CONFLICTING CLAIMS TO GERMAN EXTERNAL ASSETS

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GERMAN assets abroad were seized or put under special wartime controls by many nations under many different systems of law and administration. These external assets of German enemies are now to be applied against reparation claims.

The German external investment, in part by design, took the form of elaborate structures reaching through many countries, some neutral during the war, some invaded by Germany, and some free of German occupation. The disposition of these assets involves extremely complex problems arising out of the conflicts of jurisdiction, conflicts of law, varying power of enforcement and varying time of effectiveness of the many systems of control involved. To permit an orderly resolution of these conflicts and an amicable settlement of this vast bankrupt estate, several agreements have been negotiated. An agreement achieving some measure of technical detail has been drafted by a Committee of the Inter-Allied Reparation Agency at Brussels.¹

BACKGROUND OF THE AGREEMENT

Yalta declared the obligation of Germany to pay reparation.² Potsdam divided the world into two zones for reparations purposes.³ One share

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¹ The text of the Agreement and a summary of its main provisions will be found in Maurer and Simsarian, Agreement Relating to the Resolution of Conflicting Claims to German Enemy Assets, 18 DEP'T STATE BULL. 3 (1948).

² United States Economic Policy Toward Germany, DEP'T STATE PUBLICATION 2630, app. b, at 53-54 (1946).

³ Id., app. e, at 83-85.
was allocated to Russia and Poland. Reparation claims of all other countries were to be met from the western zones of Germany and from appropriate German external assets. At Paris, an agreement was reached for the distribution of these western zone reparations and the appropriate German external assets. The Paris Agreement became effective January 24, 1946. It was signed by 18 countries—10 European allies, 6 members of the British Commonwealth, Egypt and the United States. The signers do not include the neutrals, with whom, however, special negotiations on German assets were undertaken (Part I, Article 6C) nor the other American Republics (with whom the United States undertook further negotiations) nor China. The Paris Agreement created an Inter-Allied Reparation Agency whose seat is at Brussels. It provided an elaborate system of quotas for various categories of reparations, and directed that each signatory “shall, under such procedures as it may choose, hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control and shall charge against its reparation share such assets” net of certain deductions.

The disposition of German external assets was thus allocated to the signatory country within whose jurisdiction they are found. In the case of German enemy owned real estate in the United States, for example, the United States is to deal with the property so as to eliminate German control and account for the property. Suppose, however, that pulpwood was shipped to Canada just before the war from Norway in a Greek vessel. The outbreak of war forced the vessel to unload in a British port. The pulpwood was owned by a Danish subsidiary of a corporation organized in Germany and the bill of lading was pledged to a New York bank and is actually in the hands of the New York bank’s Canadian correspondent. The German company is in fact partly owned by Belgian and French interests. Jurisdiction can be claimed on substantial grounds by half a dozen countries. This example is, of course, made up to illustrate some of the kinds of conflicting jurisdiction that may arise. Actual cases, however, are far more complex and are numerous.

To resolve such conflicting claims to German enemy external assets

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4 Id., app. h, at 105.
an Agreement Relating to the Resolution of Conflicting Claims to German Enemy Assets has been drafted by the Committee on German External Assets of the Inter-Allied Reparation Agency and submitted for the consideration of Member Governments.\(^7\) The Agreement has now been signed by the Netherlands, by Canada, by the United States (subject to approval and with a reservation of one case), by Belgium, by Luxemburg and by Denmark. The adherence of these six countries, when completed by notification of approval or ratification, will be sufficient to bring the Agreement into effect among themselves and such other Member Governments as wish to adhere within the next six months after the effective date. The adherence of the United States is subject to appropriate Congressional consideration.\(^8\) The Agreement will be recommended by the Executive Departments.

**Outline of the Agreement**

Preliminarily it should be noted that the systems of custodian control in the various countries are markedly different. The Agreement covers all these various forms of control. In the United States the controls chiefly contemplated are vesting, supervision or blocking by the Alien Property Custodian and Foreign Funds Control, or by the Attorney General, as their successor. In other countries, various forms of centralized or decentralized sequestration, intervention, confiscation, seizure or regulation may be involved. In general, the agreements are to be effectuated by a

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\(^7\) The Committee report was approved by the Delegates of the United States, Canada, Belgium and the Netherlands. The Delegates of the United Kingdom, France and Yugo-

\(^8\) In April, 1948, the Department of State communicated with the President Pro Tem of the Senate and the Speaker of the House, forwarding the Agreement for consideration, together with proposed implementing legislation. The proposed legislation was introduced in the 80th Congress by Senator Vandenberg as S. J. Res. 233, and referred to the Senate Foreign Relations Committee although the Congress adjourned without action on the measure. On the recommendation of the Department of State similar legislation was reintroduced in the 81st Congress, as H. J. Res 294, by Mr. Kee, and referred to the House Foreign Affairs Committee. It was not reached for action, however, prior to the close of the session.
withdrawal of actual or potential controls by one or the other conflicting claimants.

The Agreement consists of a covering document of eight Articles and an Annex of six Parts containing 40 Articles. The substantive provisions are contained in Parts I through IV of the Annex. The adjective provisions (procedure, technical clauses and interpretative clauses) are contained chiefly in the covering document and in Parts V and VI. We shall consider first the substantive provisions.

**Substantive Provisions**

Part I deals with certain forms of intangible property owned by German enemies, including securities, currency, commercial paper and bank accounts.

**Securities**

Suppose that U. S. Steel stock has been bought by a German enemy over the Amsterdam Stock Exchange and that the stock certificates are found in a bank in Amsterdam. Under the Trading with the Enemy Act, the United States Alien Property Custodian is authorized to seize the shares of stock as enemy-owned on the books of U. S. Steel and to require the cancellation of the old stock certificates and the issuance of new certificates to him. The Paris Agreement authorizes the United States to hold and dispose of German enemy property within its jurisdiction. Jurisdiction in the sense of power is plainly in the United States. The United States does have power to require an American corporation to recognize its title and the paper physically present in Amsterdam is

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9 The Trading with the Enemy Act was enacted October 6, 1917, 40 Stat. 411. It has been amended many times and now appears as 50 U. S. C. App. §§ 1-39. Section 39, providing the ultimate disposition of German and Japanese assets seized under the Act, was added by § 12 of the War Claims Act of 1948, 62 Stat. 1246.

10 40 Stat. 416 (1917), as amended, 40 Stat. 1020 (1918), 50 U. S. C. App. § 7(c) (1946); Great Northern Ry. Co. v. Sutherland, 273 U. S. 182 (1927); Silesian American Corp. v. Clark, 332 U. S. 469 (1947). Disconto-Gesellschaft v. U. S. Steel Corp., 267 U. S. 22 (1925), sustained, as against the enemy, a seizure by the British Public Trustee of shares of a U. S. corporation owned by the enemy and represented by paper in London. The Court expressly reserved the case where a seizure had also been attempted by the U. S. Alien Property Custodian, as in Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft, 283 Fed. 745 (2nd Cir. 1922). Schrijver v. Sutherland, 19 F. 2d 688 (D. C. Cir. 1927) sustains a vesting by the U. S. Alien Property Custodian of shares of a U. S. corporation represented by paper in Amsterdam which had been bought from the enemy by neutrals before vesting but after the outbreak of war.

11 Paris Agreement, supra, note 6, Part I, Art. 6A.
substantially valueless without power under American law to obtain its recognition by the American corporation. Moreover, wherever the paper may be located, the shares represent interests in American corporations. If they are enemy-owned they represent enemy influence in our economy. We are entitled to eliminate that influence and have a duty under the Paris Agreement to do so.

A strong argument can be made, however, for recognition of a vesting of the certificates by the Netherlands. The paper is physically present there. Commercial usage treats the paper for most purposes as the embodiment of the property. This is true even under American law, where, for example, the Uniform Stock Transfer Act prescribes that title to shares be transferred by delivery of the certificate endorsed or accompanied by a written assignment. A certain mass of American shares, moreover, were regularly traded over the European exchanges, notably over the Amsterdam Exchange. Such shares formed a part of the Netherlands economy, notwithstanding the fact that some of these shares came to be held by Germans.

The Intercustodian Agreement recognizes, in the case given, the jurisdiction of the American Custodian and requires the Netherlands authorities to release the certificates to him. The solution is sound in principle. It is worth noting, however, that it represents a sacrifice by the Netherlands Government of a position it might well have maintained on practical grounds. Notwithstanding the theoretical power of the United States Custodian to vest and enforce his vesting, in a great mass of cases the United States Custodian cannot learn which shares are in fact enemy-owned without the assistance of the Netherlands authorities. This is so because American securities, although registered in form, are often treated as bearer instruments. In this country, in order to facilitate trading, they may be registered in street names—brokers who act as standing nominees while the shares pass from hand to hand over the exchange. When American shares circulate in Europe, they are often registered in the names of Dutch administration offices. These institutions hold title to shares of particular issues and issue their own bearer instruments which entitle the holder to obtain on demand a corresponding number of the underlying securities. It is probable that a much greater

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12 Agreement Relating to the Resolution of Conflicting Claims to German Enemy Assets, Annex, Part I, Art. 18, 18 DEP'T STATE BULL. 3 (1948). This Agreement is hereinafter cited as Agreement. References are to the Annex, rather than to the covering document, unless the contrary is indicated in the context.
volume of American shares circulate in Europe in these ways than European bearer securities in this country.

Currency and Commercial Paper

A solution similar to that provided for securities is reached with respect to currency and to negotiable instruments representing promises to pay money.\(^{13}\) The considerations applicable to securities are in general applicable to these forms of property also. American dollar bills found in Albania, if owned by a German enemy, are to be returned to the United States. A promissory note of a resident of Czechoslovakia, if found in Egypt and owned by a German enemy, is to be turned over to the Czechoslovak Custodian.\(^{14}\)

In the case of negotiable instruments representing property, such as warehouse receipts and bills of lading, commercial usage recognizes these instruments as for many purposes representative of the property. Suppose, for example, pulpwood has been shipped from Norway to Canada on the eve of the war and is represented by a negotiable bill of lading or a negotiable warehouse receipt which is found in the United States and is determined to be enemy-owned. Physical control of the property is in Canada and the Canadians, no doubt, have used the property during the course of the war and hold its proceeds. The United States can claim jurisdiction to the warehouse receipts, which in commercial usage represent the pulpwood, but the warehouse receipt is, of course, actually valueless without recognition by Canadian law. The solution reached in this case is to recognize the jurisdiction of Canada where the underlying physical property is located.\(^{15}\)

Foreign Currency Accounts

A more difficult problem is presented when German enemies have opened bank accounts, say, in Luxemburg, in foreign currencies, say, sterling, covered by sterling accounts maintained by the Luxemburg bank in London. As a general matter the German enemy, of course, is not considered as having a direct interest in the sterling cover account in London, since his relationship to his own bank is that of creditor and debtor and his bank in turn is the creditor of the London bank.

\(^{13}\) Agreement, Part I, Art. 2 and 3.

\(^{14}\) The names of the countries used in the examples are chosen purely for convenience. It is understood, of course, that Albania, Czechoslovakia and Egypt, for example, and several other countries named in the illustrations have not at present signed the Agreement.

\(^{15}\) Agreement, Part I, Art. 4.
Many such foreign currency accounts arose as part of a conscious effort by German enemies to cloak their interests abroad. Other such accounts arose out of income obtained on German investments abroad. For example, a German enemy owning property in the United Kingdom may have directed that the income be paid to the account of the Luxemburg bank in London, obtaining as a result sterling credit with his Luxemburg bank. In many cases the German enemy regarded the cover account as, in a practical sense, his, and may not even have been conscious of the technical mechanics by which the account was set up. These facts tend to support vesting by the country where the cover account is maintained.

On the other hand, European banks in certain countries maintained for their own account substantial sterling and dollar balances abroad and made them available to their customers. In these situations, it may fairly be argued that the foreign currency balances of such banks are part of the economy of the country in which the bank is located and that that country should be entitled to vest the enemy interest.

Strictly speaking, either result might be argued for in individual cases in accordance with the precise terms of the contract of the customer with the bank. In some cases, the customer is named on the account, can draw directly on it, assumes risks of loss with respect to it. These details vary from country to country and bank to bank. Consideration of individual cases, however, would be administratively very burdensome. This extremely difficult problem was resolved by a rough compromise giving 50% of the cover account to the country in which the cover account was maintained and 50% to the country in which the primary bank is located regardless of the form or precise terms of the accounts involved. However, funds in a cover account identifiable as the income from German enemy property or the proceeds of liquidation of German enemy-owned securities in a custody or deposit account may be retained. This solution will probably result in the acquisition of a substantial volume of property for the United States which, as a practical matter, it could not have obtained without the information and assistance of the other participating countries.

**Estates and Trusts**

Part II of the Intercustodian Agreement deals with estates and trusts under which a German enemy has an interest. Note that this Part does not apply if the decedent is himself an enemy. In that event no solution

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16 *Agreement, Part I, Art. 5.*
is afforded. Such cases, however, if they give rise to conflicting claims can probably be better resolved on a case-to-case basis than by an attempt to lay down a general formula. Suppose then that a Canadian dies domiciled in Canada leaving heirs in Canada, New York and Germany. And suppose further the Canadian decedent left real and personal property in Canada, New York and the Netherlands. Normally a principal administration would be formed in Canada with ancillary administrations in New York and the Netherlands. In order to facilitate normal administration, the Intercustodian Agreement provides that custodian controls of the United States and Netherlands shall be released; thus the United States and Netherlands custodians forego their claims to the German interests in the property in their jurisdictions in favor of the Canadian custodian.  

In some measure, these sacrifices will be reciprocal. Each country will gain in some cases, lose in others and the gains and losses may balance out.

The release of control does not imply a turnover of property nor a disregard of the laws of estate distribution. The United States Custodian surrenders his claim, but the state laws of New York are unaffected. The protections afforded by those laws to local creditors remain. The protection afforded by Netherlands laws to those who are heirs as of right or the analogous protections of New York law for the widow and children, to the extent that they are assertible in ancillary proceedings, remain unaffected. It is the net product of ancillary distribution that is remitted in accordance with normally applicable law to the domiciliary administration, Canada, where the Canadian Custodian will claim the German enemy interest. The United States and Netherlands Custodians merely waive their power to prevent this normal disposition. Occasionally, however, the ancillary administration may distribute directly to the heirs instead of remitting to the domiciliary administrator. This may be done, for example, if there are local heirs, for their convenience. In such a case the German enemy interest might escape control. It is accordingly provided in such cases that the releasing party shall take appropriate action to assist the other party in obtaining the German enemy share.

The United States, for example, if requested by the Canadian authorities, instead of refraining from vesting might vest and remit to the Canadian Custodian. Existing power under United States law to take such action is doubtful, but appropriate ratification of the Intercustodian Agreement would confer or confirm the power.

17 Agreement, Part II, Art. 7A.
18 Agreement, Part II, Art. 7A.
These rules are inappropriate in the case of real estate, since real estate is immovable situated in one country and is not subject to remission. Real estate does not, properly speaking, "form part of the estate" of the decedent, under typical American decedent's estate laws. It passes automatically to the heirs. It is doubtful, moreover, that many countries would agree, without strong grounds, upon a solution that involved the acquisition of interests in real estate in their territories by other countries. In the case of real estate, accordingly, it is expressly provided that the interests of German enemies in real estate may be retained by the country in which the real estate is located.\textsuperscript{19}

In the case of a trust administered under the laws of one country, say, the United Kingdom, but holding property in another, say, Belgium, provisions roughly parallel to those for a decedent's estate are made.\textsuperscript{20} These provisions are not obligatory if the trust was established by a person who was a resident of Germany or who was or later became a German enemy.

\textit{Tracing Enemy Interests through Corporate Holdings}

Part III of the Agreement relates to enterprises in one country (the "primary" country) owning property in another country (the "secondary" country). Suppose for example, a Netherlands corporation owns 51\% of the stock of an American corporation. If there is an 80\% German enemy interest in the Netherlands corporation, we may assume the Netherlands Custodian will vest it. Meanwhile, the United States Custodian may have vested the stock here on the ground that it is indirectly enemy-owned or controlled. Should the United States Custodian retain that interest? The question is more fundamental than that previously discussed with respect to German-owned securities. There is conflict not only as to which country has jurisdiction over the enemy interest but whether there is an enemy interest in the American corporation at all. Technically, the Netherlands corporation is a separate entity. Its nationality is governed by the laws of its incorporation and not by its ownership or control. The 51\% interest in the American corporation can be considered in this sense Dutch-owned, not German-owned. There is precedent in the field of international private claims for refusing to look through the corporate entity. This view, however, is entirely out of keeping with the spirit and purpose of Trading with the Enemy Act legislation and of

\textsuperscript{19} \textit{Agreement, Part II, Art. 7B.}

\textsuperscript{20} \textit{Agreement, Part II, Art. 8.}
the Paris Agreement. It is essential, for these purposes, that indirect enemy interests be recognized.\textsuperscript{21} On the other hand, to treat the interest in the American corporation as wholly German enemy because it is indirectly German enemy-controlled does injury to the 20\% non-enemy interest in the Netherlands corporation.

The solution adopted allows for the interests of the non-enemy investors by treating as enemy only the proportional enemy share of the American participation.\textsuperscript{22} On the assumption that the enterprises are without creditors, this would mean that the American Custodian would be entitled to regard as German enemy assets in his country, 80\% of 51\% of the United States corporation, and would be required to regard as non-enemy 20\% of that 51\%.

Having determined this question, we are faced next by the question of the form in which the enemy interest should be taken. The United States Custodian might keep his share in kind and surrender the balance for the benefit of the non-enemy interests in the parent company. Since the purpose of the release is precisely to benefit the non-enemies, the Netherlands Custodian would be expected to take no share but arrange that the entire amount released go to the non-enemy interest. This solution of retention of the enemy share, and release of the non-enemy share for the sole benefit of the non-enemy interest is provided for but only as an exceptional device.\textsuperscript{23}

Similarly, the United States Custodian might keep the entire property but compensate the non-enemy interests in the parent company for their share. Money compensation, however, does not afford satisfactory relief to the non-enemy interest nor does it satisfy the primary country’s desire to maintain its properties abroad as going concerns. This solution is, therefore, adopted only in those cases in which the secondary country (in the example that would be the United States) determines that its national security \textit{requires} that it maintain its own control over a German-controlled production property. In reaching this conclusion, the secondary country is to give full weight to the economic interests of the primary country.\textsuperscript{24} The kind of cases in the United States in which the necessity for such retention in kind may be found are suggested by the cases which the United States Custodian has already designated as “key corporations”


\textsuperscript{22} \textit{Agreement}, Part III, Art. 12.

\textsuperscript{23} \textit{Agreement}, Part III, Art. 15.

\textsuperscript{24} \textit{Agreement}, Part III, Art. 13.
subject to special controls against renewed German interests. These are General Aniline & Film Corporation, in the field of dyestuffs, photographic materials and other specialized fields of organic chemistry, American Bosch Corporation, in the field of fuel injection and ignition equipment, Schering Corporation, leading manufacturer of hormones, North American Rayon Corporation and American Bemberg Corporation, substantial producers of rayon yarn. The power is restricted to exceptional cases even though it remains subject to the secondary country's final determination.

As a final method of adjusting the conflicting interests in the American corporation, in accordance with the basic approach of the Agreement, the United States Custodian might surrender the entire interest. This release enriches the stockholders of the Netherlands corporation including the Netherlands Custodian. The Netherlands Custodian would then be required to compensate the United States Custodian to the extent of the indirect German enemy interest in the property released. Substantial arguments support this procedure as the normal method. In general, business assets have greater value as part of a going concern than when severed from their parent enterprise. Accordingly, release in kind against compensation results in a larger ultimate realization on the seized enemy interest. The assets released, moreover, will have a greater value to the non-enemy interest in the parent corporation than they have to the United States Custodian. Moreover, the parent enterprise will most often be located, as in the example, in countries having foreign exchange problems. Assets abroad in kind have for such countries a special value they do not have for the secondary country (the United States). This method of release against reimbursement is laid down as the basic solution.

Where the capital structure of the enterprise involved is more complex than the simple case of the creditorless corporation, problems arise as to the appropriate formula for the determination of the percentage of German enemy interest. No formula is embodied in the Agreement. A sound, workable and accurate test would have been the following: The percentage of German enemy interest is represented by the total value of the German enemy net equity plus the total German enemy creditors claims, all divided by the total net equity plus the total creditors claims:


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\frac{\text{German enemy net equity} + \text{German enemy creditors claims}}{\text{Total net equity} + \text{Total creditors claims}}
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If this test is more refined than is sometimes necessary or useful, it is open to the parties to waive refinements. The existence of the precise formula would afford assurance that a solution is available if the parties do not agree on some simpler test to fit a particular case.

