union. In such cases the employer has no legal obligation to bargain collectively. *NLRB v. Columbian Enameling & Stamping Co.*, 306 U. S. 292 (1939); see Hoeniger, *The Individual Employment Contract Under the Wagner Act: I*, 10 Ford. L. Rev. 14, 22 et seq. (1941). These legitimate situations must be distinguished from one where the employer makes a sham and mockery of the negotiations with the representatives of the employees and has no intention of actually bargaining. Individual contracts into which discouraged employees are inveigled will then be set aside. *Singer Mfg. Co. v. NLRB*, 119 F.2d 131, 133 (C. C. A. 7th 1941).

Legitimate individual contracts between an employer and a majority of his employees constitute no defense for refusal to bargain with the duly chosen union representatives of the employees, even though the individual contracts have not run out. *J. I. Case Co. v. NLRB*, 321 U. S. 332 (1944). The court at 337 pointed out that these individual contracts would not be allowed to "defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit."

Another opinion handed down the same day involved the Railway Labor Act. 48 Stat. 1185 (1934), 45 U. S. C. § 151 et seq (1940), as amended 54 Stat. 785, 786 (1940), 45 U. S. C. §§ 151, 215-228 (Supp. 1946). Although the individuals concerned had agreed to a change of rate of pay for certain shipments, failure of the employer to give notice to the authorized representative violated the act and voided the individual contracts. *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U. S. 342 (1944). The same result was reached as to the NLRA in the case of *May Stores Co. v. NLRB*, 326 U. S. 376 (1945).

Only a few weeks after the *Case* decision, another very important advance in the doctrine was made. A supply company had readily recognized the chosen representative of its employees. Two days before negotiations were to commence, a majority of the employees let it be known to the employer that they preferred to deal directly with him, provided wage increases were granted. The employer granted the increases, then refused to deal with the union. The court upheld the decision of the NLRB to the effect that the employer must negotiate with the union, declaring that the defection from the union was
caused by the employer's conduct. The employees could not free the employer from his obligations simply by requesting him to disregard them. Until the employees of their own volition should officially sever relations with the union, the employer had no choice of negotiating with anyone but the union representative. *Medo Photo Supply Corp. v. NLRB*, 321 U. S. 678 (1944).

The dissenting judge in the instant case readily concedes that merit increases can be the subject of bargaining. But he points out that here a contract was signed without any reference to such increases. There was no evidence of an attempt to undermine the union, previous relations had been serene, and the employer fulfilled all the obligations of the contract as it stood. The NLRB itself had held in *Libby, McNeil & Libby*, 65 N. L. R. B. 873 (1946), that inauguration of an incentive plan is not *per se* an unfair labor practice. Despite these factors, the majority considered it vital to the policy of the act to fully protect collective bargaining from any possible abuse. *The Aluminum Ore Co. v. NLRB*, 131 F.2d 485 (C. C. A. 7th 1942), ruled out any attempt to regulate *all* wages unilaterally. The instant case extends the rule to include even an attempt by the employer to regulate merit wage increases unilaterally.

As pointed out in the *Case* decision, advantages given to individuals might be simply a scheme to undermine the union by creating dissatisfaction and an illusion of better wages and conditions without the services of a union representative. The prohibition against contracts with minority groups is reasonable and necessary, if labor disputes are to be prevented. The machinery set up under the act can only be effective, if there is bargaining between authorized representatives of both employers and employees. The discriminating standards which would result from conflicting negotiations and separate contracts of individuals or minority groups would bring about the very discord, unrest and labor disputes which the National Labor Relations Act was designed to prevent. The apparent hardship which will be worked on those employees who lose their merit increases by reason of the decision must be sublimated to the good which will result for the entire group of employees.

RICHARD J. PEER

NEGLIGENCE—Duty of Insurer to Settle—Insured Can Recover from Insurer the Amount He Was Forced to Expend Above the Policy Limit in Settlement of Claim Where Insurer Was Guilty of Negligence in Failing to Settle Claim Within Policy Limit.

Plaintiff insured's automobile struck a pedestrian and defendant insurer took control of consequent claim for personal injuries, in accordance with its rights under the policy. Insurer refused offer of claimant to settle within policy limit and trial resulted in judgment for sum in excess of policy limit. Insurer paid
policy limit and insured paid excess. Insured sues to recover excess from insurer, alleging negligence of insurer in failing to settle within policy limit. Held, the insurer was negligent in refusing settlement and going to trial when the danger of adverse rulings and verdict was so great that a reasonable man would have avoided going to trial. Dumas v. Hartford Accident and Indemnity Co., 56 A.2d 57 (N. H. 1947).

Where the automobile insurance policy forbids the assured voluntarily to assume any liability, settle any claim or incur any expense except at his own cost, or interfere in any negotiation for settlement or legal proceeding and reserves to insurer the right to settle any claim or suit, the remedy of the assured lies in an action based on the conduct of the insurer rather than on the contract. Attleboro Mfg. Co. v. Frankfort M. Ins. Co., 240 Fed. 573 (Mass. 1917). It is an action ex delictu.

It is well settled in cases of limited liability insurance that the insurer may so conduct itself as to be liable for the entire judgment recovered against the insured, although that judgment exceeds the amount of liability named in the policy. American Mut. Liab. Ins. Co. v. Cooper, 61 F.2d 446 (C. C. A. 5th 1932). But the courts that have considered the question are not in agreement as to the nature and kind of proof which it is incumbent upon the insurer to make. Some courts hold that the insured is entitled to recover upon proof that the insurer was guilty of negligence in refusing to settle a claim for damages covered by the policy, while others impose a heavier burden upon the insured and deny recovery unless he can show that the insurer, in refusing to make settlement, acted in bad faith. In applying the latter rule it has been held that a mistake of judgment is not bad faith. Wakefield v. Globe Ind. Co., 246 Mich. 645, 225 N. W. 643 (1929). Nor is a refusal to settle when grounded upon a bona fide belief that the action might be defeated. St. Joseph T. & S. Co. v. Employers' Ind. Co., 224 Mo. App. 221, 23 S. W.2d 215 (1930). Mere refusal to settle, without evidence of bad faith, will not under this rule sustain a verdict against insurer. Maryland Cas. Co. v. Cook-O'Brien Const. Co., 69 F.2d 462 (C. C. A. 8th 1934). On the other hand, in applying the rule of negligence, courts have demanded that the insurer must be as quick to compromise the claim as if it were itself liable for any excess verdict. Douglas v. U. S. F. & G. Co., 81 N. H. 371, 127 Atl. 708 (1924). Insurer's duty is not only to pay all sums within the policy limit which insured becomes obligated to pay but also to save him harmless from liability by reasonable performance of its service to settle claims. Attleboro Mfg. Co. v. Frankfort M. Ins. Co., supra. Something more than an act of judgment is involved in the decision of the insurer to stand trial or to settle; there must be a willingness within the policy limit to spend its money to purchase immunity for the insured. Due care must be exercised in investigating the facts, learning the law and in estimating the danger to the insured of an excess judgment. Dumas v. Hartford, supra.
The practical difficulty in applying the rule of negligence was noted by the court in *Best Building Co. v. Employers' Liab. Assur. Corp.*, 247 N. Y. 451, 160 N. E. 911 (1928). Negligence consists of conduct which "falls below the standard established by law for the protection of others against unreasonable risk." Restatement, Torts § 166. All the "facts and circumstances" of the case are to be taken into account, including all those facts of the particular situation which the actor knew or as an "ordinary prudent man" should have known. Harper, Law of Torts, § 69. Where the seriousness or gravity of the threatened or possible peril is great, there may be an unreasonable risk although the chances of its actual materialization into harm seem comparatively slight. Tullgren *v. Amoskeag Mfg. Co.*, 82 N. H. 268, 133 Atl. 4 (1926).