Instead of a standard formula, the Agreement permits the parties to agree upon the method of calculating the percentage of direct and indirect German enemy interest. Until agreement is reached, the secondary country need not release. The United States is most often a secondary country and under this provision it will be entitled, if it wishes, to call for the substantial adoption of the formula stated above, in its own cases, even if other countries among themselves decide not to do so. Among the questions left open for possible bilateral settlement is such a question as the method of valuing option rights.

The solutions discussed presuppose a straightforward German investment carrying control. If the Netherlands corporation is merely a cloak, it is to be disregarded. The American Custodian will vest the property in America as German-owned, without reimbursement or adjustment. On the other hand, if the German interest in the Netherlands corporation does not in fact carry with it control, the American Custodian is to release the property in his country without reimbursement. This eases the task of administration without raising serious problems of national interest or value of property at stake. The corporate entity is disregarded not only in the case of a dummy corporation but also in the case of a holding corporation whose stock is closely held or not regularly traded in a recognized financial market.

The definition of German control supplied by the Agreement is realistic and marks a noteworthy advance on previous efforts. It includes cases in which German enemies held 50% or more of the voting rights or proprietorship interests. It also extends to cases in which German enemies directly or indirectly controlled policy, management, voting power or operations, regardless of percentage holding. In addition, it is recognized that the property in the secondary country may be German-controlled if German enemies controlled the policy, management, use, or operation

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28 Agreement, Part III, Art. 12.
29 Agreement, Part III, Art. 16.
30 Agreement, Part III, Art. 11.
of that property, regardless of whether they controlled the parent enterprise. Such cases may arise, for example, through contract relationships, patent pressures or dependence on foreign research, executive personnel relationships, or through the sapping of independence resulting from cartel arrangements. The definition is much broader than the test formerly applicable under the United States Trading with the Enemy Act, which disregarded control altogether. This stultifying test has only recently been repudiated by the United States Supreme Court. It is broader than most international private claims definitions of control. It is narrower than the sweeping test laid down by the United States Foreign Funds Control, which would treat as German, for example, any enterprise in which there is a substantial German interest, say 25%. This foreign funds control test was a dragnet laid down as a unilateral cautionary device with full awareness that it would often be too inclusive. It is appropriate for its own purposes but not for the adjustment of conflicting claims of several governments. The Agreement lays down a test between these extremes, simple enough to be workable but flexible enough to deal with the complex cases that will in fact arise.

Tracing Non-Enemy Interests

Part IV of the Agreement relates to property owned by enterprises organized under the laws of Germany. Suppose that assets in Yugoslavia are owned by a corporation organized in Germany in which Swiss or Belgians own 80% of the stock. We have just seen that in Part III the corporate entity is disregarded and Germany enemy interests are traced through the corporation in which they hold stock. Shall non-enemy interests similarly be traced through the corporation? In other words, is the Yugoslav Custodian entitled to regard such property as German enemy-owned because owned by a German corporation or should he recognize that such property is indirectly non-enemy controlled?

33 Exec. Order No. 8389, as amended, 5 Fed. Reg. 1400 (1940), as amended, 6 Fed. Reg. 2897 (1941), and by numerous other Executive Orders. A compiled text of this Executive Order, as amended, has been printed in Documents Pertaining to Foreign Funds Control (U. S. Treas. Dep't 1946), and in Trading with the Enemy Act, As Amended (Government Printing Office 1948).
34 See, e.g., Administration of the Wartime Financial and Property Controls of the United States Government pp. 6, 27, 29, 32 (Treas. Dep't 1942).
It may be noted preliminarily that a very similar question was raised at the time the Paris Agreement was written. A non-unanimous resolution signed by nine countries, including Belgium and Yugoslavia, expressed the view that the burden of reparation should fall on the German people and that accordingly property in Germany belonging legitimately to a United Nation or its nationals, whether wholly owned or in the form of a shareholding, should so far as possible be excluded from the part of German property considered to be available as reparation. A floor for the percentage of share-holding required for such recognition of non-enemy interests was set at 48%. This resolution was not adopted, however, as part of the Paris Agreement and the question remained open for further consideration.

The problem is a difficult one. Non-enemy shareholders in German corporations have taken certain entrepreneurial risks. Among these risks are those to which the German economy in general was subject. They stood to have the advantage of favorable development of the German economy and to suffer the losses which might befall the German economy as a whole, including the injuries resulting from war. From this point of view they have nothing to complain about if they suffer a loss in their investment resulting from wartime seizures of the enemy corporation’s external assets. As a matter of law they would have no interest in the assets owned by their corporation. This is true as a matter of American private corporation law, as a matter of private corporation law of the European countries generally, and it has precedent in the international private claims field. They have made their investments available, moreover, for the use of the German economy as part of the total war potential of the German Government and from the point of view of policy therefore it may not be inappropriate that they should take the burdens to which the German economy generally is subject.

The Paris Resolution referred to above, however, is plainly on sound ground in stating that the burden of reparation was intended to fall on the German people, and not on the non-enemy investor. The non-enemy investor contributed support to the German economy at a time when it was entirely lawful to do so, and when in fact such investment was encouraged by the United States and other governments in the interests

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35 Paris Agreement, Annex, Resolution 3, in United States Economic Policy Toward Germany. Dept State Publication 2630 at 125 (1946). The signatories of this Resolution were the Delegates of Albania, Belgium, Czechoslovakia, France, Greece, Luxembourg, The Netherlands, Norway and Yugoslavia.
of the world economy. He counted on the protection in case of need of his own government. The United States has traditionally sought to protect the legitimate interests of its investors abroad. The question is not one that should appropriately be governed by legal technicalities. Accordingly, the Agreement makes provision for the recognition and protection of non-enemy interests in German corporations which have external assets.36

This protection under the terms of Part IV would not be accorded to the Swiss investor (assuming that Switzerland does not become a party) but it would be accorded to the Belgian investor since Part IV is limited to the protection of the interests in the enterprises of non-enemy nationals of Parties to the Agreement. Part IV goes beyond the Paris Resolution by affording recognition to interests as small as 25% in the aggregate or which, regardless of amount, constituted control of the corporation. No relief is provided where the non-enemy interests are creditor interests only. If the requisite non-enemy share interest is present, however, creditor interests may seek relief as well. Although the provisions of Part IV establish certain limits to the protection afforded they do not shut the door to diplomatic representations in other cases that appear meritorious. It may be noted that nothing in the entire Agreement confers rights on a private party to prosecute a claim against his government or another government in a court or administrative tribunal. Part IV, in particular, expressly provides that claims may be presented only if sponsored by the appropriate government.37

Existing Trading with the Enemy Act legislation in the United States authorizes the tracing of non-enemy interests in corporations organized in Germany only in the extremely limited case in which all of the stock of the German corporation is held by Americans. In that event a return may be made to the American interests provided that the claimants shall succeed to obligations lawfully assertible against the enterprise by persons who would themselves be eligible for returns (that is, loosely speaking, by non-hostile persons).38

PROCEDURAL PROVISIONS

We have considered so far the substantive Parts of the Agreement. These are Parts I through IV of the Annex. Part I relates to securities,
currency, commercial paper and bank accounts owned by German enemies. Part II relates to interests owned by German enemies in non-enemy estates and trusts. Part III relates to German enemy interests traced through non-enemy business enterprises. Part IV relates to non-enemy interests traced through German corporations. The full meaning of the provisions of these substantive Parts can be seen only in the context of the adjective provisions of the Agreement. These are set forth principally in the Agreement proper and in Parts V and VI of the Annex. The adjective provisions are of exceptional interest and include a number of dispositions even more controversial than the substantive Parts of the Agreement and some significant new advances in the amicable settlement of international disputes.

The Agreement proper consists of eight Articles. Article 1 provides that the Parties "shall be guided as far as possible" by the provisions of the Agreement and Annex and shall take such action as may be necessary and appropriate to give the Agreement effect. Thus, the Agreement is not an arm's length, rigidly binding contract. It is intended to set forth an approach to the problems to be solved and it leaves room for liberal construction of the Agreement in the light of its purposes—presupposing mutual good faith and good will. It may be noted that if national legislation does not permit the full carrying out of the Agreement, appropriate new legislation will have to be proposed. The Agreement does not mean, however, that the national legislation is automatically to be deemed amended. In view of the complexities of the various national legislations, an attempted automatic amendment would only provoke confusion.

Articles 2 and 3 provide for separate agreements by Parties. Agreement between Parties must not adversely affect the rights under the Agreement of other Parties. Agreements by Parties with non-Parties hereafter entered into must not adversely affect such rights and those already entered into are to be modified if agreement can be obtained to harmonize them with the present Agreement. Examples of the kinds of separate agreements to which these provisions may be relevant are the agreement permitting countries whose assets are blocked under United States laws to obtain the release of such assets through certification of the freedom of enemy interest therein. A series of bilateral agreements have also been entered into between the United Kingdom and several other countries. The United Kingdom, Canada and the United States in 1945 entered into a joint declaration of policy covering many points

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39 Available for inspection in the Office of the Secretary, Office of Alien Property.
now governed in a different way.\textsuperscript{40} This instrument will no doubt be reviewed. These provisions also cover agreements settling particular cases such as the agreements entered into in August 1947 by the United States, the Netherlands and the Algemeene Kunstzijde Unie (Netherlands General Rayon Union) making a final settlement of conflicting claims with respect to the AKU holdings in the United States.\textsuperscript{41} That settlement, in anticipation of the present Agreement, expressly provides that any claim of other governments arising under a IARA Agreement shall be satisfied by the Netherlands Government.

Article 4 provides for settlement of disputes through negotiation and if necessary through conciliation by members of a permanent panel of conciliators set up by Part VI of the Annex. As will be pointed out below, this is an unusual and important provision.

The Agreement comes into effect when signed prior to September 1, 1948 by countries entitled to 35 percent of Category A reparations (Article 5).\textsuperscript{42} The Netherlands, Canada and the United States are entitled to 35.4 percent.\textsuperscript{43} The Agreement remains open for other IARA member countries for six months after its effective date. If non-IARA countries should desire to adhere, their application is to be discussed by the Parties (Article 6). No country can be bound by an agreement with a non-IARA country without its own consent. If unanimous agreement is not reached, however, on the admission of a non-IARA country which should desire to adhere, it will be open to the remaining Parties to accept the non-member country in their own relationships. This would be subject, however, to the protection afforded the non-consenting country by Article 3. The principal non-member countries having custodial conflicts with member countries are Sweden, Switzerland and the Latin-American countries.

Adherence may be effectuated by notice as well as signing (Article 7) and the Agreement will be extended to such territories, colonies, mandated or trusteeed territories as a Party may declare in writing (Article 8).

\textbf{Interpretation and Application}

Part V of the Annex contains a number of miscellaneous provisions relating generally to interpretation and application. Other provisions on these subjects are contained in the substantive Parts of the Annex.

\textsuperscript{40} See note 39 \textit{supra}.
\textsuperscript{41} See note 39 \textit{supra}.
\textsuperscript{42} The time limitations on signatures have been once extended by mutual agreement and a further extension is anticipated.
\textsuperscript{43} \textit{Paris Agreement}, \textit{supra} note 6, Part I, Art. 1B.
Elimination of Enemy Interest

A basic requirement of the Paris Agreement on Reparations creating IARA was the permanent elimination of German enemy interests. This is assured, in cases of inter-custodian conflict, by a number of clauses of the Annex. Part V explicitly provides that a party is not obliged to release an enemy interest to another party (or to an enterprise in another party's territory) unless the receiving party will treat the interest as German enemy.

Suppose that shares of stock issued by a French corporation, represented by certificates found in Belgium, are claimed by both France and Belgium as German enemy owned property. Under Part I, France may call on Belgium to release the shares. On the other hand, if France asserts that the shares are owned by a non-enemy Frenchman, while Belgium asserts that the owner is a German enemy, a release by Belgium would not give assurance that any German enemy interest would in fact be eliminated. In order to claim the benefit of the Agreement, France would necessarily invoke Article I of the Agreement which relates only to German enemy assets and Article 1B of the Annex which relates to securities owned by a German enemy. The very title of the Agreement shows that it is intended to relate to German enemy assets. France could hardly claim the benefits of the Agreement since its claim rests on the assertion that the property in question is not German enemy. This is made unmistakable by the express provision that Belgium need not release except to the extent that France will treat the property as German enemy. Indeed, Belgium may properly decline to release, under a further provision, if France considers the property as German enemy but there are proceedings pending in France which may have the effect of preventing France from treating the property as German enemy. Even if such proceedings are brought after release and are successful, Belgium may recapture the property or its proceeds, if that is possible. And before releasing Belgium may ask for assurances that it will be able to recapture.

These provisions are reinforced by Part III of the Agreement which relates chiefly to the tracing of German enemy interests through corporate holdings. There the requirement of release is expressly conditioned on agreement as to the general limits of the German enemy interests and

44 Paris Agreement, supra note 6, Part I, Art. 6A.
45 Agreement, Part V, Art. 26A.
46 Agreement, Part V, Art. 26H.
as to whether the property itself or the owning enterprise is German controlled.\textsuperscript{47}

The provision requiring that enemy interests need not be released unless they will be regarded as German enemy has an interesting technical significance. We have assumed so far that property is either German enemy property or non-enemy property. But it may be neither. It may be Japanese, Bulgarian or Rumanian, for example. Satellite country interests and Japanese interests may be mixed with German interests. If Belgium releases the entire property and is reimbursed only for the German enemy interest, an unintended disposition of these other enemy interests will result. Problems of this sort are minimized by providing that Belgium may insist on assurances that all the enemy interests will be treated as German enemy interests.

Complete elimination of German enemy interests is further assured by express provision in Part V that cloaked property and any property held for the benefit of a German enemy shall be regarded as directly owned by that German enemy.\textsuperscript{48} If a French corporation held property in the United States as a cloak for a German corporation, there is no inter-custodian conflict. The property in the United States is German-owned and will be vested and retained by the United States Custodian. If the cloaked property is stock in a United States corporation having assets in Canada, there may be a genuine conflict between Canada and the United States, to be settled under Part III, but no conflict between the United States and France.

\textit{Material Date}

In view of the various dates at which controls of various countries took effect and the many changes in the status of property since the outbreak of war, the date as of which the facts are determined is very important. The Agreement first defines "wartime emergency measures" as measures for the control of German enemy transactions or property after September 1, 1939.\textsuperscript{49} Thus, war-time emergency measures of the United States include the freezing controls effective as to Germany on June 14, 1941, before the United States entered the war.\textsuperscript{50} The Agreement then defines "the material date" as the day on which the country called on to release property under Part III came into the war or took war-time

\textsuperscript{47} \textit{Agreement, Part III, Art. 12.}

\textsuperscript{48} \textit{Agreement, Part V, Art. 28.}

\textsuperscript{49} \textit{Agreement, Part V, Art. 34(ii).}

\textsuperscript{50} \textit{Exec. Order 8389, as amended, § 3(j), 5 Fed. Reg. 1400 (1940).}
emergency measures.\textsuperscript{51} This definition strictly applies only to Part III which relates chiefly to cases of German enemy interests traced through corporations. For Part I relating chiefly to securities and other intangibles, several crucial dates are specified for various purposes. For Part II, relating to estates, the date of war-time emergency measures is the crucial date. For Part IV, relating to the tracing of non-enemy interests through German corporations, the required conditions must be met both on September 1, 1939 and at the time of taking action.

An example will make clear the effect of these dates. Suppose a Norwegian corporation, partially German-owned, owns property in the United States. Norway came into war on April 10, 1940. The United States took war-time emergency measures on June 14, 1941. Under Part III of the Agreement, the American Custodian will release the property in the United States against reimbursement. Shares in the Norwegian corporation will have been traded in, however, after the German occupation. How will such trading affect the amount of reimbursement? If German enemies acquired shares from Norwegians, that may be a forced transfer which will be refused recognition in accordance with the Inter-Allied Declaration of January 5, 1943, against Acts of Dispossession.\textsuperscript{52} If German enemies sold shares to Norwegians, the transfer is one which the United States would refuse to recognize, as applied to the status of the American property, since Norwegian transactions were frozen by this country April 10, 1940.\textsuperscript{53} If the transfer occurred before June 14, 1940, however (the "material date" for the United States), it would be recognized in determining the percentage of German enemy interest in the Norwegian corporation, provided the Norwegian Government recognized the transaction. A Norwegian vesting, however, will not be considered as changing the German enemy character of the property.\textsuperscript{54}

If the property in the United States has been pledged, the Norwegian Custodian is required to recognize the pledge only in the altogether clear case where the pledge was made in good faith before April 10, 1940 and was valid under the Norwegian law as well as the United States law.\textsuperscript{55}

\textsuperscript{51} Agreement, Part V, Art. 34 (iii).
\textsuperscript{52} United States Economic Policy Toward Germany, Dept’l State Publication 2630, App. A, at 52 (1946); see Agreement, Part V, Art. 27B.
\textsuperscript{53} Exec. Order 8389, 5 Fed. Reg. 1400 (1940) was issued April 10, 1940. It freezes transactions involving Norway and Denmark as of April 8, 1940.
\textsuperscript{54} Agreement, Part V, Art. 29.
\textsuperscript{55} Agreement, Part V, Art. 26E.
The United States, however, is not required to take action to set aside the pledge if it is valid under United States law.

Administrative Provisions

For administrative convenience, it is provided that no act of liquidation need be reversed. Special provisions are contained in several substantive Parts making it unnecessary to release the proceeds of liquidation completed or income received, before specified dates. Otherwise, proceeds and income are to be released in accordance with the disposition specified for the property itself. Provision is made for dividing administrative charges and expenses and delivery costs and for indemnification for charges and expenses incurred by a country after releasing property. A Party may refuse to accept a release and is then relieved of liability for charges and expenses. Provision is also made for confidential exchange of information and for other forms of cooperation to give effect to the Agreement.

No Private Rights

It is expressly provided that the Agreement confers no rights on individuals against their own or another government in any court or administrative tribunal. Even where release of property is to be made to a national rather than to his government, the right to the release is conferred only on the government. The Agreement is, nevertheless, of interest to private parties, since it gives them important information as to the probable disposition of property in which they have an interest. It tells corporations which of several governments will probably hold its stock. It tells prospective purchasers which of several Custodians will probably offer the property for sale and, therefore, which of alternative methods of sale will probably be followed. It tells creditors of corporations whether they may likely be able to look to assets abroad for satisfaction.

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56 Agreement, Part V, Art. 26B.
57 Agreement, Part I, Arts. 1D and E, 2C; Part II, Art. 7C. To assure that acts of liquidation need not be reversed, liquidation is made an exception to the requirement for release in kind provided in Part III, Art. 13A(i) and Part IV, Art. 24A(i).
59 Agreement, Part V, Art. 26J.
60 Agreement, Part V, Art. 32.
61 Agreement, Part V, Art. 33.
**Complex Cases**

Certain of the cases in which inter-custodian conflicts arise are extremely complex.\(^{62}\) A chart of the *Stinnes* interests, for example, shows over 100 companies in over a dozen countries as well as in Germany. Any one of these properties may be owned through a channel of ownership which in some instances passes through four or five countries. In a case like *Metallgesellschaft or Vereinigte Stahlwerke* we find subsidiaries in some four or five IARA countries and parent companies which are in turn directly or indirectly owned in part by their own subsidiaries. There are, moreover, extremely intricate stockholding and debtor-creditor relations amongst the affiliates.

To meet such problems it is provided that in cases involving a chain of companies, releases of property and reimbursement payments shall be made on a step to step basis as between two countries.\(^{63}\) On the other hand, in calculating the percentage of direct and indirect German enemy interest in each of the successive primary countries such interests are to be traced through the entire chain of companies. Specific provision is also made with respect to the priority of application as between Parts I and III, where an enterprise owns commercial paper, for example, and as between Parts III and IV where the chain of companies is rendered more complex by the fact that the chain passes into and out of Germany. The solution of such problems is briefly that the provisions of Part III are to be applied after the results of Part I have been determined\(^{64}\) and the provisions of Part IV are to be applied only after the results of Part III have been determined.\(^{65}\) For example, where a chain of corporations passes into Germany and out again, a corporation organized under the laws of Germany is first regarded as wholly German for the purposes of a tentative Part III settlement. Only then are the non-enemy interests considered and given protection under Part IV. If some such arbitrary rule were not adopted, complex cases would prove unmanageable.

This step by step resolution assures the theoretical existence of a definitive solution to each case. It is not enough, however, to assure a practical approach to the problems of complex enterprises. In such cases, it is accordingly provided that a special committee may be set up

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\(^{62}\) The substance of this discussion of complex cases and conciliation techniques was contained in 3 Arb. J. (n.s.) 80 (Summer 1948).

\(^{63}\) Agreement, Part III, Art. 18.

\(^{64}\) Agreement, Part III, Art. 19; cf. Part I, Art. 2D; cf. also Part IV, Art. 25.

\(^{65}\) Agreement, Part III, Art. 20.
on which all the interested countries will be represented and that that committee shall make recommendations for the practical solution of the case.\textsuperscript{66} The powers of the committee are not set down. It may be presumed that they will be guided by the principles underlying the agreement but that they will seek through some kind of rough give and take to eliminate non-essential complications. It will moreover be open to them to adopt flexible administrative techniques required by the situation in each particular case. For example, an extremely complex case may sometimes be best solved by the establishment of a joint liquidating trusteeship. The committee may draft the terms of the trusteeship so as to protect special interests which may be found present and entitled to recognition. Again it may be found more in the interest of the parties that the enterprise be continued rather than liquidated and they may agree that an international holding corporation of some kind be established in which the various interested countries will accept equity or creditor positions in lieu of their claims to the underlying assets. Such a holding corporation may prove an effective device for settling complex conflicts. At the same time, it may afford an interesting experiment in the establishment of economic links directly among the United Nations in fields in which such links were formerly with Germany. The usefulness of the committees for complex cases is as yet untested but it may prove to be a novel and important development in international relations.

\textit{Conciliation}

Part VI provides a mechanism for the settlement of disputes relating to the interpretation, implementation or application of the Agreement. There is to be established a permanent panel of conciliators who will make their own procedural rules.\textsuperscript{67}

The conciliators are to be elected from nominees designated by the parties.\textsuperscript{68} This tends to assure the selection of qualified independent expert conciliators. It is a procedure familiar in the case of an arbitral tribunal but unusual in the case of conciliation. The range of powers of the conciliators is not defined but, like the powers of the special committees for complex cases referred to above, they are left flexible to fit the situations that may arise. Certain matters are reserved from the scope of conciliation.\textsuperscript{69} These are: whether in the opinion of the secondary

\textsuperscript{66} Agreement, Part V, Art. 31.
\textsuperscript{67} Agreement, Part VI, Arts. 35, 36.
\textsuperscript{68} Agreement, Part VI, Art. 35.
\textsuperscript{69} Agreement, Part VI, Art. 38.
country its national security requires the retention of the property and whether extension of the time for payment of reimbursement shall be permitted beyond seven years after the date of the release. One member of the panel will be assigned to any particular dispute not resolved within a reasonable time by negotiation. The services of the conciliators will presumably be available also in the negotiation stage of the settlement of any dispute before formal conciliation procedures are resorted to. This would be a matter for mutual agreement of the parties. If agreed upon, the conciliator would have the traditional function of trying to bring the parties together by investigation and report of the facts, development of possible compromises or other solutions, and persuasion of both parties. Once the formal conciliation procedure is invoked, however, the conciliator is authorized to make a final recommendation which will be binding on the parties. This provision is so untraditional as to raise some question whether the term “conciliation” is properly used at all. Traditionally, an arbitrator makes a binding determination while a conciliator’s recommendation is not binding.

An example from another field may help to make clear the distinction involved. A boundary dispute between nations may turn on questions of fact—discovery, exploration, occupation, the authenticity of old maps and grants—and on questions of law applicable to those facts. Such questions can be submitted to an arbitral tribunal or international court for a decision. The tribunal will determine the facts and apply its views of appropriate international law. Its decision will normally be binding. A different approach to the settlement of a boundary dispute would take into consideration the ethnic relations of the people living in the area, their economic relations, needs for access to ports and the like, the military defensibility of possible boundary lines and so on. These are not questions to which there are right and wrong answers but only more or less skillful, more or less imaginative solutions. Questions of this sort are ordinarily submitted to a conciliator rather than an arbitrator but the recommendation of the conciliator is traditionally not binding. When a matter is submitted on terms of reference permitting so broad

70 Agreement, Part VI, Art. 37.

71 For a very interesting account of the Venezuela-British Guiana Boundary Dispute, see Schoenrich, The Venezuela-British Guiana Boundary Dispute, 43 Am. J. Int’l L. 523 (1949). It there appears that General Harrison, one of the Judges appointed under the arbitration treaty, denounced as “iniquitous” a compromise decision which, it seems, might have been justified as the proposal of a conciliator, but which seemed inconsistent with the intended judicial character of the proceeding.
a range of consideration, parties are usually not willing to commit themselves in advance to accept the recommendation of the referee. The undertaking to be bound by the conciliator’s solution is a striking and promising innovation of the Agreement.

Although, under the Agreement, the conciliator’s recommendation is binding, he is not required to decide which of the parties to a dispute is correct. His function accordingly is not judicial in nature. He is required to find a solution which is in his judgment the best possible solution in the spirit of the Agreement. His function is thus rather administrative than judicial. He may invent new techniques for the solution of new problems. Experience shows that many disputes which seem very real to the parties but actually are verbal arise from a faulty statement of the issues and may be made to disappear through the adoption of a different administrative approach to the problem. Often, disputes arising out of head-on collision between two conflicting interpretations of a legal document may be eliminated by finding a new plane of agreement on which the real interests of both parties are served without conflict. The procedure set up by this Agreement challenges the ingenuity of the conciliator to find such bases for genuine reconciliation. The future of this method for the amicable settlement of international disputes is attended with a special interest because it represents a new development in international law consistent with the spirit of American initiatives in this area. Unlike accepted conceptions of arbitration it calls upon the conciliators to formulate solutions rather than to make decisions but unlike accepted conceptions of conciliation the solution formulated is binding upon the parties.

**Principles Underlying the Agreement**

As will have been seen, the solutions of the various problems dealt with in the Agreement in large part represent practical compromises of real problems where alternative solutions could reasonably be defended. In some cases a particular dispute was settled on some rough basis such as the 50-50 division of foreign currency cover accounts in Part I. In

72 In the drafting of the International Trade Organization Charter, there was presented on a broader plane, the problem of the resolution of conflicts requiring the finding of facts of a specialized economic character and the proposal of remedies resting on determinations of a mingled political and economic nature rather than on narrowly judicial determinations. The opposing approaches to this problem are vividly presented in Rubin, *The Judicial Review Problem in the International Trade Organization*, 63 Harv. L. Rev. 78 (1949).

73 Agreement, Part I, Art. 5.
other cases concessions were made on one point by some of the parties to balance concessions made on another point by other parties. Specific examples cannot readily be given but they are numerous. Underlying all of the solutions, however, is a general consensus on certain broad principles. These principles have for the most part not been expressly stated anywhere but they may be gathered from the clauses of the Agreement. That the parties believed that their solutions rested upon discernible principles and were not merely unprincipled compromises of particular disputes is suggested by the fact that the conciliator, in case of disputes, is to formulate a solution "in the spirit of the Agreement."

Elimination of Enemy Interests

The Paris Agreement expressly lays down as a chief goal for the treatment of German external assets the permanent elimination of German enemy influence as a threat to the national economic security of the participating countries.

We have just seen that the interpretative parts of the Agreement are carefully drafted to assure effective action to eliminate German enemy interests. The substantive parts of the Agreement are framed with the same goal in mind. This problem is most important in the case of corporate interests and we may, therefore, take as an example a case under Part III of the Annex relating to tracing German enemy interests through non-enemy corporations. In cases of corporate claims, the most effective elimination of the German enemy interest will generally occur at the point closest to Germany, that is to say in the parent company. Suppose, for example, there is a champagne selling agency or a ceramics selling agency in this country, owned by a French corporation which in turn is partly German owned. The German interest can, in general, be more surely established and more effectively dealt with by the French Custodian than by the American Custodian. Accordingly, the general rule is adopted that the subsidiary property shall be released by the United States Custodian to the parent corporation against money compensation for the enemy interest which will be dealt with by the French Custodian. Nevertheless, if the subsidiary asset is one having a vital bearing on the national security of the country in which it is found, that country is entitled to assure itself of its own control over the elimination of German enemy influence. Suppose, for example, the company involved was a valuable chemical manufacturer in this country owned by a French corporation.

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74 Agreement, Part V, Art. 37A.
which in turn is partly German enemy owned. We may safely assume that the French will make an effort in good faith to eliminate enemy control from the parent corporation and that is, of course, the principal and basic step for the elimination of enemy control from the subsidiary. Experience has shown, however, that enemy control can survive such action and its complete removal can be effectively accomplished only through controls exercised directly on the subsidiary assets. It has been found, for example, that Germany has maintained effective control of properties in this country through cartel arrangements, through personnel relationships, through the influence of patent holdings and research which exceed the formal control over the parent corporation. This is expressly recognized in the definition of German control contained in the Agreement which includes specifically the case where the policy, operations, use or management of the subsidiary assets are German controlled, regardless of the extent of its influence over the parent. Accordingly, provision is made that in cases of such importance as the chemical plant referred to above the United States may insist upon retaining control over the plant in the United States and make a money adjustment for the non-enemy interest. This decision is to be made in the sole discretion of the United States which is bound, however, to give full consideration to the economic interests of France before reaching its determination.

Protection of Non-Enemy Interests

A second principle of pervasive influence in the Agreement is the protection of non-enemy interests intermingled with enemy interests. Protection of non-enemy interests was not expressly stated as a principle of the Paris Agreement. Nine of the countries signing the Paris Agreement, however, joined in a resolution urging that the burden of reparation should fall primarily on the German people and accordingly providing for recognition for the interests of the United Nations and their nationals holding interests in German enterprises having assets in Germany subject to reparations seizures where such interests amount to more than 48%.75

The situation there contemplated is analogous to that covered by Part IV of the Annex, namely, where non-enemies held interests in German enterprises which in turn hold assets subject to taking as reparations. The solution contained in Part IV goes even further than the Resolution for it provides protection, so far as external assets are concerned, where the non-enemy interests are as little as 25% or where, regardless of percent, they amount to control over the enterprise. The same principle is implicit in the solution to the Part III case where, for example, assets in Czechoslovakia are partly or wholly owned by an enterprise in Denmark which is partly or wholly owned by Germans. The interests of the non-enemies are protected by limiting the secondary country (Czechoslovakia) to that percentage of the assets in its country representing the German enemy interest. Moreover, it is expressly provided that that portion of value of the property in the secondary country which corresponds to the percentage of the direct and indirect non-enemy interests in the primary country (Denmark) shall inure to the benefit of such non-enemy interests, and that parties are required to make reasonable provision to avoid injury to interests of non-enemies or nationals of a third party. In connection with the administration of estates (Part II) repeated provisions expressly protect non-enemy creditors of deceased and non-enemy heirs. In connection with securities, commercial paper, currency and bank accounts (Part I) provision is made for segregating the respective interests of German enemies and non-enemies. A further protection for non-enemy interests is the recognition of bona fide liens or pledges. The recognition of interests of non-enemies in property even where such persons have cloaked German enemy interests therein is expressly reserved for negotiation.

Effective Administration

Another general principle of the Agreement is the resolution of conflicts along such lines as will promote the greatest total realization of German enemy assets. Subsidiary assets are in general to be released to parent enterprises. One of the principal justifications for this is that the assets will commonly have more value in the hands of the parent than

76 Agreement, Part III, Art. 17; see also the similar provisions in Arts. 15, 16 and 20.
77 See particularly Agreement, Part II, Art. 9, and compare Arts. 7A and 7B.
78 Agreement, Part I, Art. 6.
79 Agreement, Part V, Art. 26E.
80 Agreement, Part V, Art. 28.
they would if severed from the going concern. Similarly, the release of securities to the country of issue will probably result in establishment of a larger mass of realized German enemy assets than if the country holding the securities were left to attempt to assert its rights under them. Usually, this means that German enemy interests are to be dealt with, regardless of legal technicalities, in the place where the ultimate controllable property is actually found. The approach taken by the entire Agreement is a very realistic one which freely disregards the legal technicalities of situs and title. Similarly, there is also a broad disregard of corporate entities. German enemy interests are traced directly or indirectly through the entire chain of corporations in which they may be manifested. Non-enemy interests are also traced even through corporations organized in Germany. On the other hand where enemy influences are established which go beyond interests formally recognized in the corporate chain they are also recognized.

All other things being equal, particular solutions are framed so as to promote the administrative convenience of all the parties and so as to avoid the raising of unnecessary conflict-producing issues. It is in this spirit for example that the Agreement provides that closed transactions, in general need not be reopened, the amounts involved being presumed to be of less importance than the administrative inconvenience and occasion for dispute that might be afforded by reopening such transactions.

To sum up, the Agreement rests on the following chief principles: the elimination of direct and indirect German enemy interests and protection against the renewed development of German enemy influence as a threat to the national economic security of the participating countries; the protection of direct and indirect non-enemy interests; the promotion of effective administration seeking the greatest total realization of German enemy external assets through the recognition of the jurisdiction that can be asserted most effectively, non-legalistic approach to the problems of alien property, the promotion of mutual administrative convenience and through the development of imaginative administrative techniques the promotion of amicable settlement of disputes, or their avoidance.
THE DELIVERED PRICE CONTROVERSY
AND THE O’MAHONEY BILL

EUGENE Z. DUBOSE*

The business and legal worlds were thrown into a storm of confusion in April, 1948, by the decision of the Supreme Court in the Cement case.¹ Since then, there has been a veritable babble of wholly inconsistent interpretations and prophecies, and the halls of Congress, the public forums and the pages of periodicals have become flooded with comment and criticism.² The Federal Trade Commission, which instituted the proceeding, itself wavered and vacillated between two irreconcilable interpretations³ of the decision and it would appear that members of its staff continue to disagree as to both the effects of the decision and the desirability of the results which, under one interpretation or another, might follow from the reasoning employed by the majority in its opinion.⁴ The

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¹ FTC v. Cement Institute, 333 U.S. 683 (1948).
⁴ Compare, e.g., Wooden, The Concept of Unlawful Discrimination As It Applies to Geographic Price Differences, 37 Geo. L. J. 166 (1949), with Dawkins, Defenses Available in Cases of Geographic Price Discriminations, id. at 217, and statement of Allen C. Phelps, U.S. Congress, Senate, hearings before Subcommittee on Trade Policies of the Committee on Interstate and Foreign Commerce on S. 236, 81st Cong., 1st Sess. (Jan. 25, 1949). Mr. Wooden was Associate General Counsel of the Commission until his recent death; Mr. Dawkins is Legal Adviser and Consultant to the Commission, and Mr. Phelps is Assistant Chief Trial Counsel and Chief of the Commission’s Export Trade Division.

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decision of the Seventh Circuit Court of Appeals in the *Rigid Steel Conduit* case and certain aspects of the *Morton Salt* opinion, decided by the Supreme Court shortly after the *Cement* case, did nothing to clarify the debate.

It had been hoped in many quarters that the Supreme Court would dissipate some of the confusion by its decision in the *Rigid Steel Conduit* case, but its affirmance of the Court of Appeals' judgment by an equally divided court led certain members of Congress to believe that immediate action was necessary to permit non-collusive delivered pricing and freight absorption. Senator O'Mahoney introduced S. 1008, amending Section 5 of the Federal Trade Commission Act and Section 2 of the Clayton Act, as a substitute for a pending moratorium bill, and it was quickly passed by the Senate on June 1. Thereafter, the House passed the bill with certain amendments and the conferees made further changes. The House agreed to the conferee's report but the Senate postponed consideration until January 20, 1950. Regardless of whether the bill becomes law, it would seem that the time is appropriate to marshall certain aspects of the controversy in some ordered fashion in order to determine how successfully the pending act solves the problem. While some of the views here expressed have been voiced by others, the author believes

5 Triangle Conduit & Cable Co. v. FTC, 168 F. 2d 175 (7th Cir. 1948).
8 85 Cong. Rec. 7204-7209 (June 1, 1949).
11 95 Cong. Rec. 7232 (June 1, 1949).
12 Id. at 9260 (July 7, 1949).
13 Id. at 14794-14796 (October 14, 1949).
14 Id. at 14797 (October 14, 1949).

It should be noted that the author of this article is one of the counsel for a respondent in Matter of National Lead Co., F. T. C. Docket No. 5253, involving charges of conspiracy and price discrimination in connection with the employment of a zone method of delivered pricing.
that certain considerations, which perhaps have not been adequately presented, deserve further discussion from the standpoint of both legal and economic theories.

**Various "Geographic" Pricing Systems**

The pricing systems or methods here briefly described\(^{17}\) are those which obtain generally in industrial concerns (chiefly manufacturing) in this country. These may be roughly divided into three main types: (1) universal pricing, or its equivalent, f.o.b. mill pricing with full freight allowed (the same price nation-wide or within zones, with prices varying from zone to zone), (2) basing-point pricing (single, multiple, or f.o.b. mill, freight equalized),\(^{18}\) and (3) f.o.b. mill pricing, with actual freight costs added to a uniform mill price.

It would appear, generally, that universal pricing on a nation-wide basis is practicable only where freight or delivery costs are not substantial as compared with the delivered price. In the case of zone or "postage stamp" pricing,\(^{19}\) the same consideration would apply to the par or base zone with the increased cost of delivery in zones farther from the point of shipment, which otherwise might tend to become substantial, reflected in graduated differentials from zone to zone based on the average increased cost of delivery in the respective differential zones. On the other hand, where transportation charges form a relatively substantial part of the cost to the purchaser, as in steel, cement, and kindred goods, the delivered price has taken the form of some basing-point or f.o.b. mill system with the inclusion of full freight or a mill-plus-freight price equalized with the delivered price from a competitor's point of shipment ("f.o.b. mill, freight equalized"). Thus, uniform pricing, so far as the freight or delivery charge element is concerned, is distinct from basing-point and f.o.b. pricing. Only in the latter methods is freight as such a component part of the delivered price, while in the former the freight, having no substantial relation to the delivered price, is allocated as any

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\(^{17}\) See Dawkins, *supra* note 4, at 217; FTC's Notice to the Staff, *supra* note 3, at 1.

\(^{18}\) All three would appear to fit within the category of a "basing-point" method, as the Commission uses the term. "The very essence of the basing point concept is that there be a point for pricing purposes which is other than the place of actual manufacture or shipment. If the individual producer or seller always calculated his delivered price by adding the actual freight from his own place of production or shipment there would be no occasion to use the term 'basing point'." Wooden, *Section 2(a)—Its Application to a Basing Point Delivered Price,* Robinson-Patman Act Symposium 94, 96 (CCH 1948).

\(^{19}\) Cf., Salt Producers Ass'n. v. FTC, 134 F. 2d 354, 358 (7th Cir. 1943).
other cost to the general cost of doing business. It might be said that the distinction between basing-point and f.o.b. pricing, on the one hand, and universal pricing, on the other hand, is one of degree (viz., what is "substantial") and yet, generally, the transportation-price relationship differences are so marked in industries using one or the other method as to make the distinction one of kind.

**Significant FTC Cases**

For the purposes of this study, it is necessary to consider only a few of the cases instituted by the Federal Trade Commission—*Pittsburgh-Plus*,20 *Glucose*,21 *Cement, Rigid Steel Conduit*, and certain features of the *Standard Oil*22 and *Morton Salt* cases, all of which involved either Section 5 of the Federal Trade Commission Act or Section 2 of the Clayton Act or both. These cases are the principal ones which recently have been analyzed in various comments and publications but here, after a bare dissection of the main features, certain aspects will be discussed in relation to the focal point of economics towards which they all appear to be directed.

In the *Pittsburgh-Plus* case, U. S. Steel Corporation and its subsidiaries were accused by the Commission of violating both Section 5 of the Federal Trade Commission Act and Section 2 of the Clayton Act (before its amendment by the Robinson-Patman Act)23 in the use of a single basing-point method of selling steel. Although not specifically charged, the findings were to the effect that the system was maintained collusively within the industry.24 Under Section 2 of the Clayton Act, the Commission found that the single basing-point method, with Pittsburgh as the basing-point for all plants, no matter where located, resulted in differing, unjustifiable, and therefore discriminatory delivered prices. It found the effect of the discriminations was to lessen competition (a) among consumers, (b) between respondents who were engaged in the same processing manufacture as consumers and the consumers and (c) among

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20 United States Steel Corp., 8 F. T. C 1 (1924).
22 Standard Oil Company, FTC Docket No. 4389. On March 11, 1949, the Court of Appeals, Seventh Circuit, directed enforcement of the Commission's order, as modified on a minor point. Standard Oil Co. v. FTC, 173 F. 2d 210 (7th Cir. 1949); certiorari granted by the Supreme Court, CCH Trade Reg. Rep. ¶ 62,099 (1949).
24 United States Steel Corp., 8 F. T. C. 1, 30-34 (1924).
steel producers themselves.25 No court review of the Commission's cease and desist order was ever pressed and, in the fall of 1948, after the Cement decision, the respondents consented to the entry of a decree of enforcement.26

The Glucose cases,27 in their actual holdings, did not reach any novel results, but certain language employed by Chief Justice Stone in both opinions has been interpreted to mean that the word "price" in Section 2 of the Clayton Act is the amount the seller nets at his factory after deducting delivery costs, the so-called "mill-net" theory.28 However, in both cases, what the Court had before it was a system involving a single basing-point method of pricing with differing delivered prices which, in the Corn Products case,29 could not be justified under the "due allowance" proviso of Section 2(a) of the Clayton Act,30 or which, in the Staley case,31 could not be justified by Section 2(b) under the claim that the "lower price . . . was made in good faith to meet an equally low price of a competitor".32 In both, the Commission found that competition among purchasers of glucose, candy manufacturers, was adversely affected as a result of the differing prices paid by them since the difference of a fraction of a cent in candies made from glucose could divert business from one manufacturer to another.33

In the Corn Products case, the respondent had two plants, one located at Chicago and the other in Kansas City, the delivered prices for both plants being computed on the basis of a Chicago price with freight from Chicago regardless of whether the shipment was made from the Chicago or the Kansas City plant. The price at Kansas City was the Chicago price plus full freight from Chicago to Kansas City and the discrimination, in the form of phantom freight, resulted frequently when shipments were made from Kansas City to local customers or to customers in other towns, all of whom paid a price including full freight from Chicago to Kansas

26 Id. at 54-55.
27 See note 21 supra.
29 See note 21 supra.
30 324 U.S. 726, 730-732 (1945).
31 See note 21 supra.
32 324 U.S. 746, 753 et seq. (1945).
In measuring the extent of the discrimination, and in showing that the differences in delivered prices did not make "only due allowance" for differences in delivery costs, the Court looked at the mill net return received by the Kansas City plant. In the Staley case, the respondents, whose sole plant was at Decatur, Illinois, followed in every respect the pricing method used by the Corn Products Company which had been under consideration in the companion case. Thus the price for Staley's product at Decatur was Corn Product's Chicago price plus full freight to Decatur. The Court declared that Section 2(b) applied to individual competitive situations and did not permit "systematic" adoption in toto of a competitor's discriminatory pricing method, at least where the party claiming the protection of Section 2(b) had not attempted, in the first instance, to establish a non-discriminatory system of his own.