The law exacts "only the ordinary prevision to be looked for in a busy world." Judge Cardozo in *Greene v. Sibley, Lindsay and Curr Co.*, 257 N. Y. 190, 192, 177 N. E. 416, 417 (1931). The insurer is charged not with knowledge of the real facts regarding the accident but only of such facts as were known to him and which should have been considered in deciding whether or not to settle. Stowers Furn. Co. *v. American Ins. Co.*, 29 S. W.2d 956 (Tex. 1931). The entire course of conduct pursued by the insurer throughout the entire period must be examined. *Hilker v. Western Auto. Ins. Co.*, 204 Wis. 1, 231 N. W. 413 (1930). In *Georgia Cas. Co. v. Mann*, 42 Ky. 447, 46 S. W.2d 777, 779 (1932), the court held that the insurer "may look to its own interest as well as those of the insured." But in *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S. C. 286, 170 S. E. 346 (1933), it was held that when the interest of the insurer conflicted with those of the insured, the former was bound under its contract of indemnity, and in good faith, to sacrifice its interest in favor of the insured.

In the ordinary affairs of life many persons are at times called upon to decide matters in which the rights of others are involved. When such rights are not fixed by statute or court decision there is but one criterion by which the propriety of the decisions should be judged and that is whether or not an honest judgment was exercised. *Wakefield v. Globe*, supra. Unless it is true, as the court concluded in *Hilker v. Company*, supra, that the confusion of the words "negligence" and "bad faith" is merely "tautological", a new criterion is in the process of being defined for judging the conduct of insurers. The old majority rule of bad faith is tending to become the minority rule, being displaced by the rule of negligence. 8 Appleman, Insurance Law and Practice, § 4712 (1942). The instant case lends its weight to this development. The results are speculative. What effect may there be on the attorney-client relationship, what restriction on the freedom of the attorney to advise his client to exercise his right to go to trial? What of the possibility of substituting the hind-sight judgment of the jury—for it is the jury that determines what the conduct of the fictitious "ordinary prudent man" is in the case at
bar—for the honest technical advice of the attorney “in a busy world”? Will this test tend toward “strict liability” for the insurer? On the other hand, mindful of the difficulty of proving bad faith, might not the negligence rule, fairly applied, give the insured the only effective means to compel acceptance by the insurer of reasonable settlement offers? The insurer “cannot be unduly venturesome at the expense of the insured.” Dumas v. Company, supra.

RICHARD L. WALSH

PATENTS—The Discovery and Application of a Principle of Nature Is Not Inventive if the Application Would Be Obvious to Anyone Knowing the Principle.

Respondent brought suit for infringement of a patent covering a bacteria inoculant for leguminous plants. The product claims in issue were drawn to an inoculant comprising a plurality of selected cultures of different species of the bacteria, each species being represented in the composite culture by a strain which did not exhibit an inhibitory effect on the other species present. Evidence brought out at trial showed that there were at least six known species of the particular bacteria genus, each of which when grown in symbiotic relationship with a specific group of leguminous plants fixed nitrogen from the air and converted it to organic nitrogenous compounds in the earth. It had been the general practice, prior to the patent in question, to manufacture inoculants containing only one species of the bacteria, because of an accepted belief that the various species produced an inhibitory effect on each other when mixed in a common carrying agent. The patentee successfully selected certain strains of the various species which did not have a harmful effect on each other and combined them into a composite culture. The district court found the product claims void for want of invention. On appeal to the circuit court of appeals, the claims were found valid and infringed. Funk Brothers Seed Co. v. Kalo Inoculant Co., 161 F.2d 981 (C. C. A. 7th 1947). The Supreme Court, considering on appeal only the question of validity of the product claims, reversed the circuit court of appeals. Held, the claims did not set forth an invention. Funk Brothers Seed Co. v. Kalo Inoculant Co., 68 Sup. Ct. 440 (1948). Mr. Justice Frankfurter concurred in finding the product claims invalid but predicated the invalidity on the basis of lack of sufficient identification of the particular composite culture covered by the claims. Mr. Justice Burton and Mr. Justice Jackson dissented.

The Court speaking through Mr. Justice Douglas attacked the validity of the claims in piecemeal fashion. After generalizing on the status of the law regarding the unpatentable nature of a natural force, the Court labeled the mixture of bacteria and carrying agent as aggregative and lacking in invention and therefore not patentable. It was agreed that considerable ingenuity was
required to discover the compatible nature of the specific strains of bacteria. The Court decided however that the ingenuity shown in the discovery of the natural force was distinct and severable from the ingenuity required to apply this natural force to some useful purpose, and that only the latter could be considered in determining patentability.

It is a positive rule of law that a law or principle of nature alone in the naked sense is not patentable subject matter. A principle of nature is said not to contain subject matter to which property rights can attach, since it exists in nature independently of human effort and as so found must be considered the common property of all mankind. Also, it is not a complete and operable means since it must be brought into contact with an object before it can produce effects. 1 ROBINSON, THE LAW OF PATENTS 195 (1890). A law of nature is a force rather than an article or tangible thing and the question of its patentable nature most often arises in dealing with process claims.

In the famous case of O'Reilly v. Morse, 15 How. 61 (U. S. 1853), an attempt was made to claim the use of the motive power of an electric current for making or printing intelligible characters. The Court held that this was not patentable subject matter since it was a force of nature. However, in the cases of McClurg v. Kingsland, 1 How. 202 (U. S. 1843), regarding a chilled roller casting process; Mowry v. Whitney, 14 Wall. 620 (U. S. 1872), or a car wheel heat treating process; Tilghman v. Procter, 102 U. S. 707 (1880), or a process of separating fats and oils; or The Telephone Cases, 126 U. S. 1 (1887), the combination of several natural forces producing a unitary result were found patentable. Though the single force of nature which the applicant attempted to monopolistically control in the Morse case could be considered as lacking subject matter to which property rights could attach, this concept is not very helpful in rationalizing the cases where a combination of several laws of nature are found to be patentable and therefore obviously capable of ownership. The difference in result in the two classes of cases may be explained on the basis that a patent covering a single law of nature would embrace a broader monopoly than would be consistent with the public interest, whereas a patent on a combination of laws of nature is much more limited in scope. See 1 WALKER ON PATENTS § 19 (Deller ed. 1937); Wall v. Leck, 66 Fed. 552 (C. C. A. 9th 1895); Le Roy v. Tatham, 14 How. 155 (U. S. 1852).