The Cement case involved the multiple basing-point system which had long been employed by the cement industry, with many plants located at basing-points but with a large proportion of non-base plants whose prices were determined by the prices charged from the nearest basing-point. There was also inter-penetration between basing-point areas resulting in freight-absorbing sales by a base mill seller who "invaded" the territory of another base mill competitor. The Commission charged and found a conspiracy to establish and maintain the basing-point system among sellers and a conspiracy to violate plus a violation of Section 2 of the Clayton Act. The first charge, brought under Section 5 of the Federal Trade Commission Act, was based upon what the Commission believed to be adequate evidence of concerted action to maintain the established system through active policing and punitive measures, involving various groups of respondents from time to time with adherence to the general plan on the part of all. Aside from the questions of fact involved and the somewhat ambiguously worded finding of "combination", no quarrel may be had with the legal conclusion reached by

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34 324 U.S. 726, 730-731 (1945).
35 Id. at 732-733.
36 324 U.S. 726 (1945).
37 Id. at 749.
38 Id. at 753-755, 757.
40 Ibid.
41 The Cement Institute, 37 F.T.C. 87, 102-103, 117, 147 et seq. (1943).
42 This evidence was summarized by the Supreme Court in 333 U.S. 683, 709-720 (1948).
43 See particularly, Finding Par. 7 (h), 37 F. T. C. 87, 150 (1943).
the Commission and sustained by the Supreme Court on the charge of conspiracy and collusion. The second charge, however, is not so clear. In the first place, a conspiracy to violate the Robinson-Patman Act (clearly a "combination which tampers with price structures"),\(^{44}\) without proof of any overt act of violation, would be unlawful under either Section 1 of the Sherman Act or Section 3 of the Federal Trade Commission Act.\(^{45}\) This portion of the second charge properly belonged in Count I. The finding that the system produced unlawful discriminations was reminiscent of the old unreviewed *Pittsburgh Plus* case with respect to the adverse effect upon competition. But before reaching this conclusion, the Commission found that the cement manufacturers treated "price" as "mill net". This was based in part upon the generally prevailing practice followed by purchasers, who paid the actual freight charges to the carrier and only the balance of the invoiced delivered price to the seller, and the terms of contracts of sale, and in part upon admissions by cement producers that the cement price stripped of "freight, package and discount...becomes the selling price so far as we are concerned".\(^{46}\) The Commission further found that regardless of whether "price" under the circumstances disclosed be regarded as mill net or the delivered price to the purchaser, there were discriminations which could not be justified by differences in the cost of delivery.\(^{47}\) It concluded with the finding that the effect of the discriminations in mill nets by each seller was, in the words of the statute, "to lessen competition and tend to create a monopoly"\(^{48}\) in the sale of cement and "to injure, destroy, and prevent competition with respondents who grant and exact such discriminations".\(^{49}\) This conclusion is significant in view of the fact that there was no proof of competitive injury among purchasers of cement and no proof, except in the case of "punitive base"\(^{50}\) raids, of discriminations which tended to eliminate competing sellers.

The Supreme Court on this phase of the case went even further than the Commission, although in view of its express limitation of the decision

\(^{44}\) *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 221 (1940).

\(^{45}\) *Id.* at 223-224 and footnote 59 of the case; *FTC v. Cement Institute*, 335 U. S. 683, 690-693 (1948).


\(^{47}\) *Id.* at 256.

\(^{48}\) *Id.* at 257.

\(^{49}\) *Ibid.*

\(^{50}\) An example of this was given in the Supreme Court's opinion, *FTC v. Cement Institute*, 335 U. S. 683, 714 (1948).
to planned, concerted action, the net effect can only be to add to the "elusive uncertainty"51 of the Robinson-Patman Act. In a preliminary portion of the opinion, the majority, in describing the "multiple basing point delivered price system", used language which had little, if anything, to do with a basing-point system but more accurately related to a system of uniform universal pricing, although the analysis given was said to illuminate "the crux of Count II" (the Robinson-Patman Act charge).52 The Court then discussed the system employed under "Pittsburgh-Plus", with the result that delivered prices in any one locality were the same with net receipts to non-base mills (either those which on all sales were non-base or base mills selling in the territory of another base mill) varying according to the phantom freight collected or the freight absorbed, and stated that the multiple basing-point method produced "the same consequences—identity of prices and diversity of net returns".53

When it later reached the Robinson-Patman charge (Count II), the Court said that the Commission had found that the varying mill nets resulted in price discriminations which had the effect of lessening competition "between" (among?) respondents,54 that the respondents' contentions that variations in mill nets did not constitute discriminations in "price" or that, if so, they were justified under the "good faith" proviso

52 "A brief reference to the distinctive characteristics of 'factory' or 'mill prices' and 'delivered prices' is of importance to an understanding of the basing point delivered price system here involved.

"Goods may be sold and delivered to customers at the seller's mill or warehouse door or may be sold free on board (f.o.b.) trucks or railroad cars immediately adjacent to the seller's mill or warehouse. In either event the actual cost of the goods to the purchaser is, broadly speaking, the seller's 'mill price' plus the purchaser's cost of transportation. However, if the seller fixes a price at which he undertakes to deliver goods to the purchaser where they are to be used, the cost to the purchaser is the 'delivered price'. A seller who makes the 'mill price' identical for all purchasers of like amount and quality simply delivers his goods at the same place (his mill) and for the same price (price at the mill). He thus receives for all f.o.b. mill sales an identical net amount of money for like goods from all customers. But a 'delivered price' system creates complications which may result in a seller's receiving different net returns from the sale of like goods. The cost of transporting 500 miles is almost always more than the cost of transporting 100 miles. Consequently if customers 100 and 500 miles away pay the same 'delivered price', the seller's net return is less from the more distant customer. This difference in the producer's net return from sales to customers in different localities under a 'delivered price' system is an important element in the charge under Count I of the complaint and is the crux of Count II."

53 Id. at 699.
54 Id. at 722.
of Section 2(b), had been rejected in the Glucose cases, and that "the combined effect of the two [Glucose] cases was to forbid the adoption for sales purposes of any basing point pricing system".\textsuperscript{55} It said that the Corn Products case (as summarized in the Staley decision) was a direct holding that a pricing system involving both phantom and absorbed freight violated Section 2(a) "if under that system prices are computed for products actually shipped from one locality on the fiction that they were shipped from another",\textsuperscript{56} and that, as construed in the Staley case, Section 2(b) applied to individual competitive systems and did not permit a seller to use a system "which constantly results in his getting more money for like goods from some customers than he does from others."\textsuperscript{57} The Court could observe no difference between situations involving phantom freight and those resulting in freight absorption—"'Neither comes within its [Section 2(b)']s terms'".\textsuperscript{58} The Court held, therefore, that the Commission properly concluded that there were illegal discriminations which lessened competition and which were not protected by Section 2(b).\textsuperscript{59}

The Court completely ignored the argument of the respondents on this phase of the case. The respondents contended that the Corn Products case held that Section 2(a) contained only "the more restricted prohibitions of discriminations in delivered prices" and that the adverse competitive effect there found was as between competing purchasers. They further claimed that there was no adverse effect on the seller's line of competition and that the Commission's finding that the effect of the system employed by the cement industry was to lessen competition and to prevent competition "with" respondents who exacted discriminatory prices was directly contrary to the established facts.\textsuperscript{60}

The Supreme Court said by way of dictum that "individual conduct" which falls short of a Sherman Act violation may constitute an "unfair method" of competition.\textsuperscript{61} This becomes significant when read in the light of later statements to the effect that the Commission, composed of experienced experts whose statutory duty it was to nip in the bud any practice which might tend to destroy competition, could not be said to

\textsuperscript{55} Id. at 722, 723.
\textsuperscript{56} Id. at 724.
\textsuperscript{57} Id. at 725.
\textsuperscript{58} Ibid.
\textsuperscript{59} Id. at 725-726.
\textsuperscript{60} See Brief for Respondents, pp. 217-225, FTC v. Cement Institute, 333 U.S. 683 (1948).
\textsuperscript{61} FTC v. Cement Institute, 333 U.S. 683, 708 (1948).
be wrong in concluding that the basing-point system “if left free for use” would result in complete destruction of competition, that the *Gypsum Co.* and *Sugar Institute* cases illustrate that the system “may lend itself to industry-wide anti-competitive practices” and that a “combination” may not be “an indispensable ingredient” of an unfair method of competition, and the observation that, as a result of the Commission’s order, “there will very likely be changes in the present ownership of cement mills, and the construction of new mills in the future may be reasonably anticipated.”

The *Rigid Steel Conduit* case is important only with respect to the charge and findings under Count II of the complaint. There the Commission alleged and found that each respondent violated Section 5 of the Federal Trade Commission Act through the concurrent use of a formula method of quoting delivered prices with knowledge that each other respondent acted in similar fashion and with the result that price competition between and among them was unreasonably restrained. Neither conspiracy nor price discrimination was charged or found in Count II. The Commission later officially stated that in this case it chose to rely on “the obvious fact that the economic effect of identical prices achieved through conscious parallel action is the same as that of similar prices achieved through overt collusion.” The Commission accordingly en-

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64 Id. at 720-721 and footnote 19 of the case.
65 Id. at 728-729.
66 The reasoning of the Commission was adopted by the Court of Appeals in the following language:

“As already noted, each conduit seller knows that each of the other sellers is using the basing point formula; each knows that by using it he will be able to quote identical delivered prices and thus present a condition of matched prices under which purchasers are isolated and deprived of choice among sellers so far as price advantage is concerned. Each seller must systematically increase or decrease his mill net price for customers at numerous destinations in order to match the delivered prices of his competitors. Each seller consciously intends not to attempt the exclusion of any competition from his natural freight advantage territory by reducing the price, and in effect invites the others to share the available business at matched prices in his natural market in return for a reciprocal invitation.”

Triangle Conduit and Cable Co. v. FTC, 168 F. 2d 175, 181 (7th Cir. 1948).
67 FTC's Notice to the Staff, *supra* note 3, at 3. Indeed, the Seventh Circuit Court of Appeals has said, by way of dictum:

“...Moreover, a uniform participation by competitors in a particular system of doing business, where each is aware of the others' acts and where the effect is to restrain commerce, is sufficient to establish an unlawful conspiracy.”

Allied Paper Mills v. FTC, 168 F. 2d 600, 607 (7th Cir. 1948), cert. denied, 69 S. Ct. 640 (1949).
In upholding the Commission's findings and order under Count II, the Court of Appeals, Seventh Circuit, relied on that portion of the decision in the Cement case where the Court said that "individual conduct" falling short of a Sherman Act violation might constitute an unfair method of competition. More apposite, however, would have been the statements in the Cement decision that the Commission could not be held to be wrong in concluding that the basing point method if left "free for use" might lead to monopoly where experience had demonstrated that the method had led to anti-competitive practices and the footnote dictum

68 See Transcript of Record, pp. 3547-3548, Triangle Conduit and Cable Co. v. FTC, 168 F.2d 175 (7th Cir. 1948).

69 "In this situation, and indeed all parties to these proceedings agree, the legal question presented is identical with the one the Supreme Court considered in the Federal Trade Commission v. Cement Institute case, supra. In that case, after stating that the Commission has jurisdiction to declare what conduct is an unfair method of competition, the court said: '... individual conduct, ... which falls short of being a Sherman Act violation may as a matter of law constitute an "unfair method of competition" prohibited by the Trade Commission Act. A major purpose of that Act was to enable the Commission to restrain practices as "unfair" which, although not yet having grown into Sherman Act dimensions would most likely do so if left unrestrained. The Commission and the courts were to determine what conduct, even though it might then be short of a Sherman Act violation, was an "unfair method of competition." This general language was deliberately left to the "Commission and the courts" for definition because it was thought that "There is no limit to human inventiveness in this field"; that consequently, a definition that fitted practices known to lead towards an unlawful restraint of trade today would not fit tomorrow's new inventions in the field; and that for Congress to try to keep its precise definitions abreast of this course of conduct would be an "endless task."

"In the light of that opinion, we cannot say that the Commission was wrong in concluding that the individual use of the basing point method as here used does constitute an unfair method of competition."

Triangle Conduit and Cable Co. v. FTC, 168 F.2d 175, 181 (7th Cir. 1948).
clearly intimating that existence of "combination" is not essential to support a finding of an unfair method of competition.\(^7\)

The Commission's order in the *Standard Oil* case dealt with the "good faith" proviso of Section 2(b). Apparently relying on a dictum in the *Moss* case,\(^7\) the Commission held that a prima facie case of discrimination is made by showing different prices to competing customers; that the "good faith" proviso permitting rebuttal of a prima facie case was merely procedural, shifting the burden of going forward once a prima facie case had thus been proved, and that when the Commission went on to find competitive injury, proof of meeting a competitor's lower price in good faith offered no substantive defense.\(^7\)

Again, the only portion of the *Morton Salt* decision which gives one pause is the dictum (since there was proof of actual competitive injury) that under Section 2(a) the words "may be substantially to lessen competition" referred to situations where there was a "reasonable possibility" that the discrimination "may" have a substantial adverse effect on competition,\(^7\) instead of the "probability" of substantial lessening of competition, the test theretofore employed.\(^7\)

\(^7\) FTC v. Cement Institute, 333 U.S. 683, 720-721 (1948) and footnote 12 of the case.

\(^7\) Samuel H. Moss, Inc. v. FTC, 148 F.2d 378, 379 (2d Cir. 1945).

\(^7\) For a complete discussion of this case see Austern, *Required Competitive Injury and Permitted Meeting of Competition, ROBINSON-PATMAN ACT SYMPOSIUM 63*, particularly at 73 et seq. (CCH 1947), and Berger and Goldstein, *Meeting Competition under the Robinson-Patman Act*, 44 ILL. L. REV. 315 (1949).

The opinion of the Court of Appeals, Seventh Circuit, however, states that the Commission need not have proved actual competitive injury in order to make the "good faith" section 2(b) ineffective since "it would have been necessary . . . to prove only that such discrimination in price may have that effect. Federal Trade Comm. v. Morton Salt Co., 334 U.S. 37 . . . " *Standard Oil Co. v. FTC*, 173 F.2d 210, 216 (7th Cir. 1949). Again, in the *Minneapolis-Honeywell* case, the Commission in effect superimposed the "due allowance" proviso of section 2(a) upon the "good faith" proviso of section 2(b) and held, among other things, that where there was no cost justification for the lower prices of a seller, he could not be held to be meeting the equally low, or lower, prices of his competitors in good faith. It further held that a seller could not hold his old customers by charging prices within the range of his competitors' prices, for this "impedes the progress or growth of competitors" and this injures competition. *Minneapolis-Honeywell Regulator Co., FTC Docket No. 4920*, CCH, *TRADE REG. REP. (9th ed) § 13,675* (1948). Thus, in effect, one must foster a competitor's growth. See dissent of Commissioner Mason. *Ibid.*


\(^7\) See dissenting opinion of Justice Jackson. *Id.* at 55, *et seq.* While there would appear to be a difference in degree only between the definition of "may" as "probable", on the one
The aspects of the cases above discussed at first glance would seem to have little in common and yet, upon analysis, a systematized pattern appears based on the hypothesis that effective competition requires the elimination of all "discriminatory" pricing in the form of varying net returns to sellers. Nowhere is this thought expressed in haec verba but in adopting the arguments of appellate counsel for the Commission in some instances the courts, perhaps unwittingly, have employed language which logically can lead only to this conclusion. In so doing, the courts on occasion (as in the Cement and Morton Salt cases) have gone beyond the decision of the Commission and have paid little attention to the findings and conclusions reached by the Commission.

With these thoughts in mind, one could say that the reasoning and language (as distinguished from the actual points decided) of the cases discussed above could lead to the following propositions:

1. "Price" includes both the delivered price and the seller's net return, and differing delivered prices or differing mill net returns may be discriminatory if there be the defined adverse effect upon competition (Cement case and the Court's restatement of the principles of the Glucose cases).

2. The prohibited lessening of competition may be (a) among sellers, (b) or in the elimination of competing sellers, or (c) as between competing purchasers (Pittsburgh-Plus and Cement cases).

3. Proof of unlawful discrimination is made if there be differing mill net returns or differing delivered prices, not justified by cost differences, and evidence showing a "reasonable possibility" that these "may" substantially lessen competition in any of the situations presented in (2) above (Cement and Morton Salt cases).

4. If there be proof as in (3) above, the "good faith" proviso of Section 2(b) affords no defense (Standard Oil case).

5. In any event, Section 2(b) does not permit a seller "constantly" ("regularly" or "systematically") to absorb freight in order to meet a competitor's lower price (Cement case).

6. Even if Section 2(b) permitted meeting the lower delivered prices of a competitor, the diversity in mill net returns (equally discriminatory) would not come within the "good faith" proviso for the freight-absorbing seller would always have a lower mill price than that

hand, or "reasonably possible" on the other hand, to define "may" as "reasonably possible" that it may leads to the realm of metaphysics.
of his competitor, and thus would not be meeting an "equally low price
of a competitor" (Cement case and Section 2[b]).

(7) Fairly regular similarity of delivered prices charged by any
group of sellers may constitute an unfair method of competition in
violation of Section 5 of the Federal Trade Commission Act (Rigid
Steel Conduit and Cement cases).

(8) Varying mill net returns accompanied by fairly regular simi-
ilarity in delivered prices among any group of sellers may constitute
unlawful discrimination, since diversity of net returns results in dif-
fferences in "price" which, under the circumstances, lead to lessening
of competition among sellers who "match" their delivered prices (Ce-
ment case).

(9) Finally, it is up to the Commission, in the performance of its
statutory duty, so long as it acts in accordance with its experienced
expert judgment, to determine whether any method of doing business
employed by any individual or group, regardless of collusion, "combi-
nation" or discrimination, may lead to unlawful restraint of trade
(Cement and Rigid Steel Conduit cases).

With this pattern suggested by the cases discussed outlined in this
fashion, it becomes pertinent to analyze the economic theory or theories
which underly the assumed desired result.