The same reasoning rejects an attempt to control a particular use of an article of nature in the raw state, and as a general rule product claims drawn to an article of nature alone and unmodified are unpatentable. American Fruit Growers v. Brodex Co., 283 U. S. 1 (1930); General Electric Co. v. De Forest Radio Co., 28 F.2d 641 (C. C. A. 3rd 1928); Ex parte Grayson, 51 U. S. P. Q. 413 (1941). Since the so-called basic building blocks of nature are being broken down daily by scientific discovery it is to be noted that repeated attempts to utilize such an intangible concept as the doctrine of the unpatentability of a principle of nature are bound to mire the patent law in a quagmire

In the instant case the law of nature doctrine was raised as a preamble to the determination of whether a patentable combination had been created by the patentee or whether the mixture of bacteria and humus was an unpatentable aggregation. It is clear that if two or more articles of nature are grouped together into one unit, the group of articles may be a patentable combination. However, merely bringing old devices into juxtaposition and then allowing each to work out its own effect without the production of something novel, is not invention. *Hailes v. Van Wormer*, 20 Wall. 353 (U. S. 1873). Out of the union of the separate parts a new means must be created in order to come within the scope of a patentable combination. If after being unified the separate parts still perform the same distinct and independent functions, and still act as so many separate units, not co-operating with each other to perform a new function, the union will be stigmatized as an unpatentable aggregation. This test is however often more easily stated than applied. As one court said:

"In our opinion the defense of aggregation is considerably overworked. The term 'aggregation' is usually preceded by the word 'mere' and describes a group of elements which fall far short of invention in the user's opinion. It is a generic term used quite loosely to define various structures which fail to embody patentable discoveries." *Lincoln Engineering Co. v. Stewart-Warner Corp.*, 91 F.2d 757, 764 (C. C. A. 7th 1937).

The circuit court of appeals found that the patentee in the present case was claiming a patentable combination. However, the Supreme Court here applied the test of aggregation rigorously and concluded that since a plurality of specific strains of bacteria had been selected for their inherent and unpatentable natural characteristic of compatibility with the other strains, it was obvious that each strain but carried out the same function after union as it had before the union into one inoculant. The "aggregation" was characterized as also lacking invention.

Throughout the case law, patent litigation often turns on whether a patent has disclosed an invention or a teaching of mere mechanical skill. Patentability must rest upon an unobvious modification or teaching which is new and useful and which is beyond the ken of one skilled in the art. The test must be applied in relation to the time the patent application was filed, keeping in mind the prior state of the art and disregarding the teaching of the patent. If a mechanic merely skilled in the art could accomplish the same result in the same manner without the patent teaching, the patent is void for want of invention. *Hotchkiss v. Greenwood*, 11 How. 248 (U. S. 1851); *Van Heusen Products v. Earl & Wilson*, supra; *Poulson v. Coe*, 119 F.2d 188 (App. D. C. 1941).
The patentee in the instant case discovered an unknown characteristic of certain strains of bacteria. Since the general belief had been that the bacteria could not be mixed without an inhibitive reaction, this discovery was obviously beyond the scope of one skilled in the art. Even if the discovery be ignored as unpatentable, a skilled mechanic could still not arrive at the same result in the same manner, because he would have to discover before he took the simple step of application. The only way the Court could hold, as it did, that the ingenuity shown was not inventive, was to consider that the fictitious mechanic had more knowledge than existed in the prior art. The mechanic had to be aware of the characteristics of the bacteria discovered. Though an advance may seem simple in retrospect, its very simplicity coupled with the fact that the prior art is void of sufficient teaching to light the way has almost universally been considered an inventive step. Previously, it was only the discoverer who was allowed to patent means made simple and obvious by his discovery. The unobviousness of the discovery cloaked the simple step with the ingenuity required of a patentable invention. RIVISE AND CAESAR, PATENTABILITY AND VALIDITY § 34 (1936); Dick v. Lederle Antitoxin Laboratories, 43 F.2d 628 (S. D. N. Y. 1930); General Electric Co. v. Laco-Philips Co., 233 Fed. 96 (C. C. A. 2d 1916). The discoverer of the resistive qualities of an alloy old to the art successfully patented product claims drawn to a resistance element composed of the alloy and the courts found the claims valid in General Electric Co. v. Hoskins Mfg. Co., 224 Fed. 464 (C. C. A. 7th 1915). By implication these cases are overruled by the instant decision.

NORMAN J. O'MALLEY

REAL PROPERTY—The Pennsylvania Community Property Law Results in a Deprivation of Property Without the Owner's Consent and Hence Violates the Pennsylvania Constitution.

Plaintiff brought a bill in equity to compel issuance to him by the defendant a paid-up life insurance policy based on the cash surrender value of a policy assigned to him by one Lewis. Just prior to the assignment, Lewis had paid in advance an annual premium derived, in part, from moneys received after September 1, 1947, the effective date of the Pennsylvania Community Law or 1947 (Act No. 550, 48 P. L. § 201 et seq.), as life tenant of a trust created many years previous, and from a dividend on stock owned by him since 1943. The defendant insurance company refused to recognize the assignment as valid without the consent of Lewis' wife on the ground that a part of the premium had been paid out of community property and the wife consequently had a legal interest in the value of the policy. Held, the Pennsylvania Community Property Law results in the taking of what is, under existing law, private property and giving it to another without the owner's consent, and
thus violates the right of private property declared in the Pennsylvania Constitution. In addition, the statute is so contradictory and uncertain as to be inoperative in that it gives an alleged ownership of property to a spouse, yet deprives him of all the incidents of ownership and of any practical means of protection of his interest. Wilcox v. Penn Mutual Life Ins. Co., 55 A.2d 521 (Pa. 1947).

Under the Pennsylvania Community Property Law of 1947 each spouse is vested with an undivided one-half interest in property acquired after marriage, or the effective date of the act, except that acquired by gift, devise or descent, or received as compensation for personal injuries. The wife is given management and power of disposal over her separate property and over that part of the common property consisting of her earnings, all rents, interest, dividends and other income of her separate property and all other common or community property, the title to which stands in her name. The husband is given control and disposal over property not set forth as being under the control of the wife. That part of the community property placed under the control of each spouse is liable for the separate debts of each, except for certain torts.

Until the decision in Poe v. Seaborn, 282 U. S. 101 (1930), there seemed to be no desire on the part of common law states to adopt the community system. However, in that case it was held that a wife and husband, domiciled in a community property state where both have equal vested interests from the moment of acquisition of community property, are entitled to file separate income tax returns in which each may return one-half of the community income. The result made possible an enormous tax saving for couples domiciled in community property states, with consequent pressure on other states to adopt this system.

Pennsylvania is one of five states which have enacted community property statutes since the Poe decision. The others are Oregon, Michigan, Oklahoma and Nebraska.

The court in the instant case points out the fundamental conflicts in the attempt to engraft this system of property in a state which has a common law heritage. Yet, had the Pennsylvania statute declared that separate property included income and profits from such separate property, and had there been some restrictions placed on the spouse’s power of management and disposal over community property so as to protect the interest of the other spouse, it may be inferred from the court’s opinion that the system might constitutionally have been introduced in Pennsylvania in spite of the fundamental conflicts discussed by the court.

The constitutionality of the various statutes in the traditional community property states has seldom been questioned. Undoubtedly, this is because the system had come to them as a heritage from the Spanish Law. This is true even though most of those states at an early date adopted the common law as the rule of decision. See 1 De Funiak, Principles of Community Prop-
ERTY, §§ 42-53 (1943). Even so, the inclusion of rents and profits from the separate property of a spouse as community property, which was one of the grounds on which the Pennsylvania statute was held invalid, has not been retained in the majority of the traditional states, even though under Spanish Law such fruits and profits were considered a part of the community. Blaine v. Blaine, 63 Ariz. 100, 159 P.2d 786 (1945); Huber v. Huber, 27 Cal.2d 784, 167 P.2d 708 (1946); Kohny v. Dunbar, 21 Idaho 258, 121 Pac. 544 (1912); Barrett v. Franke, 46 Nev. 170, 208 Pac. 435 (1922); McElyea v. McElyea, 49 N. M. 322, 163 P.2d 635 (1945); In re Witte's Estate, 21 Wash.2d 112, 150 P.2d 595 (1944).

However, a California court in an early case did conclude that a statute which gave to the husband power and control, as community property, over the dividends from stock owned by the wife as her separate property, was invalid under the constitution of California, in which the term "separate property" was interpreted in the common law sense of an estate separate in both title and use for the separate benefit of the owner. George v. Ransom, 15 Cal. 322 (1860). In contrast, a Texas statute which attempted to preserve, as separate property, the rents and profits from separate property of a wife was held unconstitutional since, the court held, the Texas constitution provided the sole measure of what constituted separate property and it did not include rents and profits. Frame v. Frame, 120 Tex. 61, 36 S. W.2d 152 (1931).

The court, in the instant case, in holding that the contradictions and uncertainties of the statute were grounds for its invalidity, found it impossible to reconcile the idea of ownership with a full power of control, management, and disposal in another, for whose debts the property would be liable, and who was under no duty to account until the dissolution of the marriage. The California court in the George case, supra, likewise felt that there could be no constitutional separation of ownership and all incidents of ownership.

This reasoning has been criticized as a misconception of the true meaning of community property. It is stated that the control given to the husband in the community property sense is merely one of administration which can be exercised only for the joint benefit of husband and wife, and this is confused by the courts with control at common law which gave the husband virtual ownership and exclusive right to enjoy all the benefits of the wife's property. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, § 71 (1943). However, the court in the instant case states that the common law cannot be ignored and antagonistic Spanish Law cannot be adopted. But in none of the traditional states does there appear to be a complete absence of restrictions on the power of a spouse to manage and control community property. In some the husband may not alienate community property without the consent of the wife. Munger v. Boardman, 53 Ariz. 271, 88 P.2d 536 (1939); Metropolitan Life Ins. Co. v. McClelland, 57 Idaho 139, 63 P.2d 657 (1936); Terry v. Humphreys, 27 N. M. 564, 203 Pac. 539 (1922). Or the wife is protected
against gifts by the husband to which she does not consent. In re McCoy's Estate, 189 Wash. 103, 63 P.2d 522 (1937). Or community property cannot be liable for the separate debts of a spouse. Tway v. Payne, 55 Ariz. 343, 101 P.2d 455 (1940); Snyder v. Stringer, 116 Wash. 131, 198 Pac. 733 (1921).

In a variation of the traditional system of community property, earlier statutes of Oklahoma and Oregon established community property based on contract of the husband and wife, instead of a legal community arising as an incident of marriage. Okla. Stat., tit. 32, § 51 et seq. (Supp. 1941); Ore. Laws, tit. 63, c. 2A (Supp. 1943). This Oklahoma statute was upheld in Harmon v. Oklahoma Tax Commission, 189 Okla. 475, 118 P.2d 205 (1941), the court emphasizing that the statute which operated on a person only with his consent does not violate his constitutional right to enjoy the gains of his own industry. However, the attempt of Pennsylvania to solve its problem by this means would have been to no avail, since even though constitutional, the principal aim of savings on income tax could not be accomplished. In Commissioner v. Harmon, 323 U. S. 44 (1944), it was held that spouses could not file separate returns on the basis of each having an equal vested interest in community income where it was a consensual system.

Since the instant case is the first decision involving the validity of the recent efforts of state legislatures to establish the community system of property for the obvious purpose of income tax savings for their citizens, it is significant in that it raises questions of doubt as to the other statutes recently enacted, all of which, with the exception of Michigan, are similar in provisions and wording to the Pennsylvania statute. Perhaps all will be re-enacted to conform to the Michigan statute which specifically provides that income from separate property remains separate and restrictions specifically placed on those spouses given the control of community property with rights of action given to the other spouse to protect incidents of his ownership.

TAYLOR MALONE, JR.


The petitioner was one of four trustees responsible for the administration of four trusts. The trusts were set up in 1914, and until 1938 the trustees had never taken any commissions. In 1937 the trustees began a proceeding to fix their commissions which subsequently was amended to request their discharge as trustees. Remainder men and guardians raised objections to the account submitted by the trustees in support of their request for discharge, alleging negligence in the handling of securities and objecting to the trustees' computing of commissions. The court referred the issues to a referee. Before
the completion of hearings the parties, with court approval, reached an agreement whereby the trustees resigned, abandoned any claim to commissions and paid $3,000 each to the corpus of the trust. The referee filed an opinion in which he acquitted trustees of any lack of "probity" or "integrity", and in which he declared that from the evidence taken he was unable to say whether they had been negligent in the sense that they made themselves personally liable. The Tax Court held that the $3,000 was deductible as a non-business expense under section 23 (a) (2) of the Internal Revenue Code, *Heide v. Commissioner*, 8 T. C. 314 (1947), basing its decision on an interpretation of the decision in *Trust of Bingham v. Commissioner*, 325 U. S. 365 (1945). On appeal the Second Circuit Court of Appeals reversed, holding the expense was not incurred as a necessary expense in the production of income. *Heide v. Commissioner*, 16 U. S. L. Week 2367 (1948).