**Economic Theory in Relation to Hypothesis**

The basic tenet of proponents of the hypothesis that effective com-
petition is incompatible with diversity of net returns to sellers\(^{75}\) would
appear to be that there can be no effective competition from the stand-
point of price without a "market" in which buyers and sellers, dealing
in a homogeneous commodity, mingle freely under "competitive" con-

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\(^{75}\) Space does not permit more than a general summary of the main points. The conten-
tions discussed appear, in one form or another, in the two articles by Mr. Wooden, *supra*
note 22; Wooden, *The Concept of Unlawful Discrimination as it Applies to Geographic
Price Differences*, 37 Geo. L. J. 166 (1949) (particularly at 170-174). See, e.g., Mund,
*Monopolistic Competition Theory and Public Price Policy*, 32 Am. Econ. Rev. 727 (1942); 
Mund, *Reply to Professor Clark*, 33 Am. Econ. Rev. 612 (1943). The opposition is repre-
sented by Clark, *Imperfect Competition Theory and Basing-Point Problems*, 33 Am. Econ.
Rev. 283 (1943); Clark, *Rejoinder*, 33 Am. Econ. Rev. 616 (1943); and Smithies, *Aspects
of the Basing-Point System*, 32 Am. Econ. Rev. 705 (1942). For a discussion of some of
the broader economic aspects of delivered pricing systems, see Comment, *58 Yale L. J.* 426,
428-443 (1949).
ditions and establish a competitive “going price” for the product.\textsuperscript{76} As a corollary, it is said that the “principle of indifference” works to prevent any buyer from paying more to one seller than he does to another, on one hand, and to prevent any seller, on the other hand, from taking less per unit for his wares from some purchasers than he does from others\textsuperscript{77} in \textit{any one market}.\textsuperscript{78} The medieval centralized market, described in detail by Fetter,\textsuperscript{79} and the present day “produce-exchange”\textsuperscript{80} markets, in both of which effective, “workable” competition would appear to have been achieved, are used as illustrations of the principle. In both, it is said, sellers generally tend to sell on a shipping-point plus full freight basis. The argument proceeds that since in these types of markets absence of discrimination, with no phantom or absorbed freight, is the significant attendant factor of free competition,\textsuperscript{81} it follows that in all manufacturing and merchandising fields “discrimination” (in the form of varying net returns to sellers) must be abolished before a start can be made towards achieving free competition.\textsuperscript{82}

It is further contended that originally manufacturers in this country (local mills) sold on a mill plus full freight method and that the later discriminatory methods of delivered pricing where freight is absorbed or equalized (resulting in “systematic” price discrimination) came about as the result of wilful, volitional action;\textsuperscript{83} that this in turn frequently presents buyers with a closed front of identical prices in any given market leaving them no opportunity to bring into play any bargaining power which they might possess: that thereby the free interplay of competitive forces which obtains in a “market” is prevented, and that this condition


\textsuperscript{77} Wooden, \textit{The Concept of Unlawful Discrimination as it Applies to Geographic Price Differences}, 37 \textit{Geo. L. Rev.} 166, 170, 172 (1949).

\textsuperscript{78} This important qualification is ignored by Mr. Wooden. \textit{Ibid.}

\textsuperscript{79} Fetter, \textit{The Masquerade of Monopoly}, 247-253 (1931).

\textsuperscript{80} For a summary of this contention, see Clark, \textit{ Imperfect Competition Theory and Basing-Point Problems}, 33 \textit{Am. Econ. Rev.} 283, 286-287 (1943). Compare, Wooden, \textit{supra} note 77, at 174.

\textsuperscript{81} “ . . . in the still existing areas of our economic life where competition is admittedly the rule, there is no discrimination in price.” \textit{Id.}, at 173-174.

\textsuperscript{82} Mund, \textit{Reply to Professor Clark}, 33 \textit{Am. Econ. Rev.} 612, 615 (1943).

\textsuperscript{83} \textit{Ibid.} at 616; Mund, \textit{Monopolistic Competition Theory and Public Price Policy}, 32 \textit{Am. Econ. Rev.} 727, 743 (1942).
cannot be explained on any basis other than collusion. It is claimed that irrefutable proof of this conclusion is the fact that, absent collusion, no inter-penetration of marketing areas could occur, since under ordinary circumstances the seller whose natural area was being invaded by a more distant seller would lower his base price to bar his "invading" competitor from the market. The economic effect of any system of freight absorption, it is said, is to keep prices at a high monopolistic level since sellers who adsorb freight in distant sales must recoup their losses by charging nearby customers higher prices than would normally prevail with the result that local customers, denied the "natural" advantages of their location, in effect subsidize (through the payment of "phantom freight") purchasers reached by the seller through freight absorption. It is finally claimed that the growing concentration of industry has been implemented and made possible by the use of discriminatory pricing systems and that the prevention of any form of discrimination is the "logical antidote" to the process of centralization. Proponents of these conclusions have been called members of the "orthodox" school of economic thought—opponents are termed "rationalistic" or "iconoclastic".

To the inexpert mind of the layman the choice of the "classical centralized" market as illustrative of the hypothesis that freedom from "discrimination" (in the sense employed by the proponents of the hypothesis—varying net returns to sellers) is a sine qua non of free competition is somewhat bewildering. As Fetter describes them, these markets were usually selected towns where merchants, artisans, etc. from various districts gathered to sell their wares to a multitude of buyers. To the layman the pertinent question would be: how did the merchants and artisans get their wares to the market place? Did they not have to absorb freight to deliver their goods to the market town (whether or not this involved..."
merely wear and tear on the feet or oxen cart)? In order to compete with merchants located in the market town, did these foreign merchants not have to absorb these costs as well as other costs of sale (closing up shop in their home towns, etc.) in order to sell at the “going price” received by local merchants who had no such costs?

Further research would reveal that in “produce-exchange” markets, apparently the same situation exists.\(^91\) Thus, in the sale of wheat, the farmer ordinarily sells on consignment and pays the freight to the market or exchange, with freight deducted from the proceeds of sale. The farmer may, on occasion, sell in different markets and thus get varying net returns. The sale is made at the market and at the “going price” there established so that farmers not equidistant from the market have varying net returns and the buyers all pay the same price. As in the case of the basing-point system employed by the cement industry, the “produce-exchange” method, therefore produces “the same consequences—identity of prices and diversity of net returns”.\(^92\)

Insofar, however, as the “produce-exchange” market results in prices from market to buyers’ destination on the basis of shipping-point plus freight, economists who reject the thesis that effective competition can exist only where freight absorption is prohibited, point out that the conditions obtaining in those markets simply do not exist in present day large-scale manufacturing and that, therefore, there is no inductive proof that prevention of freight absorption would tend to produce more effective competition among manufacturers.\(^93\) Indeed, if each manufacturer were limited to his natural “freight advantage” area, the conditions imposed might lead to the creation of local monopolies with only one or a few sellers from whom purchasers would have the choice of buying—a step further removed from perfect competition.

The opponents of the hypothesis have shown that where, as in manufacturing, there are spatially separated groups of producers with a number of producers at or near each point of shipment, a seller at any particular point will be reluctant to cut his price, since this will be instantly met by his local competitors, but will be more willing to obtain volume

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\(^91\) This is a summary of portions of the testimony of Professor Edward A. Duddy, one of the economic experts called by the Commission in the Cement case. See Brief of the Respondents-Petitioners in the Seventh Circuit Court of Appeals, Vol. IV, Appendix A, pp. 2963-2968, FTC v. Cement Institute, 157 F.2d 533 (7th Cir. 1946).

\(^92\) FTC v. Cement Institute, 333 U.S. 683, 699 (1948).

of sales by freight-absorbing sales in more distant markets.\textsuperscript{94} Under this situation the tendency is for "open price reductions to go below a monopoly level, but stop above the limit of marginal cost."\textsuperscript{95} Although there may be mutual inter-penetration of market areas through freight-absorbing sales, it is not likely that such sales will be precisely offsetting.\textsuperscript{96} Furthermore, as a practical business policy, sellers know that freight-absorbing sales may increase volume and profits, even though the margin of profit is smaller on this type of sale than on one in the home market (which may be glutted). As Clark has said, "... they are keenly aware of the difference in 'marginal net revenue' between a price reduction applied to their main volume of business, and one limited to the new business it brings in. In short, their rationality is sufficient to account for their treating these two kinds of business differently, and habitually accepting lower mill nets on the latter kind of business than on the former."\textsuperscript{97}

Boiled down to its basic essential, the conclusion of proponents of the hypothesis seems to be that in manufacturing industries sellers' prices will not be the same, except sporadically, without agreement.\textsuperscript{98} On the other hand, they claim that under the "market" theory there will always be a "going price"—\textit{i.e.}, an identical price in accordance with the principle of indifference.\textsuperscript{99} Little attention is given, however, to the fact that in such a "market" sellers not equidistant from the "market" will have varying net returns \textit{inter sese}, in any one market, as well as individually, as they move from market to market. It would seem, therefore, that the test of free competition has no relation to the issue of "discrimination" in the form of varying net returns to sellers but depends on whether the conditions are such as to present to both sellers and buyers the opportunity of a reasonable amount of independent action.\textsuperscript{100}

\textsuperscript{94} Id. at 289-290. See Comer, \textit{Price Leadership}, 7 \textit{Law & Contemp. Prob.} 61, 63 (1940).

\textsuperscript{95} Clark, \textit{Imperfect Competition Theory and Basing Point Problems}, 33 \textit{Am. Econ. Rev.} 283, 288 (1943).

\textsuperscript{96} Id. at 290.

\textsuperscript{97} Ibid.

\textsuperscript{98} Id. at 291-292. In the Commission's letter of January 12, 1949 to the Chamber of Commerce of the State of New York, it was said: "Momentary identity of delivered prices in ordinary commercial sales is not regarded by the Commission as adequate evidence [of a conspiracy]." Answer to Question 2 posed by the Chamber.


\textsuperscript{100} See 58 \textit{Yale L. J.} 426, 443 (1949), where the author, in concluding his discussion of the economic aspects of delivered pricing, states:
The contention that concentration of industry has been chiefly implemented by discriminatory pricing systems permitting varying net returns to sellers smacks of post hoc, propter hoc reasoning. It would appear more reasonable to conclude that the evolution of industry from small one-town mills to large-scale industrial production with a nationwide market (which has certainly lowered unit costs) naturally resulted in the inter-penetration of markets and freight-absorbing sales. While large-scale production perhaps presents a greater opportunity for monopolistic control than does "atomistic" production, it is certainly not the method of selling which gives rise to concentration with monopolistic intent—unless, of course, the unexpressed concept be that mass production is per se illegal and that its benefits (high wages and relatively low costs) are outweighed by the opportunities it presents for abuse. Needless to say, any program leading to the atomizing of units of production would require careful pragmatic study as to its ultimate effects on con-

"In basically non-competitive markets, perfected delivered price systems are primarily symptoms and not causes of economic ill health. In basically competitive markets on the other hand, delivered price systems are prima facie innocent. Any sensible application of the anti-trust laws must take all of these market factors into account."

Compare these statements with the following sentence from the conclusion:

"The cases culminating in the New Cement decision have caught up with delivered price systems and recognized them for what they are." Id. at 455.


"There are some persons, infected with monopoly-phobia, who shudder in the presence of monopoly. But the common law has never suffered from such a neurosis."

A footnote (7) to this statement reads in part:

"Some economists have recently aided clear thinking on the subject by dropping the black-and-white distinction between competition and monopoly and talking of 'monopolistic competition'."


101 In United States v. Columbia Steel Co., 334 U.S. 495, 526 (1948), the majority said:

"It is not for courts to determine the course of the Nation's economic development. Economists may recommend, the legislative and executive branches may chart legal courses by which the competitive forces of business can seek to reduce costs and increase production so that a higher standard of living may be available to all. The evils and dangers of monopoly and attempts to monopolize that grow out of size and efforts to eliminate others from markets, large or small, have caused Congress and the Executive to regulate commerce and trade in many respects. But no direction has appeared of a public policy that forbids, per se, an expansion of facilities of an existing company to meet the needs of new markets of a community, whether that community is nation-wide or county-wide."
sumers and labor, as well as upon sellers and military or governmental requirements.

A member of the Commission’s staff has recently attempted to demonstrate that freight absorption may permit a large seller to eliminate a smaller competitor, even if the freight-absorbing seller merely meets the lower delivered price of his smaller competitor and does so in “good faith” competition. A series of hypothetical situations is set forth by charts and the claim is made that the larger seller may enter the natural market of the smaller competitor and, through the operation of the “principle of indifference”, take customers away from the latter who, with limited production facilities, is unable profitably to retaliate either by lowering his prices or by invading the larger seller’s market. No actual case histories are given and, in at least one instance, a highly improbable example is depicted, with all of the larger seller’s customers located at points which, in relation to the smaller competitor’s shipping point, are to the far side of the larger seller. In any event, the theory would appear to be clearly hostile to the concept of competition which certainly does not call for the protection of competitors from normal competitive practices of other competitors. Indeed, Section 2(b) of the Clayton Act, as heretofore construed, announced a legislative policy to the contrary. The view expressed, however, would seem to furnish the economic basis for the Commission’s determination in the Standard Oil case to the effect that Section 2(b) does not permit the meeting of a competitor’s lower delivered price in “good faith” where competitive injury ensues from the practice. This notion that competitors should be protected from competition, that “competition of a non-discriminatory type [i.e., without variations in a seller’s net return], open and above-board” is the desirable goal, calls to mind the “Open Competition Plan” and the Sugar Institute code which the Supreme Court anathematized in the Hardwood and Sugar Institute cases.

103 Id. at 162-163.
104 It has been suggested recently, however, that the general purpose of the Robinson-Patman Act “could only be to safeguard not competition, but competitors...” Adelman, Effective Competition and the Anti-trust Laws, 61 Harv. L. Rev. 1289, 1335 (1948).
105 See note 22 supra.
The contention that freight absorption necessarily results in higher prices because a seller must charge local customers higher prices to recoup his losses on distant sales where freight is absorbed, that a lower mill net on some sales necessarily calls for a corresponding addition to the “normal” mill price on other sales, has also been refuted in our analysis showing that frequently sellers, as a matter of good business judgment, will lower their return to get a particular piece of business without affecting their general level of return. This theory of “necessary recoupment” has recently been described as an “illiterate notion” having no basis in economic fact.  

Indeed, freight-absorbing sales may permit the seller to maintain volume production and keep his prices at a relatively low level, a situation which conceivably could redound to the benefit of local purchasers who, if the seller were restricted to a given area, might be charged higher prices resulting from the higher unit cost to the seller.  

The “principle of indifference” (which is merely a descriptive phrase and not a causative factor) similarly offers no barrier. To the extent that this principle applies, and it is limited to homogeneous products, it merely means that the seller generally will not accept less per unit from some buyers than he does from others in any one market. In industrial mer-

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110 In his dissenting opinion in the Cement case, Justice Burton said:

“Unlike the Commission and the majority of this Court, the lower court and I, therefore, have faced the further issue presented by the Commission’s charges unsupported by a finding of the alleged combination. This has led us to consider an issue quite different from that decided by this Court today. That issue lies within the long-established and widespread practice by individuals of bona fide competition by freight absorption with which practice Congress has declined to interfere, although asked to do so. This is the field where a producer, for his own purposes and without collusion, often ships his product to a customer who, in terms of freight charges, is located nearer to one or more of the producer’s competitors than to the producer himself. In selling to such a customer, this producer is at an obvious freight disadvantage. To meet the lower delivered-price of his competitor, the producer, therefore, reduces his delivered-price in that area by a sum sufficient to absorb his freight disadvantage. He might do this for many reasons. For example, this producer might be such a large customer that the volume of his orders would yield such a return to the producer that the producer, by distributing his fixed charges over the resulting increased volume of business, could absorb the freight differential without loss of profit to his business as a whole and without raising any charges to his other customers. The securing of this particular business might even enable the producer to reduce his own basic factory price to all his customers. It might make the difference between a profitable and a losing business, resulting in the producer’s solvency or bankruptcy. If the advantage to be derived from this customer’s business were not sufficient, in itself, thus completely to absorb the freight differential, the producer might absorb all or part of such differential by a reduction in his net earnings without affecting his other customers.” 333 U. S. 683, 737–739 (1947).
chandising there are as many “markets” as there are buyers’ respective destinations. Thus, the principle would apply as to any given destination, not generally as to every market.

“Conscious parallel action” which results in identical or similar prices in any one market cannot be said to be inherently collusive. Such action may be some circumstantial proof of collusion where, under all the facts, there would appear to be no valid economic reasons for the resulting identity of prices. When, however, consideration is given to the fact that, without collusion, the “going prices” charged by any group of sellers in a given market are below a monopoly level but are restrained from reaching marginal costs, because each seller knows that his price reduction will be met by local competitors and that no one will gain by a price war except the ultimate fittest survivor, one cannot logically conclude that “the economic effect of identical prices achieved through conscious parallel action is the same as that of similar prices achieved through overt collusion”. Under overt collusion the “reasonable prices today” become “unreasonable prices tomorrow”, while, absent collusion, “conscious parallel action”, resulting from actual and potential competition, will bring about fluctuations and readjustments in the light of market conditions.

In the final analysis, to compel all sellers to restrict their marketing to areas governed by cost of delivery would be to create a species of cartel arrangements where exclusive trading privileges would be granted to one or a group of centrally located sellers in any given territory in accordance with the arbitrary freight rate structure. The allocation of exclusive marketing areas, if accomplished by agreement among sellers, would clearly constitute a violation of the Sherman Act. It would appear that the detrimental effect of this form of allocation of exclusive markets would be no less if accomplished by agency fiat. Certainly, however,

111 FTC’s Notice to the Staff, supra note 3, at 3.
113 “Potential competition, either as a supplement to actual competition or as a substitute for it, may restrain producers from over-charging those to whom they sell. . . . Potential competition, insofar as the threat survives, may compensate in part for the imperfection characteristic of actual competition in the great majority of competitive markets.” Wilcox, Competition and Monopoly in American Industry, TNEC Monograph No. 21, 7-8 (1941).
114 It is difficult to follow the reasoning of the Commission on this point. While admitting that f.o.b. mill pricing “could be used to allocate trade territories”, the Commission states that changes would result with changes in freight rates and transportation methods “and [it] would be a highly inconvenient device in any instance in which important markets lay near the boundary between territories. For this reason there is nothing inherently suggestive
in view of the many problems involved, the matter is one which properly should be for Congress to determine.

LEGAL VALIDITY OF PROPOSITIONS SUPPORTING THE HYPOTHESIS

The legal propositions used to support the hypothesis (viz., that varying net returns to sellers are inherently illegal if there be an "adverse effect" upon competition) revolve about the construction of Section 2 of the Clayton Act and Section 5 of the Federal Trade Commission Act, under one or both of which, as we have seen, the cases discussed have been instituted. These principles have been most clearly articulated by Mr. Wooden, the Associate General Counsel of the Commission, and therefore attention will be focused upon Mr. Wooden’s arguments, not in the spirit of ad hominem criticism, but simply because of the fact that this spokesman has undertaken frequently to express the underlying legal reasons in most lucid fashion. The principles under consideration involve the meaning of the word “price” in Section 2(a) of the Clayton Act, the required adverse effect upon competition in the same Section, the “good faith” proviso of Section 2(b), relating to the permissible meeting of a competitor’s lower price, and the “unfair methods of competition” clause of Section 5 of the Federal Trade Commission Act and its application to particular competitive situations.

(a) Meaning of “price”.

The argument of the proponents of the hypothesis centers upon the theory that the variation in a seller’s mill net return is both the measure and the essence of discrimination in price. The failure of Section 2(a) of the Clayton Act to define price, it is claimed, does not avoid the necessity of having some definite concept of price. It is said that the “due allowance” proviso of Section 2(a) is a requirement and that the discrimination in any price, whether a mill price or a delivered price, is

of collusion in f.o.b. mill pricing”. FTC’s Notice to the Staff, supra note 3, at 2. The “reason” given escapes analysis. On the other hand, no consideration is given to the economic effect of f.o.b. mill pricing. See Clark, Imperfect Competition Theory and Basing Point Problems, 33 AM. ECON. REV. 283, 295-297 (1942), for a list of suggested points for study in connection with uniform f.o.b. mill pricing. See also, Smithies, Aspects of the Basing Point System, 32 AM. ECON. REV. 705, 706, 707-720, 723 (1942).


116 The Cement Institute, 37 F. T. C. 87, 256 (1943).
measured by the failure to make exact allowance for differences in the costs of manufacture, sale or delivery.\textsuperscript{117} Any other construction "would attribute to Congress the contradictory intention of prohibiting discriminations that fail to make due allowance for differences in cost of delivery and, at the same time, legalizing them".\textsuperscript{118}

Necessarily, any attempt to analyze these propositions must begin with the legislative history of the Robinson-Patman Act, which was summarized by Chief Justice Stone in the \textit{Corn Products} case. As was there stated, the original proposed bill would have defined "price" as the amount received by the vendor after deducting actual freight or the cost of transportation. The minority of the House Committee objected to this phraseology, pointing out that it would localize all industry and tend to prevent competitive freight-absorbing sales, with the result that there would be increases in costs and a statutory prohibition of the full benefits of mass production.\textsuperscript{119} After debate, the proposed definition of "price" was withdrawn and the "due allowance" provision was permitted to remain.\textsuperscript{120} This proviso, however, at one stage of the legislative proceedings had contained the words that "nothing herein contained shall prevent or require differentials", but the words "or require" were eliminated in conference and the statement of the managers pointed out that these words were eliminated as "unnecessary".\textsuperscript{121} The Senate Committee, in its report, stated that the proviso "neither requires nor compels the granting of discriminations or differentials of any sort" but left any who wished to do so free to sell to all at the same price or "to grant any differentials

\begin{footnotes}


\item[118] The Cement Institute, 37 \textit{F. T. C.} 87, 237 (1943).