INT. REV. CODE § 23 provides in part: "In computing net income there shall be allowed as deductions: . . . (2) Non-trade or non-business expenses.—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income." 54 Stat. 998, 1008 (1940), as amended; 26 U. S. C. § 23 (1946 Supp.).

Section 23 (a) (2) was added by Congress in 1942 to alleviate hardship where a taxpayer was not allowed to set off expenses against gross receipts, even though without the expenses there would have been no receipts.

Under section 23 fiduciaries have been allowed to deduct losses sustained in management of estates and trusts, even though the loss may have been the result of their own fault, provided it could be determined that the handling of the trust or estate was the business of the taxpayer. The principal case allowing this deduction is the *Abbott* case, relied on by the Tax Court in the instant case. In that case the petitioner, a lawyer, devoted about one-half of his time to the affairs of estates and trusts. Under one of the trusts he was authorized to purchase mortgages not to exceed two-thirds the assessed value of the real estate. A dispute arose with beneficiaries over alleged mismanagement, based on disagreement as to whether two-thirds referred to aggregate or individual value. Taxpayer compromised for $10,000 and was allowed a deduction of this amount as a business expense. The Board of Tax Appeals said: "It is beyond doubt that the petitioner's regular business included serving for pay as a trustee . . . circumstances of the payment support its deduction, and it should have been allowed." *Abbott v. Commissioner*, 38 B. T. A. 1290 (1938).

This reasoning was followed by the Board in allowing a deduction to a bank, acting as a trustee, of a loss sustained in dealings made necessary by a transaction, which, in the opinion of its counsel, was a breach of trust. The deduction was allowed under section 23 (f), relating to losses of corporations, but, in so holding, the Board of Tax Appeals said that the amounts "... might
reasonably be regarded as ordinary and necessary expenses incurred in the operation of petitioner's business." _Bishop Trust Co. Ltd. v. Commissioner_, 47 B. T. A. 737 (1942). In a case where the trustee of several trusts sued the former trustee, who was also the settlor and who controlled the corporation in which the trusts were stockholders, for alleged mismanagement of the corporation, a compromise settlement of $160,000 was allowed as a deduction. The Tax Court, in allowing it, said it was immaterial whether the payment were treated as a loss or as an ordinary or necessary business expense. _Zeigler v. Commissioner_, 5 T. C. 150 (1945).

Before the 1942 amendment such deductions were not allowed to fiduciaries who could not show that their fiduciary activity was their business. In _Stuart v. Commissioner_, 84 F.2d 368 (C. C. A. 1st 1936), the court held a payment by a trustee to the trust for a loss sustained through an unauthorized loan was not deductible. The court found that he was not engaged in managing trusts and the managing of these particular trusts was an isolated incident. Likewise, where the petitioner, a bank official, acted under power of attorney for a bank customer without charge, a compromise payment to avoid a suit for alleged mismanagement was not considered a deductible expense. _Tallman v. Commissioner_, 37 B. T. A. 1060 (1938).

Subsequent to the 1942 amendment, but prior to the _Bingham_ case, _supra_, the Tax Court refused to recognize that section 23 (a) (2) extended to non-professional trustees the right to deduct losses incurred in managing (or more appropriately mismanaging) property held in a fiduciary capacity. No deduction was allowed a trustee for legal expenses incurred opposing a suit for an accounting, which suit was settled by stipulation. The court ruled that management and conservation of property does not extend to expenses necessary to protect one's property from a money judgment. _Jacobs v. Commissioner_, 1 T. C. M. 883 (1943). Deduction was also disallowed in a similar case of a trustee who paid legal expenses to oppose a suit for "alleged mismanagement". The court held that the scant record was sufficient reason to reject the claim for paucity of proof, but even if proved it would not be deductible under section 23 (a) (2). _Estate of Clark v. Commissioner_, 2 T. C. 676 (1943).

In 1945 the Supreme Court was called upon to interpret section 23 (a) (2) in a case in which trustees sought to take deductions for the trust for expenses involved in winding up the trust after its expiration, including legal fees spent opposing an income tax deficiency suit and fees for legal advice as to the distribution of the property. In allowing the deductions the court held that to be deductible, expenses "must be reasonable in amount and must bear a reasonable and proximate relation to the management of property held for the production of income." _Trust of Bingham v. Commissioner_, _supra_, at 370. If they met these requirements, it was not necessary that they be spent in production of income; it was sufficient that they be incurred in the management of property held for producing income. "The effect of § 23 (a) (2) was to
provide for a class of non-business deductions coextensive with the business
deductions allowed by § 23 (a) (1), except for the fact that . . . they be in-
curred for the production of income or in the management or conservation
of property held for the production of income.” Trust of Bingham v. Commis-
ioner, supra at 374.

The Tax Court in the instant case interpreted the Bingham decision as
extending to non-professional fiduciaries the rights of deductions allowed
professional fiduciaries. In overruling the Tax Court decision, the Circuit
Court of Appeals refused to consider losses suffered by an occasional
trustee as necessary to the production of income or the management or
conservation of property. The net effect of the actual decision in the instant
case is to leave the status of fiduciaries exactly as it was before the Bingham
case: (1) Professional fiduciaries may deduct losses resulting from the manage-
ment of trusts or estates as business expenses; (2) Non-professional trustee
cannot make such deductions as non-business expenses. In the light of the
Bingham decision expenses necessary for the production of income or manage-
ment of property held for the production of income may be deducted by the
person to whom the income inures. The instant case disposes of the idea that
section 23 (a) (2) is a “catch all” clause embracing any expense not deductible
as a business expense under section 23 (a) (1), and limits deductions to ex-
penses resulting from “conditions which stand in the path of . . . ‘producing’
the income at all.” Heide v. Commissioner, supra.

Beyond the actual decision, there are intimations in the language used by
Mr. Justice Hand that the doctrine of the Abbott case may not be followed
if a similar situation is presented to an appellate court. “And we need not
necessarily disagree with the Board’s decision in Re Abbott . . . and although
it seems strange to think of them as ‘necessary’, conceivably that may be
permissible . . .” indicates that the court, though not expressing an opinion on
the Abbott decision, has some doubt as to its validity. Recognizing that the
Abbott decision doctrine has not been litigated in the appellate courts and
noting also, for such relevance as it may have, that the duty of professional
trustees exceeds that of non-professional so that “if the trustee has greater
skill than that of a man of ordinary prudence, he is under a duty to exercise
such skill as he has,” Restatement, Trusts, § 174 (1935), the continuing
validity of the Abbott decision as measured against the validity of the instant
case may well merit the attention of the U. S. Supreme Court in the near
future.

J. FRANCIS POHLHAUS
TORTS—Decedent's Claim for Personal Injuries Survives If the Injuries Were Received Incidental to Defendant's Trespass on Decedent's Property.

This action grew out of an attempt by a deputy of the United States Marshal to execute a civil process upon the brother-in-law of the appellee, Foreman, a resident of the District of Columbia. By the use of force the deputies wrongfully entered appellee's home, where the brother-in-law also resided, and when the appellee resisted their entrance they beat and arrested him. In August, 1941, Foreman brought an action against the United States Marshal, Colpoys, and his surety. The trial resulted in a verdict which was set aside. In 1944, the marshal died and his executors were substituted as defendants. In 1945, the issues for retrial were limited to an alleged forcible and unlawful entry and any consequent damage that may have resulted therefrom.

The district court allowed the plaintiff to recover damages for the personal injuries and an appeal was taken by the defendants to the United States Court of Appeals for the District of Columbia. Held, recovery may be had against an executor or administrator for personal injuries which were suffered as an incident to a trespass on land since by statute the trespass action survives. Colpoys v. Foreman, 163 F.2d 908 (App. D. C. 1947).

The instant case presents three main problems. First, on the basis of an agency relationship, is a marshal liable for the wilful, tortious conduct of his deputies in the exercise of their official duties? Secondly, if he is liable for such conduct does it follow that damages arising out of an assault on a person are the proximate result of a wrongful entry by the tortfeasor? Finally, do the injuries complained of govern the cause of action making it essentially one for the recovery of personal injuries and hence barred by the survivorship statute? 12 D. C. Code § 101 (1940).

Since it is recognized today that a master may be liable for wilful acts done by the servant within the scope of his employment, is there an analogous relationship between the marshal and his deputies upon which liability may be based? The deputies are not publicly appointed officials but are appointed by the marshal, 36 Stat. 1167 (1911), as amended 49 Stat. 377 (1935), 28 U. S. C. § 503 (1940). Since he appointed the deputy and is required to bond him, 38 Stat. 208 (1913), 5 U. S. C. § 639 (1940), the marshal should be held liable. This liability has been recognized by the courts. Cf. Russel v. Glasgow, 63 Ariz. 310, 162 P.2d 129 (1945); Missouri ex rel. De Vault v. F. and C. Co., 107 F.2d 343 (C. C. A. 8th 1939); Trammell v. F. and C. Co., 45 F. Supp. 366 (D. C. S. C. 1932).

The question as to whether damages arising out of an assault should be allowed in an action essentially for a trespass to land presents a more difficult problem. The direct damages for a mere wrongful entry are merely nominal. However, a plaintiff may recover by way of compensatory damages for any consequential injuries of which the injury sued for was the proximate cause. Without straining the causation chain beyond the breaking point, can it be
said that the trespass caused the personal injury? In keeping with decisions on the point it would probably be more accurate to hold that the wilful act of the assaulter intervened so as to create two separate and distinct causes of action. Because a man's house is his castle, he may resist invasions of his privacy, and when attacked while resisting an invasion, the courts are ever ready to allow him to recover therefor. In Engles v. Simmons, 148 Ala. 92, 41 So. 1023, 1025 (1906) which was a suit against a trespasser for personal injuries, the court said, "This suit is for an injury to the plaintiff, and not for a trespass to the realty as supposed by appellee." Accord, Matheson v. American Tel. and Tel. Co., 137 S. C. 227, 135 S. E. 306 (1926); Sampson v. Henry, 13 Pick. 36 (Mass. 1832); Yoakum v. Kroeger, 27 S. W. 953 (1894).

But in many cases where the causal chain was more in evidence than in the instant case, the courts have allowed recovery for personal injuries in trespass actions. In Keesecker v. G. M. McKelvey Co., 64 Ohio App. 29, 27 N. E.2d 787 (1940) the court held as a matter of law that a trespasser who left an outer door of a porch open was responsible in a trespass action by way of consequential damages for an injury to a mentally deficient child who fell through the opening onto a driveway. Courts have allowed damages in a trespass action for injuries to health resulting from the removal of essential parts of a house. Hatchell v. Kimbrough, 49 N. C. 165 (1856); Preiser v. Wielant, 48 App. Div. 569, 62 N. Y. Supp. 890 (1900). See Ham v. Maine-New Hampshire Interstate Bridge Auth., 92 N. H. 277, 30 A.2d 1 (1943); Ft. Worth and N. O. Ry. Co. v. Smith, 25 S. W. 1032 (1894).

The conclusion we may draw is that in comparison to the above cases, the instant case is a liberal application of the rule of damages and a strictly legal interpretation of the doctrine of causation.

The third phase of the case concerns itself with the century old axiom—Actionis personalis cum persona moritur. In England it was abolished entirely by The Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. V, c. 41, § 1 (1). In the United States legislation has been passed in most states altering the severity of the rule. For the latest survey of legislative changes, see Alvin Evans, A Comparative Study of the Statutory Survival of Tort Claims For and Against Executors and Administrators, 29 Mich. L. Rev. 969 (1931). The reason behind the rule appears to be merely historical. The arguments that there would be difficulty in establishing evidentiary facts or that the purpose of punitive damages disappear with the death of the tortfeasor bear little weight today. But despite the lack of an adequate rationale, the statutes remain and the District of Columbia statute declares in clear terms that actions for injuries to the person do not survive, 12 D. C. Code § 101 (1940).

Despite the name assigned to it, the action in the instant case is one substantially for personal injuries. As a personal action it would not survive because of, any merely indirect or incidental damage to property. Vittum v.
Gilman, 48 N. H. 416 (1869); Birmingham v. Chesapeake & Ohio Ry. Co., 98 Va. 548, 37 S. E. 17 (1900). In Porter v. Mack, 50 W. Va. 581, 40 S. E. 459, 464 (1901), in interpreting the West Virginia statute, W. Va. Code, c. 85, § 20 (1868), providing that actions of trespass or trespass on the case might be maintained by the personal representative for taking away goods and for waste or destruction of or damage to any estate of or by his decedent, the court said, "The damage to [an] estate [which] the legislature had in view was the direct damage occasioned by overt or negligent acts in relation to such estate, and not indirect and consequential damage arising out of injury to person or reputation." In Feary v. Hamilton, 140 Ind. 45, 39 N. E. 516 (1895), where the court was faced with a similar statute, it concluded, "It is settled law that actions arising out of contract, express or implied, will not survive where the damage sustained by such are for injuries to the person, as mental anguish, pain of body or injury to character . . . cases cited. . . . The nature of the damage sued for and not the nature of its cause determines whether or not it will survive." It has been recognized that a cause of action may be divided so that that part of the action which seeks recovery for injuries to the person will abate while so much of the action which seeks recovery for the injury to property survives. Randall v. Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419 (1882). Courts are accustomed to look at the substance of the injury not the form in which it is brought to determine whether or not it will survive. Birmingham v. Chesapeake & Ohio Ry. Co., supra. The District of Columbia statute, 12 D. C. Code § 101 (1940), serves but to reiterate the well known distinction laid down by Lord Mansfield in Hambly v. Trott, 1 Cowp. 372, 98 Eng. Rep. 1136 (1876) recognizing that where there is a property right affected, the action will survive, whereas if the injury is but personal, it dies. Where there are both types of injuries, the courts have in the past looked to the wrong complained of and if it is such that affects primarily and principally property and/or property rights, and the injuries to the person are merely incidental, then it will survive. But, if the injury complained of is to the person and the property rights affected are merely incidental, then the action dies. It is indeed difficult to conform the instant case with the reasoning running through these decisions. Perhaps it would be better not to try but rather to admit that it is really a change, a step forward in interpreting the survivorship statute in a more sensible manner and from a modern viewpoint.