\item[119] See H. R. \textit{Rep.} No. 2287, Part 2, 74th Cong., 2d Sess. 16 (1936). The example given was of A, a New York manufacturer of shoes, who competed with B, a St. Louis manufacturer, in sales to customer X in St. Louis. As the report stated:

"If A is, under this bill, compelled to superimpose upon his price the transportation cost, he will lose the account of X, and B will get the business and A's costs will be increased. A ordinarily made up the transportation charges for shipping to X by means of mass production and other economies. He will be restricted in doing this under this bill. The effect therefore will be the following: A will be compelled to confine his activities to New York, and B, the manufacturer in St. Louis, will be compelled to confine his activities to St. Louis. Thousands of businesses will thus become parochial, because the circle of customers will be more and more definitely delimited. The result will be increases in manufacturing and distributing costs and a cutting off from customers of the full benefits of mass production and distribution. The consumer again will 'pay the piper.'"

\item[120] 80 \textit{Cong. Rec.} 8102 \textit{et seq.} 8140, 8223-8224 (1936).

\item[121] I \textit{CCH, Trade Reg. Serv.} (9th ed.) ¶ 2212.353 (1948).
\end{footnotes}
not in excess of such differences."\textsuperscript{122} The Court in the \textit{Corn Products} case stated this legislative history indicated that Congress was unwilling to make all uniform delivered price systems and all basing-point systems illegal per se, but intended to leave the legality of such systems to be determined in accordance with "\textsection 2(a), as enacted, and its more restricted prohibitions of discriminations in delivered prices."\textsuperscript{123} (emphasis supplied).

The proponents of the hypothesis argue that the \textit{Glucose} cases stand for the proposition that price must be treated as the mill net return and that the Court there held that any failure to make due (\textit{i.e.}, exact) allowance for differences in the costs of delivery automatically constitutes discrimination measured by the mathematical result following from the failure to make such allowance.\textsuperscript{124} It is also argued that delivered prices must reflect differences in cost since the words "only due allowance" by definition necessarily "unite in excluding allowances that are not made on account of differences in cost of delivery."\textsuperscript{125}

The \textit{Glucose} cases, upon analysis, cannot be said to support these conclusions. The Court, in the \textit{Corn Products} case, held that the differences in delivered prices among purchasers located in different cities had an adverse effect on competition between those who paid the higher price and those who paid a lower price and that these could not be justified under the due allowance proviso which "permits differentials" making due allowance for differences in the cost of delivery. Thus, a "favored zone" was created for purchasers located near Chicago not enjoyed by those near Kansas City who paid a price which included freight from Chicago even though delivery was made to them from the Kansas City plant.\textsuperscript{126}

\textsuperscript{123} Corn Products Refining Co. v. FTC, 324 U.S. 726, 737 (1945).
\textsuperscript{125} Id. at 144.
\textsuperscript{126} The pertinent language is as follows (all emphasis supplied):

"Thus \textit{purchasers} in all places other than Chicago \textit{pay a higher price} than do Chicago purchasers," 324 U.S. 726, 730 (1945).

"The Commission found that the higher prices paid for glucose purchased from petitioners by candy manufacturers located in cities other than Chicago, result in varying degree in higher costs of producing the candies." \textit{Id.} at 731.

"The statute \textit{permits} differentials (c) which make only due allowance for differences in the cost of manufacture, sale, or delivery. . . ."

"Petitioners' pricing system results inevitably in systematic price discriminations, since the \textit{prices they receive upon deliveries} from Kansas City bear relation to factors other than actual costs of production or delivery." \textit{Id.} at 732.

"Since petitioners' basing point system results in a Chicago \textit{delivered} price which is
In the *Staley* case, the Court clearly stated that a "price discrimina-
tion is measured by the difference between the high price to one pur-
chaser and the lower price to another".\(^{127}\) In the next paragraph, by way of dictum, the Court said that it "does not follow" that a seller, by ab-
sorbing freight, "may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price".\(^{128}\)

Under the facts as found by the Commission in the *Cement* case (largely ignored in the Supreme Court’s opinion), there is no basis for saying that "mill net" is to be treated under all circumstances as "price".

The Commission found, from the practice of purchasers of paying only the mill price to the seller and from the terms of sales contracts attempting to place risk of loss in transit on the purchaser, that the intention of the parties was to pass title at the time of delivery to the common car-
rier, a construction reinforced by admissions that the real price of cement was the price stripped of freight, package, and discount.\(^{129}\) The Commission did not decide there whether price was mill net or the delivered price but held that the variations in mill nets (where there were differing delivered prices) resulted in unjustifiable discriminations.\(^{130}\) It is difficult to perceive the reason for the Supreme Court's failure expressly to note these findings in its discussion of the Robinson-Patman charge. Indeed, taken out of the factual context of the case, the language of the Supreme Court, as we have seen,\(^{131}\) would support the mill net theory, although on its facts the *Cement* case could be said to determine that "price" is the delivered price at the agreed place of delivery in accordance with the in-
tention of the parties as to the passing of title, whether delivery be to the buyer at the mill, to a common carrier or to the buyer at his destination.\(^{132}\)


\(^{129}\) 37 F.T.C. 87, 255 (1943).

\(^{130}\) *Id.* at 256-257.

\(^{131}\) See note 52 supra.

\(^{132}\) See Hinds, *Uniform Delivered Prices Under Section 2(a), Robinson-Patman Act Symposium* 83, 85 (CCH 1946).

"But the context of the statute [the Robinson-Patman Act] itself shows, beyond question, that the term 'price' refers to the delivered prices, whether the place agreed
The argument of Mr. Wooden that the due allowance proviso is a requirement that all delivered prices exactly reflect all differences in the cost of manufacture, sale and delivery cannot withstand analysis. The words “only due”, employed by Mr. Wooden in the sense of “no other than” rather than “no more than”, cannot be construed textually as an affirmative command. At the most, his argument creates an ambiguity which should be resolved by reference to the legislative history clearly expressing the Congressional intent that price differentials are permissible if they do not exceed the cost limits, but that prices need not reflect cost differences. Mr. Wooden’s corollary contention is that the due allowance proviso must be deemed to require all delivered prices to reflect cost differences because, otherwise, the anomalous situation would exist “where not only the delivered prices are lawful which make due allowance for differences in delivery cost but also delivered prices which do not make such allowance [are lawful]”. This, again, ignores the terminology of the proviso which reads that “nothing herein contained shall prevent differentials [in price] which make only due allowance for differences in the cost of manufacture, sale or delivery”. Thus, clearly, there must first be “differentials” in delivered prices before the terms of the proviso apply. This interpretation was apparently adopted in the Glucose cases where the Court said that the proviso “permits” differences making due allowance for differences in delivery costs, that Section 2(a) is

upon for delivery be f.o.b. the seller’s factory, or the buyer’s place of business, or some other place. Indeed, the statute specifies the ‘cost of delivery’ as one of the factors whose differences will justify differentials in the price. How can there be differences in the ‘cost of delivery’ with respect to prices which are not delivered prices?

"If, as the Commission contends, by the term ‘discrimination in price’ in subsection (a) Congress was referring to discrimination in ‘mill net’, Congress would hardly, in the very same sub-section have specified ‘cost of delivery’ as one of the costs whose differences would save differentials from the condemnation of unlawful discriminations. There are obviously no costs of delivery in ‘mill net’ return."

133 See Wooden, Section 2(a)—Its Application to a Basing Point Delivered Price, Robinson-Patman Act Symposium, 94, 100 (CCH 1948); Wooden, supra note 113.
136 324 U.S. 726, 732 (1945). There would appear to be sharp disagreement among members of the Commission’s staff on the meaning to be attributed to the “due allowance” proviso. Wooden, as we have seen, sees it as a requirement giving the local purchaser the benefit of his “natural advantage” of location. Dawkins, Legal Adviser and Consultant to the Commission, states that this runs counter to the legislative intent and the dictum in the Staley case. Dawkins, Defenses Available in Cases of Geographic Price Discriminations, supra note 4, at 220-221 (1949) (one of the series of six articles written by Commission staff members which appear in that issue). Indeed, Dawkins, in speaking of f.o.b. full-freight allowed pricing, the equivalent of uniform delivered pricing, says: “If the f.o.b. price [either
limited to prohibitions of discriminations in delivered prices\textsuperscript{137} and that in a "uniform delivered price at all points of delivery", there is no discrimination in price.\textsuperscript{138}

The economic theory that there is necessarily phantom freight in the uniform delivered price, which Mr. Wooden intertwines with the legal argument relating to the due allowance proviso,\textsuperscript{139} rests on the untenable "necessary recoupment" principle, that by absorbing freight a seller is compelled to charge local purchasers a higher-than-normal price. Necessarily, there is freight absorption in any system of universal pricing but this does not mean that a local purchaser is paying a price higher than he would under a mill-plus-freight price. The argument ignores the economies of low-cost volume production. In the final analysis, any system of universal pricing cannot logically be condemned under Section 2(a) since there are no "discriminations in price" and no "differentials" requiring justification under the due allowance proviso. Furthermore, as a matter of statutory construction, under the Glucose cases and under the Commission's theory in the Cement case, "price" in Section 2(a) can only mean the delivered price at the agreed place of delivery.

(b) \textit{Required adverse effect upon competition.}

Section 2 of the original Clayton Act, as well as the present Section 2(a), after the Robinson-Patman amendment, provided that it should be unlawful for "any person" to discriminate in price among purchasers where the effect "may be" substantially to "lessen competition or tend to create a monopoly in any line of commerce". The Robinson-Patman amendment added phraseology calculated to make the prohibition applicable to individual cases which resulted in injuring competing sellers or the competitors of favored purchasers.\textsuperscript{140}

Primarily, Section 2 of the Clayton Act was directed towards the practice of large corporations who cut prices locally in order to drive out local


\textsuperscript{138} \textit{Id.} at 757.

\textsuperscript{139} \textit{Id.} at 726, 737 (1945).

\textsuperscript{138} \textit{Id.} at 221. Thus, the author appears to state that full freight absorption, as in a uniform delivered price, makes exact, and therefore "due", allowance for differences in delivery costs.
competitors. The Van Camp case extended the protection to competing buyers in any line of commerce. Nothing in the legislative history of either the Clayton Act or the Robinson-Patman Act indicates that it was the Congressional intention that the concept of price discrimination should include the practice of sellers collusively establishing a pattern of identical prices throughout a given market, with prices differing in different localities, where the effect was neither to eliminate other sellers nor to injure competition between favored purchasers and those who paid unjustifiably higher prices. Such legislation was not needed as collusion was clearly outlawed by Section 1 of the Sherman Act. Nevertheless, in the Pittsburgh-Plus case, and in the Cement case it was held that such conduct (identical prices charged by sellers in any given locality, with prices varying at different destinations) was illegal under the Clayton Act, regardless of the existence of either situation just described, since the "discriminations" lessened competition among sellers. The Commission in the Cement case also found that this practice tended to injure, destroy or prevent competition "with" cement producers who charged the discriminatory prices.

The Supreme Court in the Cement case said nothing to clarify its application of the Clayton Act to the practice under consideration. The Glucose cases cannot support its conclusion that there was illegal price discrimination in the cement industry, for in those cases the proof showed injury to competing purchasers of glucose, a situation which did not obtain among purchasers of cement, largely dealers, whose business was conducted locally without competition from dealers located at other delivery points. Of course, the Supreme Court did show that an integral part of the "combination" was the practice of establishing punitive bases at or near the mills of recalcitrant producers who refused to adhere to the agreed system, clearly a violation of the Clayton Act as originally enacted, and perhaps this factor contributed to the Court's conclusion. It is difficult to perceive, however, in just what fashion the mutual adherence to a pattern of identical prices tended to prohibit other sellers (who charged the same prices) from doing business in any locality or

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141 See McAllister, Sales Policies and Price Discrimination Under the Clayton Act, 41 Yale L. J. 518, 519 (1932).
144 37 F.T.C. 87, 257 (1943).
145 See 333 U.S. 683, 714 (1948).
tended to injure competition "with" those exacting the "discriminations". The conclusion of the Commission as sustained by the Supreme Court can only tend to confuse collusion with price discrimination, although the Commission in an official statement recently said that the "issues are so different . . . that the two types of problems should be kept sharply separate. . . ." 146

The Clayton Act by its terms does not apply to concerted action; it is directed towards the conduct of individual sellers ("it shall be unlawful for any person . . . to discriminate in price") who discriminate to eliminate other competing sellers or to injure competition between competing purchasers. Until the decision in the Cement case, at least, the Act had been confined to these situations.147 Furthermore, in the collusive situation, it is not the "discrimination" which lessens competition. It is the agreement, express or implied, among sellers to charge the same prices in any given locality. To apply the concept of the Clayton Act to such a case would seem, therefore, to be wholly unwarranted, or at least the result of confused thought.

This phrase of the Cement case thus would appear to have a more important bearing on the question of the prohibited effects of discrimination than the unfortunately metaphysical "reasonably-possible-that-it-may" test of the Morton Salt case, for the former provides the Commission with a weapon to charge and find discrimination regardless of collusion or adverse competitive effect upon purchasers or competing sellers. The difficulty here is in the attitude of the Commission which apparently feels that identical or similar prices charged by a group of sellers, with different ("discriminatory") prices obtaining in different markets, inevitably have the "effect" of eliminating competition among sellers and cannot be the result of competitive forces. Thus, the Commission in any such situation could find that the effect of charging the same prices in any given market was illegal under Section 2(a) regardless of the presence or absence of actual or potential competition.

146 FTC's Notice To The Staff, supra note 3, at 1.
147 See Mennen Co. v. FTC, 288 Fed. 774 (2d Cir. 1923), cert. denied, 262 U.S. 759 (1923), as modified by the Van Camp case, supra note 139; Samuel H. Moss, Inc. v. FTC, supra note 71. In speaking of the adverse competitive effect on the sellers' level prohibited by Section 2(a), the Court in the Moss case said:

"It is true that § 2(a) makes price discrimination unlawful only in case it lessens, or tends to prevent, competition with the merchant who engages in the practice; and that no doubt means that the lower price must prevent, or tend to prevent, competitors from taking business away from the merchant which they might have got, had the merchant not lowered his price below what he was charging elsewhere." Id. at 379. See 33 Minn. L. Rev. 283, 288-289 (1949).
(c) Section 2(b) and the "good faith" proviso.

Section 2(b) of the Clayton Act permits a seller to rebut a prima facie case of price discrimination by showing that his "lower price" was made in "good faith" to meet an "equally low" price of a competitor. Aside from the conclusion reached in the Standard Oil case that Section 2(b) affords no substantive defense where there is proof of adverse competitive effects, the validity of which has been seriously questioned by various authorities, and certain phases of the Staley and Cement decisions require further analysis.

In the Staley case, the respondents, the manufacturer and its sales subsidiary, had come into a field in which the Corn Products Company and another glucose manufacturer were already firmly established. The Staley Company located its factory at Decatur, Illinois, but based all of its prices on Corn Product's Chicago price plus freight from Chicago. Thus Staley's local customers in Decatur paid a higher price than did its customers in Chicago, resulting in serious competitive disadvantage to the former. At all other destinations, Staley charged delivered prices similar to those charged by Corn Products. It was in this factual context that the Court said that Section 2(b) "places emphasis on individual competitive situations, rather than upon a general system of competition". The Court specifically pointed out that respondents had never attempted to establish "their own non-discriminatory price system, and then reduced their price when necessary to meet competition"; that there was no showing that the prices charged under such a system would have been higher than under the system employed; and that there was no proof "that respondents' price discriminations have resulted in 'lower' prices to meet equally low prices of a competitor". In effect, the Court held that a seller, having the burden of proving justification,

148 Austern, supra note 64; Haslett, supra note 140, at 477; Berger and Goldstein, supra note 72.

149 Statement of Allen C. Phelps, supra note 4, at 5; Dawkins, Defenses Available in Cases of Geographic Price Discriminations, supra note 4, at 224-226. Proof of the meeting of competition by offering lower prices heretofore has been assumed by the Supreme Court to be a substantive defense where the proof in support of the charge shows all the elements of illegal discrimination, including competitive injury. FTC v. Staley Manufacturing Co., 324 U.S. 746 (1945) ; International Salt Co. v. United States, 332 U.S. 392, 399 (1947).

150 324 U.S. 746, 753 (1945).

151 Id. at 754-755.

152 Id. at 755.

153 Ibid.
could not do so by merely showing that it had met both the higher and the lower prices of a competitor, where there was no proof to establish that such results were economically inevitable. The Court later emphasized the fact that Staley's discriminations were not the result of its competitors' lower delivery costs and that Staley never reduced its prices below those of its competitors in areas where Staley had a freight advantage.\textsuperscript{154} It finally stated that "good faith" was a question of fact for the determination of the Commission whose conclusion was final if supported by substantial evidence.\textsuperscript{155}

In neither the Staley case nor the Corn Products case did the Court denounce the basing-point system as illegal per se. Furthermore, there is no warrant in saying that the pricing practices of Staley Company would have been banned if it had employed its own basing-point system, non-discriminatory except where necessary to meet the lower prices of its Chicago competitors at any particular location of a customer; indeed, the implications of the Staley decision are to the contrary. It is somewhat surprising, therefore, to find the majority in the Cement case saying that the "combined effect of the two cases [Corn Products and Staley] was to forbid the adoption for sales purposes of any basing point pricing system", if prices were computed for products shipped from one point "on the fiction that they were shipped from another".\textsuperscript{156} Having reached this conclusion under Section 2(a), the Court found no difficulty in citing the Staley decision as authority for the proposition that Section 2(b) did not permit "a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others".\textsuperscript{157} In view of the collusive background of the basing-point system as employed by the cement industry, the statement that interpenetration through freight-absorbing sales was the result of a "practice rather than to meet 'individual competitive situations' ",\textsuperscript{158} and the express limitation of the decision to planned concerted action,\textsuperscript{159} however, it cannot be said that the Cement case, on this phase, stands for anything more than the proposition that the meeting of a competitor's lower price is not made in "good faith" if it is an integral part of a conspiracy or combination to adopt a price-fixing formula.

\textsuperscript{154} Id. at 757.
\textsuperscript{155} Id. at 758.
\textsuperscript{156} 333 U. S. 683, 723-724 (1948).
\textsuperscript{157} Id. at 725.
\textsuperscript{158} Ibid.
\textsuperscript{159} Id. at 727-728.
(d) The "unfair methods of competition" clause of Section 5 of the Federal Trade Commission Act.

One of the most important functions of the Commission has been to restrain "unfair methods of competition" in interstate commerce, a function which was purposely left initially to the informed expert judgment of the Commission without precise, and necessarily limiting, statutory definition of what would constitute an unfair practice.\textsuperscript{160} The \textit{Gratz} case indicated that it was "for the courts, not the commission, ultimately to determine" what the clause included.\textsuperscript{161} Later, in the \textit{Keppel} case, the Court stated that while it was the Court's ultimate responsibility to construe the clause, "in passing on that question the determination of the Commission is of weight".\textsuperscript{162} The meaning of the clause "must be arrived at by . . . 'the gradual process of judicial inclusion and exclusion'".\textsuperscript{163} In considering these expressions, one must keep in mind, however, that it has been fairly well settled that "unfair methods of competition" generally include two types of activity, (1) conduct "opposed to good morals because characterized by deception, bad faith, fraud or oppression", and (2) acts "as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly".\textsuperscript{164} The ultimate aim of the prevention of both types of activity is the same, the preservation of freedom of competition, but that is not to say that the tests to be employed in determining whether activity falls within one category or the other are the same. Good business morals (with relation to deceptive advertising, lotteries and the like) govern the first, the principles of the Sherman Act the other.\textsuperscript{165}

It cannot be disputed that "unfair methods" falling within the principle of the Sherman Act cover both individual and concerted action which, unless checked, would constitute violations of Section 1 or Section 2 of the Act, that is, both individual action with a monopolistic intent and concerted action in restraint of trade, against which the Commission may issue its cease and desist orders within the limits of its jurisdiction. The question now clouded with doubt, however, is whether any group of sellers (or buyers) may be held guilty of anti-competitive "unfair meth-

\textsuperscript{160} Id. at 708-709.
\textsuperscript{161} FTC v. Gratz, 253 U.S. 421, 427 (1920).
\textsuperscript{163} FTC v. Raladam Co., 283 U.S. 643, 648 (1931).
\textsuperscript{164} FTC v. Gratz, 253 U.S. 421, 427 (1920).
\textsuperscript{165} Ibid. See also, FTC v. Beech-Nut Packing Co, 257 U.S. 441, 453 (1922).
ods" without proof of "combination" within the meaning of Section 1 of the Sherman Act. By the footnote dictum already noted, the Supreme Court in the Cement case intimated that in group action cases "'combination' is [not] an indispensable ingredient of an 'unfair method of competition' ",\(^{166}\) citing the Beech-Nut case. In part, at least, the question was squarely presented by the Commission's order under Count II of the Rigid Steel Conduit case, although it might be urged that the proscriptions of that part of the order were necessary in order to restore effective competition within the industry and that an otherwise legal method may be enjoined if adopted as part of a conspiracy.\(^{167}\)

\(^{166}\) 333 U.S. 683, 721 (1948), footnote 19 of the case. The same thought was expressed by Wooden in The Defense of Delivered Price Systems, supra note 28, at 3.