The instant case represents basically a rebellion against the annoying doctrine, Actionis personalis cum persona moritur, which carries no recommendation other than its age. Admitting the court's argument to be strictly logical, the premises, namely that the action is really one for trespass and that damages for assault by the trespasser are properly allowable in the trespass action are tenuous. In any case, in the absence of legislative amendment, it represents much needed circumvention of an undesirable doctrine.

JOHN J. BURKE, JR.
TORTS—Where There Are Conflicting Versions As to Primary Negligence the Appellate Court May Base Its Decision on the Correctness of an Instruction on the Doctrine of Last Clear Chance.

Plaintiff alighted from a west-bound street car, and after the car had proceeded on she started walking to the south across the tracks. When she reached the center of the east-bound car tracks, an east-bound car struck her, breaking her back. Suit was brought in the United States District Court for the District of Columbia where the jury returned a verdict for the plaintiff for the sum of $6,500. This was appealed to the United States Court of Appeals for the District of Columbia on the ground of improper instruction concerning the doctrine of "last clear chance." Held, reversed and remanded for further proceedings because there was not enough evidence to justify instructing the jury on last clear chance. Capital Transit Company v. Grimes, 164 F.2d 718 (App. D. C. 1947).

The defendant at the trial offered an instruction on the last clear chance doctrine. It withdrew this, admitting that the judge's proposed instruction would adequately cover the law of the situation. On the basis of Washington Ry. and Electric Company v. Upperman, 47 App. D. C. 219 (1918), the defendant should be estopped to argue that the instruction should not have been given to the jury. The only difference between the two cases is that in the Upperman case the instruction on last clear chance offered by the defendant was accepted and given to the jury. In that case the court said, "Counsel having adopted this theory of the case, is estopped to object to its being properly presented to the jury." Id. at 227. Although the defendant in the present case withdrew its instruction, the reason for so doing clearly indicates that it, too, had adopted the theory of the case expounded in the judge's instruction and should have been estopped from arguing its correctness on appeal.

Secondly, the defendant made no objection at the trial to the giving of the instruction on last clear chance. Rule 51 of the Federal Rules of Civil Procedure says: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." This rule has been uniformly enforced. Meadows v. United States, 144 F.2d 751 (C. C. A. 4th 1944); Mill Owners Mut. Fire Ins. Co. v. Kelly, 141 F.2d 763 (C. C. A. 8th 1944); New York Life Ins. Co. v. Seighman, 140 F.2d 930 (C. C. A. 6th 1944). In Asha v. Goldstein, 140 F.2d 702 (App. D. C. 1944) this court said, "The sole ground of appeal is an alleged error of the court below in instructing the jury. Appellant made no objection to the instruction at the trial and, therefore, under Rule 51 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, the judgment will be affirmed."
It is true, of course, that in an exceptional case an appellate court has the power to consider grounds of error not objected to at the trial. However, the power "... is not one which should be exercised in an ordinary case. ... The power to notice error waived by the parties should be sparingly used. ..." See, Shimabukuro v. Nagayama, 140 F.2d 13, 15 (App. D. C. 1944). The court in the present case did not refer to this as an exceptional case, and there is nothing to suggest that it is in any way out of the ordinary. If the appellate court were ruling on the denial of the defendant's motion for a directed verdict, and if the appellate court had directed a verdict for the defendant, then it might properly have considered this instruction on last clear chance. However, since the court made no mention of this in remanding the case to the trial court for further proceedings, it must be assumed, in the absence of any statement to the contrary, that the Court of Appeals, was ruling merely on the correctness of the instruction, and thereby seemingly violated Rule 51.

Thirdly, the appellate court undertook to reweigh the evidence, thereby encroaching on the jury's function. At the trial a number of witnesses testified as to the relative positions of the street cars as they passed each other, the speeds at which the cars were traveling, and the time when the traffic light changed from green to amber to red. There was conflicting testimony as to these matters; but once the relative positions and speeds of the cars were determined, i.e., once it was decided whose testimony was to be believed, then it follows as a question of fact whether defendant had a last clear chance. The jury found it had; the appellate court chose to believe the other witnesses and found that the doctrine did not apply. This seems to be an invasion of the province of the jury to pass on the credibility of witnesses. Schear v. Ludwig, 143 F.2d 20 (App. D. C. 1944); Washington, A., & Mt. V. Ry. v. Lukens, 32 App. D. C. 442 (1909); Brown v. Washington & G. R. R., 11 App. D. C. 37 (1897); Barbour v. Moore, 10 App. D. C. 30 (1897); Helphenstine v. Downey, 7 App. D. C. 343 (1895).

From the evidence produced by the testimony of the witnesses at the trial, it could be deduced that the motorman's vision was clear and unobstructed 37 feet from the spot where the plaintiff was struck. The defendant's own car-testing expert testified that the car could be stopped in 17 feet. Actually the car did not stop until it had gone approximately 25 feet after striking the plaintiff. Furthermore, from the evidence it appears that it was not necessary to have stopped the car to avert the accident. The plaintiff was running across the tracks and had almost cleared them; she was struck a grazing blow along her back by the right edge of the car. Therefore, if the motorman had applied the brakes even a fraction of a second sooner than he did, presumably the plaintiff would have completely cleared the track.

The jury was entitled to believe this testimony, and if it is accepted as true, then the conclusion is inescapable that the motorman by the exercise of reasonable care should have been aware of the plaintiff's peril and that there was
time thereafter when he by the use of the means available could have averted the accident, and failed to do so. The Supreme Court recently expressed the doctrine with regard to this type of situation in Ellis v. Union Pacific R. R., 329 U. S. 649, 653 (1947) where it said, "The choice of conflicting versions of the way the accident happened, . . . the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. Tennant v. Peoria & P. U. R. Co., 321 U. S. 29 (1944); Lavender v. Kurn, 327 U. S. 645 (1946). Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. Lavender v. Kurn, supra, at 652. And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury. Washington & Georgetown R. Co. v. McDade, 135 U. S. 554, 572 (1890); Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 68 (1943)."