\(^{167}\) Originally it was indicated that the Commission would take this position before the Supreme Court (see Memorandum for the FTC in the Rigid Steel Conduit case filed by the Solicitor General on January 17, 1949, at 4) but in its brief the Commission merely urged that if its order under Count II were held to be erroneous it should be given the opportunity on remand to determine whether such an order might be necessary to prevent the continuation of the price-fixing conspiracy. See Brief for the FTC, pp. 47-48, Triangle Conduit & Cable Co. v. FTC, 336 U.S. 956 (1949).

See also, Zlinkoff and Barnard, Basing Points and Quantity Discounts—The Supreme Court and a Competitive Economy, 1947 Term, 48 Col. L. Rev., 985, 1017—1018 (1948), citing United States v. Bausch & Lomb Co., 321 U.S. 707, 724 (1944); United States v. Univis Lens Co., 316 U.S. 241, 254 (1942). But in those cases the legal and illegal practices were so closely intertwined as to require termination in toto. Moreover, in the Cement case, the majority stated that the Commission could not be said to be wrong in condemning the system "as here used" as an anti-competitive device. 333 U.S. 683, 720-721 (1947). In the Rigid Steel Conduit case, however, the order would not only prohibit the continued use of the basing-point system as theretofore employed but would also prohibit any other method resulting in similar prices with varying net returns, even if each seller in good faith attempted independently to set up a non-discriminatory system of his own and then regularly met the lower prices of his competitors in individual competitive situations. Cf. FTC v. Staley Manufacturing Co., 324 U.S. 746, 754-755 (1945); dissenting opinion of Justice Frankfurter in International Salt Co. v. United States, 332 U.S. 392, 403, 405 (1947).

Another significant factor in the Rigid Steel Conduit case is the Commission's dismissal of the conspiracy count as to two respondents, Spang-Chalfant and Clifton Conduit, while including them in the Count II charge and order. Thus, these two, found to be free from collusion, were nevertheless in effect ordered to go on a uniform f.o.b. mill basis. The latest official statement of the Commission offers the following ingenious explanation: "The facts of record in the Conduit case were such that the Commission might have elected to include Spang-Chalfant and Clifton Conduit in the order under the first count [the conspiracy charge]. Both had knowledge (or such knowledge could reasonably be imputed to them) of the origin and purpose of the practices adopted and followed by them. Since I view the second count of the Conduit case as, in practical effect, equivalent to a conspiracy, although the word 'conspiracy' is not used, I see nothing inconsistent in dismissing the first count as to these two respondents and including them in the order under the second count.
It is difficult to understand how it could be claimed that the *Beech-Nut* case gives the Commission power to find anti-competitive group action without proof of "combination". There the Beech-Nut Company, with the aid and cooperation of its customers, adopted the plan of blacklisting dealers who would not maintain suggested resale prices and refused to sell to such customers. The Court specifically pointed out that an individual seller had the right not to sell to those who would not maintain the fixed resale prices but that he "may not, consistently with the [Sherman] Act, go beyond this right, and by contracts or combinations" seek to restrain "the free and natural flow of commerce". The Court then went on to say that it was immaterial that the Commission found that the company's merchandising conduct did not constitute "a contract or contracts whereby resale prices are fixed", since the company had suppressed "the freedom of competition by methods in which the company secures the coöperation of its distributors and customers, which are quite as effective as agreements express or implied intended to accomplish the same purpose". The Court held, however, that the Commission's order, which required the respondent individually to desist from bringing about "by any means" the resale of its products at the fixed resale prices, was too broad and should be restricted to a requirement that the company cease and desist from carrying into effect its policy "by coöperative methods" among "the respondents and its distributors, customers and agents". Thus, the whole tenor of the opinion, coupled with the revision of the Commission's order, is to the effect that "unfair methods of competition" are anti-competitive methods achieved through

The character of their participation and the proof concerning it conformed more precisely to the second count than to the first count." *Response to Questions* addressed to Commissioner Davis by the Chairman of the Senate Subcommittee on Trade Policies, *supra* note 3, at 3. The replies were approved by Commissioners Davis, Ferguson and Ayres.

The author of the Comment, 58 *Yale L. J.* 426 (1949), said: "In a decade remarkable for attacks on Supreme Court decisions, few have been denounced so violently as the 'basing point' case, *FTC v. Cement Institute*. Perhaps none has been scored with less reason."

It is clear, however, that if the Supreme Court in the *Rigid Steel Conduit* case had followed all of the language and reasoning of its *Cement* case opinion, it would have affirmed the lower court's decision by the same clear majority. In view of its four-to-four affirmance in the *Rigid Steel Conduit* case (with Justice Jackson not participating) it would seem, therefore, that some of the criticism leveled at the language of the majority opinion in the *Cement* case is justified.

168 257 U. S. 441, 453 (1921).
169 *Id.* at 455.
170See 264 Fed. 885, 888 (1920).
"combination" (without express contract) and "coöperative methods" within the meaning of the Sherman Act which "shows a declaration of public policy to be considered in determining what are unfair methods of competition". The Beech-Nut case, therefore, concerned "planned common course of action", just as did the Cement case; expressly, it did not prohibit "individual" conduct.

The Rigid Steel Conduit case, decided by the Court of Appeals in accordance with the "individual conduct" dictum of the Cement decision, went far beyond forbidding the use of a basing-point system as a collusive device; it would prevent any freight-absorbing sales where similar delivered prices result fairly regularly among any two or more sellers. It would seem, therefore, that this case can logically be explained only in the light of the "orthodox" economic theory discussed above, namely, that the prevention of variations in mill net, as a regular practice of sellers, is essential in order to bring about workable competition. The case also presented the question of whether the Commission may not only forbid the continued use of a device employed as part of a planned common course of action but also require an industry, not acting collusively, to adopt an entirely different marketing method which, in effect, would result in cartelized selling governed by essentially arbitrary freight rates.

The theory that the prevention of freight-absorbing sales would be an effective antidote to the concentration of industrial power, which apparently received the passing approval of the majority in the Cement case, undoubtedly requires further analysis and study. At the present time, it would seem that initially the judicial establishment of such policy would benefit the large chain plant manufacturer, with plants strategically located throughout the country, to the disadvantage of the smaller single plant competitor, and to that extent would promote further industrial concentration.

171 Id. at 453.
173 In discussing the effects of requiring uniform f.o.b. mill prices, Comer, Economic Adviser to the Antitrust Division of the Department of Justice, stated in Price Leadership, 7 Law & Contemp. Prob. 61, 72-73 (1940):

"The second proposal would be fatal to the basing point system. If all steel quotations, for example, were changed to an f.o.b. mill basis, the steel basing point system would explode. Whether the debris would settle down into a pattern resembling the present system or whether a series of local monopolies would develop around mills within the areas of their freight advantages is a matter of speculation. It is a safe guess that something between the present system and scattered local monopolies would result.
RECENT OFFICIAL STATEMENTS OF THE FTC WITH REFERENCE TO GEOGRAPHIC PRICING

Criticism could be leveled at the foregoing analysis upon the ground that it is limited to only the radical features of the cases discussed. The author would plead nolo contendere to such a charge, since it is the contention here that these decisions cannot be understood unless their reasoning and probable purpose are reduced to fundamental theory. That is not to say, however, that the author claims that the majority of the Commission at the present time is in accord with all of the conclusions, reached by some members of its staff, which would follow from a complete acceptance of the doctrine that free competition requires the elimination of varying net returns to sellers.

Within two days after the Supreme Court's decision in the Cement case, the Commission issued a press release which, from its language and context, would indicate that the Commission at that time believed that this economic theory had received judicial sanction. Following the public

"That the benefits to be derived from extirpating price leadership in this manner would be unalloyed is open to question. Thus, it is a serious question whether, and to what extent, large companies in some industries would gain a competitive advantage over smaller companies in a change from a delivered to an f.o.b. price basis. The large steel companies, for example, such as the Steel Corporation, Bethlehem, and Republic, with their widely scattered plants, might be in a position to drive some of the smaller steel companies out of business under the f.o.b. system of pricing.

"Even among the various plants of a single large company serious questions of public policy might arise. If the Steel Corporation, for example, should announce f.o.b. prices for Birmingham and for the Chicago area based upon cost plus a reasonable profit, the operations of the Corporation for some products in the Pittsburgh area might be seriously curtailed. The net effect of the change might be to the advantage of the Corporation as a whole, but the effect upon the labor force and upon some communities in the Pittsburgh area might be disastrous.

"The extent of the disturbance of the business of fabricators now operating under base or zone prices in many industries and the effect upon the ultimate consumer, especially west of the Mississippi, where freight absorption may be heavy in shipments to some areas under a formula price system, should also be considered in connection with a compulsory change to f.o.b. prices."

On the other hand, see Editorial Note, 33 MINN. L. REV. 283, 291 et seq. (1949). The conclusions reached by the author of this note would not appear to be based on any extended or impartial study. Indeed, no such study has been made to date and, recently, an eminent economist admitted informally that the whole question of pricing is in its "infancy".

174 See note 3 supra. In analyzing the decision, the Commission's release read in part:

"The Court agreed with the Commission that this pricing system not only constitutes an 'unfair method of competition' but also involves unlawful price discrimination. It further held, in effect, that the identical delivered prices which the system was designed to establish, regardless of wide differences in the cost of transportation from widely scattered plants, automatically created and reflected systematic discriminations in net factory prices. Such discriminations are inherent in the system, the Court ruled, reaffirming the principles it had announced in the 'Glucose cases' in 1945 to the effect that price discrimination in a basing point system involves freight absorption as well
uproar, it is evident that the Commission later reappraised the decision and reached a more limited interpretation. It is further evident that, in its recent official statements with respect to its views on geographic pricing, the Commission has made a conscientious effort to set forth, along with its interpretations of the Cement and the other recent decisions, a series of tests to be applied in determining whether any pricing method is to be considered anti-competitive.\footnote{\textit{The O'Mahoney Bill}, 237}

The Commission clearly intended to avoid the black-or-white dichotomy of calling any particular system competitive or non-competitive per se, and yet, upon analysis, it will be seen that there are perhaps more than vestigial remains of the "orthodox" economic principle here discussed still adhered to by the majority of the Commission. Thus we see that the Commission is still of the opinion that there is nothing "inherently suggestive of collusion" in uniform f.o.b. mill pricing,\footnote{\textit{FTC's Notice To The Staff}, supra note 3, at 2.} whereas industry-wide adherence to any system of freight-absorption raises a "presumption" of collusion.\footnote{\textit{Id.} at 3.} As we have already seen, the Commission still feels that "conscious parallel action" resulting in identity of prices neces-

as phantom freight, and that the law does not exempt the one any more than the other if competition is injured or destroyed. Both now stand clearly condemned as instruments of unlawful price discrimination as well as implements of an unlawful combination to fix prices.

"Reviewing the Glucose cases, the majority opinion by Mr. Justice Black concluded that their combined effect 'was to forbid the adoption for sales purposes of any basing point pricing system.'"

"The decision has a definite and substantial impact upon the status of similar systems of identical delivered prices used by a number of heavy goods industries. In the aggregate the commodities priced under such systems are important factors in the cost of housing and other construction and of semi-fabricated products used as raw materials in a host of other industries. Hope is expressed that industry in general, and organized industry in particular, will avail itself of the opportunity now presented to conform voluntarily to the law as determined by the Supreme Court in the Cement case, and thus to materially assist the Commission in its efforts to bring about that competitive determination of prices to which the law is directed and the American economic system is committed."

While the case was pending decision in the Supreme Court, Mr. Wooden, who was the chief counsel for the Commission, stated in an article:

"If the Court should more clearly agree with the Commission concerning the status of net factory price as the true price, and that systematic freight absorption had no better legal status than phantom freight, the vulnerability under the Robinson-Patman Act of a uniform delivered price which injures competition would become apparent." Wooden, \textit{Validity Under the Robinson-Patman Act of a Uniform Delivered Price of One Seller}, 32 MINN. L. REV. 129, 148 (1948).

\textit{FTC's Notice To The Staff}, letter to Chamber of Commerce of the State of New York, and \textit{Response to Questions addressed to Commissioner Davis}. \textit{Supra} note 3.

\textit{FTC's Notice To The Staff, supra} note 3, at 2.

\textit{Id.} at 3.
sarily has the effect of eliminating price competition. Furthermore, in the field of price discrimination, the Commission suggests that the tests of discrimination apply to both mill net returns and delivered prices, as the result of which there may be illegal price discriminations in cases of industry-wide use of uniform delivered prices which have the “effect” of eliminating competition among the sellers. While stating that freight absorption “may permit interpenetration of markets and tend to promote competition”, the Commission further suggests that nevertheless freight absorption which results from the “good faith” meeting of a competitor’s lower prices may be illegal where it permits a large seller to destroy his smaller competitors. Although it is stated that the basing-point decisions “leave every business man free to use any pricing method he chooses”, this statement is qualified by the condition “so long as it is not one which eliminates or injures competition”.

From these statements one cannot be assured that any of the nine radical propositions listed above, which might follow from the reasoning or language of the cases here discussed, may not still be regarded as a valid weapon to be employed by the Commission in any particular case. To that extent, therefore, it would seem that the Commission still adheres to the view that varying net returns to sellers in any given situation may be inherently illegal either as an unfair method of competition or as an illegal price discrimination.

The New Bill to “Legalize” Delivered Prices and Freight Absorption

In the final analysis, the questions arising from a consideration of the abuses or advantages of any particular system of pricing are necessarily but part of the whole field of antitrust law which, in the last few years, has developed to such a point that clarification of aims and methods is sorely needed. The theoretical dichotomy which this study has demonstrated may exist in the minds of some members of the Commission or its staff with respect to pricing practices and systems seems to have its coun-

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178 Ibid.
179 Id. at 5.
180 Id. at 6.
181 Response to Questions addressed to Commissioner Davis, supra note 3, at 9.
183 Response to Questions addressed to Commissioner Davis, supra note 3, at 13.
terpart in the field of Sherman Act enforcement. In both the narrower and the larger fields, it would appear that there has been a tendency to view situations as either presumptively "competitive" or presumptively "monopolistic". Prior to the Columbia Steel case, one commentator declared it to be his opinion that the Supreme Court "is on the threshold of recognizing what economists call monopolistic competition as the offense of monopoly under Section 2 of the Sherman Act",184 and the dissent in that case188 would lend support to this observation. Nevertheless, recently it has been suggested by an economist that effective competition under modern conditions is composed of a blend of competitive and monopolistic elements and that size, concentration and the number of sellers or buyers have little significance in determining whether workable competition exists.186 The majority in the Columbia Steel case evidently were guided

184 Rostow, A National Policy for the Oil Industry, 126 (1948). For a spirited attack on Rostow's facts see, Stigler, Book Review, 57 Yale L. J. 1323 (1948); as to his legal and economic conclusions, see Alexander, Book Review, 61 Harv. L. Rev. 1088 (1948), and Johnston and Stevens, Monopoly or Monopolization—A Reply to Professor Rostow, 44 Ill. L. Rev. 269 (1949). Compare Rostow's sweeping statement with the more restrained approach of Fly, supra note 100, at 1341-1344, where the author eschews any per se tests to be applied to "monopolistic competition", a term he employs to denote "the mechanism for determining price in a market where there are few sellers".

185 "In final analysis, size in steel is the measure of the power of a handful of men over our economy. That power can be utilized with lightning speed. It can be benign or it can be dangerous. The philosophy of the Sherman Act is that it should not exist. For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and socially minded is irrelevant. That is the philosophy and the command of the Sherman Act." 334 U. S. 495, 536 (1947).


"I am happy to know that only a minority of my brethren adopt an interpretation of the law [the Sherman Act] which in my opinion would make eternal the bellum omnium contra omnes and disintegrate society so far as it could into individual atoms. If that were its intent I should regard calling such a law a regulation of commerce as a mere pretense. It would be an attempt to reconstruct society. I am not concerned with the wisdom of such an attempt, but I believe that Congress was not entrusted by the Constitution with the power to make it and I am deeply persuaded that it has not tried."

186 Adelman, Effective Competition and the Antitrust Laws, 61 Harv. L. Rev. 1289, 1299, 1298-1300, 1303 (1948). Adelman takes issue with Burns' theory that, with recent concentration, there has been a "decline of competition". Id. at 1295-1297, 1301. See, Burns, The Decline of Competition (1936), and Stevens, Book Review, 38 Col. L. Rev. 1126 (1938).
by this more realistic approach and undertook to review the evidence in an endeavor to see whether or not an undesirable amount of "market control" would result from United States Steel Company's acquisition of Consolidated Steel.\footnote{387} Even though, as indicated, the proper criteria may be market control and behavior, however, there are still no objective tests to be applied in determining how much market control ought to be permitted in any particular industrial situation.\footnote{388}

In the light of these considerations, one would have thought that the time was appropriate for a reexamination by Congress of the whole field of antitrust law, including questions concerning pricing methods. It is evident, however, that the failure of the Supreme Court to clarify the existing confusion, through its disappointing four-to-four affirmance in


\footnote{388} "Until and unless we decide that the real problem is market control and how much and what kind we ought to permit, the situation will remain confused." Adelman, \textit{Effective Competition and the Antitrust Laws, 61 Harv. L. Rev. 1289, 1317 (1948).} "Since every market contains some elements of control, a loose construction of the antitrust laws can be used to find illegal monopoly or restraint of some part of inter-state commerce almost anywhere, even in industries where competition is effective and beneficial. Because the law lacks standards of competition, we may be in for a period of desultory and promiscuous swinging at heads in this direction or that." \textit{Id.} at 1349-1350.

In Mason, \textit{Monopoly in Law and Economics, 47 Yale L. J. 34, 49 (1937), the author, Professor of Economics at Harvard, concluded:}

"On the other hand, if economics is to be put itself in a position to contribute to the formulation of public policy, it must conceive the monopoly problem in a more extensive way than is at present customary. It is not enough to find evidence of the existence of market controls, nor is it sufficient to conduct purely analytical and descriptive studies of various types of control situations. While this is important, the formulation of public policy requires a distinction between situations and practices which are in the public interest and those that are not. And this requirement imposes the necessity of elaborating tests which can be applied by administrative bodies and by the courts. It is easy enough to present evidence of monopoly situations, which, to economics, is merely the absence of pure competition. The existence of price discrimination, of price rigidity, advertising expenditures, price leadership and other practices are sufficient to indicate the presence of monopoly elements. But these practices are hardly sufficient evidence of the presence or possibility of market controls adverse to the public interest. A further study of different types of industrial markets and business practices and of their effects on prices, outputs, investment and employment designed to indicate means of distinguishing between socially desirable and undesirable situations and practices may or may not be fruitful. It is, in any case, the only way in which economics can contribute directly to the shaping of public policy. A simultaneous movement by legal and economic thinking away from entrenched positions might be conducive to progress on this front."
the Rigid Steel Conduit case, was the motivating reason for the introduction of the O’Mahoney bill, S. 1008.

The express purpose of the bill was to permit the individual use of delivered prices and freight absorption, the legality of which had become doubtful in view of the Cement and Rigid Steel Conduit decisions, and to eliminate the “reasonable possibility” test laid down by the dictum in the Morton Salt case.\(^{189}\) It is very much open to question whether the pending bill achieves either result.\(^{190}\)

The Act amends Section 5(a) of the Federal Trade Commission Act and Sections 2(a) and (b) of the Clayton Act. In addition, it defines the terms “price”, “delivered price”, “absorbed freight” and “the effect may be”.

Section 1 of the pending bill amends Section 5(a) of the Federal Trade Commission Act\(^{191}\) so as to provide that it shall not be an unfair method of competition for a seller acting independently to quote or sell at delivered prices or to absorb freight. This obviously was intended to remove the doubts created by the Commission’s order under Count II of the Rigid Steel Conduit case, in order to permit delivered prices and freight absorption, even though each seller might know that his competitors were employing similar pricing methods. It is not beyond the realm of possibility, however, that the Commission or the courts would seriously question whether, under these circumstances, a seller was “acting independently”. The failure to define the term “acting independently”, therefore, may lead to a test case to determine its meaning (or meanings).


\(^{190}\) So far as the Morton Salt dictum is concerned, it should be noted that Section 4 as originally passed by the House, Subsection D, of the bill provided: “The term ‘the effect may be’ shall mean that there is reasonable probability of the specified effect”. In adopting the conferees’ report, however, the House changed this to read: “The term ‘the effect may be’ shall mean that there is reliable, probative and substantial evidence of the specified effect.” 95 Cong. Rec. 14796–14797 (October 14, 1949). This would appear to deal only with the nature of the evidence required to show the specified effect and not to touch upon the question of whether the “specified effect” shall be “possible” or “probable”. In addition, as the conferees’ report specifically points out, the definition applies only “As used in this Act” and would not cover the term as used in the main body of Section 2(a) of the Clayton Act. Ibid.