As Mr. Justice Edgerton said in his dissent in this case, Capital Transit Co. v. Grimes, 164 F.2d 718, 721 (App. D. C. 1947), "This court's disregard of these principles in the present case goes to the authority of the Supreme Court as well as the integrity of the jury system."

ROBERT H. THREADGILL
BOOK REVIEWS


That "Pound's old students will . . . want to read about him" (p. 5) would indeed be sufficient justification for a biography of the eminent American jurist who was dean of the Harvard Law School from 1916 to 1936 (its "Golden Age," pp. 208, 237) but also influenced American law through his contacts with bar associations and other groups remote from academic life. His enormous erudition in the esoteric realms of Roman law, foreign law, and philosophy of law did not estrange him from the "practical" branch of the profession (p. 241, 246). In fact (omne ignotum pro magnifico) his scholarship enhanced his prestige among bench and bar, for they accepted without scruple the jurisprudence and theories of one whose knowledge of existing law and whose capacity for dealing with practical matters exceeded their own. They were irresistibly attracted, as were his students, to a man whose unpretentious but vigorous personality, warm but powerful voice, confident but matter of fact manner, and burly but benevolent appearance proclaimed that he was of earthy, not ethereal, character.

That Pound was also "a dogmatic, obstinate man, quite inclined to be violent in his opinions" (p. 15) the author allows us to learn only indirectly, through Pound's own words in describing the characteristics he inherited from a paternal grandfather. As Judge Wyzanski has remarked elsewhere,1 the author's attitude throughout the book is one of extravagance and adulation, speaking always in the superlative. For example, we are told that only Pound, of all the law faculty, was available at all times to students desiring to discuss legal questions or personal problems (p. 214). But were not Beale and Morgan, to name only two professors who have served as acting dean, equally accessible and approachable? And even Pound's attacks on the activities of administrative agencies since 1933 are sublimated by the author into a claim that almost single-handed Pound won the enactment of the federal Administrative Procedure Act of 1946, thereby giving "a sound administrative law to the American people" (p. 321). To one familiar with Pound's frequent reference to the change in American life from a "rural, pioneer, agricultural civilization" to an "urban, industrial civilization,"

1Harvard Law School Record, March 9, 1948.

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and the consequent necessity of adequate "social engineering" to recognize and to protect the social interests involved under these changed conditions, it would seem that his biographer might more appropriately have sought to offer some adequate explanation for, rather than so jubilant a glorification of, Pound's defection from his earlier "liberalism". Perhaps Pound's old students, viewing the matter amiably in an atmosphere of grateful and admiring recollections, would consider as a sufficiently satisfactory explanation of Pound's anti-administration attitude the fact that he has always been a staunch Republican (pp. 44, 50, 91, 103, 227).

The description in this book of pioneer life in Nebraska is interesting. One realizes the extent to which the change from frontier conditions to urban civilization took place during Pound's own lifetime and before his very eyes. The importance attached in Pound's writings to this transition can thus be better understood. It is true of Pound, the outstanding American legal philosopher, just as Woodrow Wilson said of Jefferson, the outstanding American political philosopher, that his views were not based upon the writings of foreign theoreticians but were formed as the result of his own personal experiences of American life.

Many readers will also be surprised to learn that Pound's own legal education was limited to one year at Harvard (1889-90). Perhaps it is because he was not a law school graduate (p. 306) that Pound, like Mr. Justice Jackson, has been so wise and dependable a lawyer.

Pound's debt to other writers, notably E. A. Ross, the pragmatists, and von Jhering must not be ignored, however. No mention is made of Ross in this biography. Sayre's assertion that "the creation of social interests as an accepted ... part of the law has been the work of Roscoe Pound" (p. 359) brings to mind the character in Molière who regarded prose as a novel discovery.

The critical comments herein expressed are not to be considered as depreciating in any way the value and usefulness of this book. It contains much interesting information about Pound. For this reason, it will be read not only by Pound's old students, but also by many other persons interested in American law, and they will derive benefit and pleasure from it. The public will be grateful for the care and effort devoted by the author to the task of gathering this material.

It would have been preferable, however, if more of Pound's correspondence had been published in full, and less of the author's own philosophizing had been included (especially in Chapter XIII on Pound as a jurist). Attention should be particularly called to the Pound-
Holmes letters (pp. 267-286) and the correspondence with the Hershey family (pp. 10, 79-85, 111-115, 291-305). During his years as a student at Harvard, Pound and Omer F. Hershey of Baltimore had become good friends. After quoting a letter from Pound to Hershey written in 1895 which speaks eloquently and appreciatively of this friendship, Sayre says, “A passage like that leaves me exhausted” (p. 85). Such exhaustion is a peril which readers of the book would willingly have encountered oftener.

It would also have been preferable if the extracts from letters about Pound to the author from various individuals which he prints at the end of his chapters had been identified by name and date, instead of being presented anonymously (p. 11). Indeed it is often not clear whether it is the author or a correspondent who is speaking in a particular paragraph of the text. The proofreading in the volume has also been amazingly slipshod. By actual count there are not less than 95 instances of typographical errors or misspelled words. It is most distracting, e.g., to read of Pound’s dislike of “hypocrisy,” his flaring forth to China like “Tenneyson’s Ullyses,” or to see worthies of the law designated as “Grocius,” “Savigne,” “Storey,” “Kelson,” and “J. Mitchell Palmer” (pp. 389, 383, 367, 375, 257, 365, 216).

The volume of essays in honor of Dean Pound was planned for the occasion of his seventy-fifth birthday on October 27, 1945, but because of wartime publication difficulties could not be issued until later. Thirty-eight essays are included, most of them dealing with some phase of legal philosophy. One is a biographical memoir by Albert Kocourek on “Roscoe Pound as a Former Colleague Knew Him”; and one is a treatment by Edwin W. Patterson of “Pound’s Theory of Social Interests.” These are the only papers relating directly to Pound’s own work, though Thomas A. Cowan’s account of “Legal Pragmatism and Beyond” refers to Pound’s thought.

and Untruth in Morals and Law” by Giorgio del Vecchio of Rome, a noted natural law advocate. Julius Stone of Australia writes about “Fallacies of the Logical Form in English Law.” A timely theme is Mitchell Franklin’s “The Legal System of Occupied Germany”; while Max Rheinstein pertinently asks “Who Watches the Watchmen?” Several writers deal with the distinction (vel non) between law and fact. In sum, the volume is an intrinsically valuable contribution to the field of jurisprudence, in which Dean Pound so eminently labored, as well as a noteworthy tribute to his personality and influence on the development of legal science in America and abroad.

The two publications here reviewed constitute a substantial contribution to the literature relating to a major figure in the life of the law, and Mr. Sayre deserves congratulation for having brought them forth.

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BOOKS RECEIVED