\(^{191}\) The amendatory language reads: “It shall not be an unfair method of competition or an unfair or deceptive act or practice for a seller, acting independently, to quote or sell at delivered prices or to absorb freight: Provided, That this shall not make lawful any combination, conspiracy, or collusive agreement; or any monopolistic, oppressive, deceptive, or fraudulent practice, carried out by or involving the use of delivered prices or freight absorption.”
Aside from this, the amendment would prohibit a finding of an unfair method of competition in the absence of conspiracy, collusion or "monopolistic" or "oppressive" practices.

The real problem which the new Act does not touch is the situation where each seller, "acting independently", employs a pricing method, knowing that his competitors are using the same method, with the result that at any particular time and place all sellers charge the same price. Where buyers are reasonably well-informed, price uniformity is apt to occur regularly, or, to employ the Commission's term, "systematically". The question would still remain whether the effect of this was to lessen competition among sellers. And if the Commission were so to find, would this be sufficient to establish an unlawful conspiracy, as the Seventh Circuit Court of Appeals said, by way of dictum, in the Allied Paper Mills case?192 On the other hand, the Robinson-Patman Act tends to solidify price structures and promote adherence to announced prices so that a seller is discouraged from granting such sporadic or secret price cuts which competitive bargaining might otherwise bring about. Thus, the honest and truly innocent seller perhaps may justifiably feel that he is facing a potential Scylla-Charybdis situation. Nor will he be entirely satisfied by the assurance that, to date, neither the Commission nor the Antitrust Division has charged members of an industry with a conspiracy merely on evidence showing "conscious parallel action" and similarity of prices.

Perhaps the theory of "conscious parallelism" is not a fit subject for legislation since it is essentially a rule of evidence relating to the circumstances from which a conspiracy may be inferred. Certainly, however, effective legislation on this point, which will neither encourage tacit price-fixing conspiracies nor discourage beneficial competitive practices, cannot be drafted overnight or without a searching analysis of conflicting economic theories in the light of actual market data.

The Commission has recently said that in determining whether a price-fixing conspiracy exists consideration is to be given to such factors as "enduring uniformities" of price, uniformities in the timing and amount of price changes, use of price formulas which determine which seller shall initiate price changes at any given destination, concealment of quality differences, disciplinary action against recalcitrant sellers who refuse to follow the "formula", and the like,193 some, or all of which, may be per-

192 See note 67 supra.

tinent and proper considerations. But the accompanying statement that "Momentary identity of delivered prices in ordinary commercial sales is not regarded by the Commission as adequate evidence [of a price-fixing conspiracy]" leaves everything up in the air. No mention is made of such economic factors as high overhead costs, inelastic demand, homogeneity of products, the pressure on each seller inhibiting price competition which threatens to become price war, and the role of potential competition which restrains sellers from charging monopoly prices. Where these conditions or some of them are present, and where buyers are well-informed, there may be uniformity of price for a considerable period of time, without combination, conspiracy or collusive agreement, and as the result of competition, imperfect though it may be. Whether this is desirable or effective competition, and, if not, what steps are necessary to achieve "workable" competition, or whether the anti-trust laws should be used as a whip to compel competition and not merely as a weapon to prohibit artificial restraints on competition, are all questions properly within the domain of Congress but it would seem that none of them is solved by the new Act.

Furthermore, the proviso to Section 1 of the new Act makes unlawful any "monopolistic" or "oppressive" practice arising from the use of delivered prices or freight absorption. According to proponents of the orthodox economic principle above discussed, anything other than uniform f.o.b. mill pricing may, under appropriate circumstances, be termed "monopolistic". Similarly, freight absorption, according to the same school of thought, may be "oppressive" where it permits a large seller to invade a smaller competitor's "natural" trade territory and take customers away from the latter.

The amendments to Section 2(a) of the Clayton Act create similar doubts as to whether Congress has effectively achieved its purpose.

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194 Ibid.
195 See Clark, Imperfect Competition Theory and Basing-Point Problems, supra note 71, at 287-289; Comment, 58 Yale L. J. 426, 431 (1949).
196 See dissenting opinion of Justice Jackson in Standard Oil Co. of California v. United States, 337 U.S. 293, 324 (1949).
197 See note 81 supra.
198 Johnson, supra note 102.
200 Section 2 of the bill as originally passed by the House added the following provisions to Section 2(a) of the Clayton Act: "And provided further, That it shall not be an unlawful discrimination in price for a seller, acting independently—
We again find, in the amendment to Section 2(a), the provision that it shall not be an unlawful price discrimination for a seller “acting independently” to sell at delivered prices or to absorb freight, and the same observation may be made here as was made above with respect to the phrase in the amendment to Section 5 of the Federal Trade Commission Act. In addition, the use of the term “acting independently” in the price discrimination act implies that Section 2 of the Clayton Act covers collusive action. To that extent the confusion of collusion with price discrimination found in the Supreme Court’s opinion in the Cement case would appear to receive statutory approval.

Subsections A and B of the amendment to Section 2(a) create additional problems. The first portion of Subsection A permits a seller to quote or sell at delivered prices if such prices are identical at different delivery points. By itself this portion of the new Act would seem clearly to permit employment of a nation-wide uniform price by a seller. Some difficulty, however, may be caused by the fact that Section 4 of the new Act defines “price” as having the meaning which it has under the applicable commercial law, while “delivered price” is defined as a price for delivery of a commodity at a point other than the seller’s own place of business. Thus, where a seller has a uniform price at all delivery points, including his own place of business, it might be urged that the specific exception to the general price discrimination rule set forth in Subsection A would not apply. By making an apparent distinction be-

“A. to quote or sell at delivered prices if such prices are identical at different delivery points or if differences between such prices are not such that their effect upon competition may be that prohibited by this section; or

“B. to absorb freight to meet the equally low price of a competitor in good faith (except where such absorption of freight would be such that its effect upon competition may be that prohibited by this section), and this may include the maintenance, above or below the price of such competitor, of a differential in price which such seller customarily maintains.”

The conference report, adopted by the House, substituted for the parenthetical language in subsection B the following words: “(except where such absorption of freight would be such that its effect upon competition will be to substantially lessen competition).” 95 Cong. Rec. 14796 (October 14, 1949).


202 Section 4 provides: “As used in this Act—

“A. The word ‘price’ shall have the meaning which it has under the commercial law applicable to the transaction.

“B. The term ‘delivered price’ shall mean a price at which a seller makes or offers to make delivery of a commodity to a buyer at any delivery point other than the seller’s own place of business.”
tween "price" and "delivered price", the new bill clearly affords technical grounds for this argument.

The second portion of Subsection A permits a seller to quote or sell at delivered prices "if differences between such prices are not such that their effect upon competition may be that prohibited by this section". In view of the decision in the Cement case, it could be contended that this was a statutory codification of the rule there announced, namely, that delivered prices which vary at different delivery points may be illegal price discriminations if employed by two or more sellers, because the effect is to eliminate competition among such sellers. This again would be a statutory approval of the confusion of collusion with price discrimination.

Subsection B of the amendment to Section 2(a) and Section 3 of the bill, amending Section 2(b), as originally worded, were clearly designed to permit freight absorption to meet the equally low price of a competitor. During the short debate in the Senate, however, the so-called Kefauver amendment was made to both of these sections of the new Act which would have permitted this practice except where the effect would be to "substantially lessen competition". The House Judiciary Committee advised deletion of this amendment, but in the debate on the House floor similar amendments suggested by Representative Carroll were adopted to permit freight absorption to meet equally low prices of a competitor except where the "effect upon competition may be that prohibited by this section". The conferees' report, adopted by the House, further complicates matters by leaving the limiting words in Subsection B in substantially the form originally enacted by the House and by eliminating a similar clause in the amendment to Section 2(b) and adding a qualifying clause reading "except that this [the defense of meeting an equally low price of a competitor in good faith] shall not make lawful any combination, conspiracy, or collusive agreement; or any monopolistic, oppressive, deceptive, or fraudulent practice". It is not entirely clear that this will eliminate the rule of the Standard Oil case since it might be held that freight-absorbing sales, even where made in good faith to meet a competitor's price, are "oppressive" as to competitors of

203 95 Cong. Rec. 7211, 7232 (June 1, 1949).
204 See note 189 supra.
205 95 Cong. Rec. 9250-9251, 9258-9260 (July 7, 1949).
206 See note 199 supra.
207 95 Cong. Rec. 14795, 14796 (October 14, 1949).
the favored purchaser or constitute a "monopolistic" practice. Even more important, however, is the failure of the new bill to provide that a seller may regularly and constantly meet his competitor's lower prices. Business is rarely done sporadically in any given territory and under the clear language of the Cement decision a seller is not meeting an equally low price of a competitor "in good faith" if he does so "constantly" or regularly.

To draft legislation of the sort represented by the O'Mahoney bill, intended to allay doubts created by a gradually evolving pattern of thought, developed only embryonically in a series of factually unrelated cases, is extremely difficult under the best of circumstances. The task is even more difficult where the legislative body is dealing with essentially uncrystallized principles of theoretical economics and such vague terms as "monopolistic", "oppressive", and the like. Under these circumstances, it is probably inevitable that a hasty legislation will fall far short of the express legislative intent. The O'Mahoney bill, an outstanding illustration of such hasty legislation, not only falls far short of the intent of Congress but does little to clarify the existing confusion.

Effective legislation on this question can come only after an objective examination of all pertinent data. This calls for an extended survey of practically every aspect of industrial merchandising and would require a reappraisal of conceptualistic legal and economic theories from the functional standpoint. Whether this would result in further legislation, the repeal of existing legislation, or merely the adoption of proper criteria to be employed by the courts and the administrative agencies cannot now be determined. But unless and until general and specific aims are formulated, the innocent will suffer with the guilty—indeed, the innocent will never know whether they are guilty until haled into court or before some administrative agency. Precise certainty, of course, can never be achieved. On the other hand, an unreasonable amount of confusion, at best only partially dissipated by the O'Mahoney bill, is not conducive to a healthy economy.

208 Particularly would this be so in the event subsection B of the new proviso amending Section 2(a) were held to establish a statutory definition of one form of monopolistic practice—viz., freight-absorbing sales whose effect upon competition will be to substantially lessen competition.


210 See MILLER, UNFAIR COMPETITION, ch. XVIII (1941).
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FEDERAL LEGISLATION
THE NATIONAL HEALTH INSURANCE PLAN

OF ALL the reforms urged by President Truman in last year's message to Congress on the State of the Union, one of the most controversial was his health plan, including a system of prepaid national health insurance.¹ The President's recommendations² were embodied in S. 1679³ and its companion bills, H.R. 4312 and H.R. 4313.⁴ The administration bill is divided into seven titles, the first six of which concern grants for education, research, hospital survey and construction, special aid for rural and other shortage areas, local health work, and maternal and child health benefits. Title VII deals with national health insurance. There has been widespread approval of the first six titles; two have been passed by the House or Senate in separate bills;⁵ and one title, concerning amendments to the Hospital Survey and Construction Act,⁶ is now a law.⁷ Title VII, however, has received bitter opposition from many groups. Its enemies claim, among other things, that it is socialized medicine. Sponsors of the bill claim that the plan recommended is the only thing that will save us from socialized medicine.⁸

The bill would provide medical services, dental services, home-nursing services, hospital services, and auxiliary services (diagnostic and labora-

¹ "We must spare no effort to raise the general level of health in this country. In a nation as rich as ours, it is a shocking fact that tens of millions lack adequate medical care. We are short of doctors, hospitals, and nurses. We must remedy these shortages. Moreover, we need—and we must have without further delay—a system of prepaid medical insurance which will enable every American to afford good medical care."—H.R. Doc. No. 1, 81st Cong., 1st Sess. 5 (1949).
tory services, drugs, special appliances, eyeglasses), for the employed (including the self-employed) and their dependents—an estimated 125,000,000 people, 85% of the population of the United States. Provision is made to extend coverage to 100% of the population, through arrangements with public agencies.

Most of the arguments concerning Title VII are political and economic disputes, concerning the state of the nation’s health, the necessity of compulsory national health insurance, the merits of voluntary health insurance plans, etc. There is also a constitutional question. The Constitution does not specifically give Congress police power over the nation’s health. Protection of local health is a matter of local concern. How, then, can the sponsors of S. 1679 justify the Federal Government’s apparent trespass on the reserved rights of the states? In order to answer this, an appreciation of the size of the national health problem is necessary, for the ability or inability of the separate states to cope with the problem is a consideration of utmost importance in regard to the constitutionality of a system of compulsory national health insurance. Therefore, in order to determine the constitutional question, it is necessary to become acquainted with the economic and political aspects of the national health problem.

All agree, whether friend or foe of national health insurance, that in spite of the great strides in medical science in the last hundred years, and in spite of the fact that the United States is one of the healthiest nations in the world, there are still many areas in the United States where medical personnel and services are pitifully scarce. The United States has 197,000 doctors—one for every 760 of its population. This is a higher per capita ratio than any other nation—England is second with one doctor for every 870 persons. In certain areas of the United States the ratio is low. Mississippi has one doctor for every 1500 persons. Many low-income and rural areas have little to offer in the way of modern equipment and services. The lack of modern facilities in these areas and remoteness

9 Id., § 701.
10 Id., § 704.
12 S. 1679, 81st Cong., 1st Sess. § 705 (1949).
from centers of medical research, usually connected with the university
medical centers in the cities, works a hardship not only on the lay members
of the population, but also on the doctors, many of whom are discouraged
by these conditions from practicing in the areas where they are most
needed. Even in areas where doctors, specialists, and all the develop-
ments of modern science are available, many people cannot take advantage
of them because of the financial barrier. Sickness comes unexpectedly.
The average American spends $49.35 per year on medical care, the
Department of Commerce reports.\textsuperscript{14} However, the "average American"
so often bobbing up in statistics is as mythical a person as the law of
torts' "reasonable man". The fact that the average American pays only
$50 a year for medical care is little consolation to John Jones when he
is faced with a bill of several hundred dollars as the result of an un-
expected illness of a member of his family. However, it is not the plight
of the average American with his annual $50 bill for medical care, or
even of poor Mr. Jones with his much larger bill, which calls for the
necessity of health insurance of some kind, whether sponsored by the
government or by private interests. Both of these imaginary persons
have received the medical care they need. Their financial troubles de-
serve sympathy, but do not call for national legislation. It is the Amer-
ican who fails to visit a doctor, because he cannot afford it, or who puts
off seeing the doctor until illness has caused irreparable harm, who needs
help. Many in the lower middle class are as greatly in need of national
health insurance as the indigent. The wealthy can afford medical care.
The indigent may often, through the charity of American doctors and
charitable public agencies, receive medical care free if they cannot afford
to pay for it. But the majority of Americans, in the middle class, who
just make ends meet on their limited incomes, usually have no reserve to
dip into when illness strikes, nor are they needy enough to apply for
charity. In fact, many people, even if they are medically indigent, will
often prefer to do without medical care rather than admit they are needy.
This American abhorrence of being an object of charity is an intangible
but potent factor to be considered in determining what method should
be sued to spread medical services to all the people.

Both the American Medical Association, the principal antagonist of
government-sponsored medicine, and the sponsors of S. 1679 agree that
if this financial barrier can be overcome, the United States will be a long

\textsuperscript{14} Falk, \textit{Cost Estimates for National Health Insurance, 1948}. 12 \textit{Social Security Bull.}
No. 8, p. 9 (1949).
way towards solving the problem of how to assure adequate medical care to all. Moreover, both agree on how the financial barrier should be overcome—by spreading the cost through some form of insurance to which the insured will contribute a fixed amount periodically, and will receive medical care for himself and his dependents in return. Thus, through what might be called compulsory budgeting, the citizen has no financial problem when sickness strikes. He has already paid his bill. Having gone this far together, proponents and opponents of S. 1679 split. They agree on the problem and on the principle underlying a plan which will solve the problem—spreading the cost. But they differ concerning who is to administer the plan. Under the administration bill, the Federal Government would administer national health insurance. All the plans proposed by the opponents of the bill would utilize voluntary health insurance plans, administered either by commercial insurance companies, or, as the majority propose, by non-profit groups like the Blue Cross, Blue Shield plans.

NATIONAL HEALTH INSURANCE AND OTHER PLANS PROPOSED.

Under the national health insurance plan of S. 1679, administration on the national level would be under the Federal Security Agency. A five-man National Health Insurance Board would be set up in the Federal Security Agency, under the direction and supervision of the Federal Security Administrator, to administer the plan.\(^5\) They would be assisted by a seventeen-man National Advisory Medical Policy Council, headed by the Chairman of the Board, who would advise the Board with reference to matters of policy and administration.\(^6\) On the state level, "It is the intent of Congress that the benefits provided under this title be administered wherever possible by the several States, in accordance with plans of operations submitted and approved as provided in this part."\(^7\) In order to be approved, the state plan would have to designate a single agency, preferably the same state agency administering the state’s general public health and maternal and child health programs, and set out a plan of administration and supervision of local units.\(^8\) If no state plan be submitted or approved, the National Health Insurance Board would administer Title VII in that state, having “all authority and duties, in

\(^5\) S. 1679, 81st Cong., 1st Sess. § 751(a),(b) (1949).
\(^6\) Id., § 752(a),(b).
\(^7\) Id., § 741.
\(^8\) Id., § 742(a).
accordance with the provisions of this title, which it finds necessary for that purpose."

The plan calls for decentralized administration within the state. The state agency would designate and divide the state into local areas. Responsibility for administration of benefits would be delegated as fully as practicable to local administrative committees or officers, aided, as the National Health Insurance Board was at the top level, by local professional committees and by local committees representing those eligible for benefits.

Doctors, dentists, nurses, and hospitals participating in the plan would enter into agreements with the state agencies, terminable upon reasonable notice. The majority of the doctors and dentists, respectively, entering into agreements in each local area may elect to be paid upon either a fee, per capita, or salary basis, or a combination of these bases. Dissenters may choose a different method than that elected by the majority, if such method is found to promote "efficient and economical provision of medical or dental services in the area." The only provision as to amount of payment is that "Such payments . . . shall be adequate to provide professional and financial incentives to practitioners. . . ." Existing voluntary health insurance plans would not be destroyed by the bill. Individuals could deal with the state agency directly or through any organization operating a health plan, as an agent.

Freedom of choice of one's own doctor or dentist would be insured provided the doctor or dentist had entered into an agreement with the state agency to render services. Doctors, dentists, nurses, and hospitals would, of course, also have freedom of choice in accepting or rejecting patients, subject to state law and professional ethics. Limits would be placed on the number of persons served by one practitioner only if recommended by the professional committee of the area involved in order to maintain high standards of quality of care.

The method of payment of premiums is not set out in the bill. This

19 Id., § 742(f).
20 Id., § 731–4.
21 Id., §§ 717(a), 720(a).
22 Id., § 718(a).
23 Id., § 719(a).
24 Id., § 716.
25 Id., § 703.
26 Id., § 720(c).
27 Id., § 719(c).
would probably be done by a separate bill amending the Internal Revenue Code, which would not be within the province of the House and Senate Committees considering the Health Bill. However, the bill sets up a Personal Health Services Account in the Treasury, to which there is to be appropriated annually 3% of all wages, up to $4800 per year, estimated to be received during that year, plus an additional appropriation of \(\frac{3}{2}\)% from 1952 to 1954, and 1% from 1955 to 1957. Amounts of appropriations after 1957 will be determined by Congress through periodical review.\(^{28}\) The plan is intended to be financed through payroll deductions, similar to Social Security deductions; 3% of the employee's income up to $4800 would be deducted, 1\(\frac{1}{2}\)% contributed by the employee and 1\(\frac{1}{2}\)% by the employer.\(^{29}\) This premium, or tax, would furnish only part of the cost of national health insurance.\(^{30}\) The balance would come from general revenue.

Other bills, insofar as they relate to an insurance plan (each bill also has other provisions relating to medical education, research, etc.) would provide as follows:

S. 1581\(^{31}\) would create a new National Health Agency in the federal government, headed by a Doctor of Medicine, which would centralize all health functions of the Federal Government.\(^{32}\) An Office of Medical, Dental, and Hospital Services in this agency would supervise federal administration of the bill.\(^{33}\) It would appropriate from general revenue up to $300,000,000 per year for grants to states which have submitted approved plans.\(^{34}\) The state plan must, among other requirements, (a) provide for medical and hospital care for the needy and the partially needy, (b) set up a state health agency to administer the plan, and (c) encourage the development of voluntary, non-profit health insurance

\(^{28}\) S. 1679, 81st Cong., 1st Sess. § 771(a) (1949).

\(^{29}\) The self-employed would contribute 2\(\frac{3}{4}\)%, a figure arbitrarily decided upon as a compromise between the 1\(\frac{1}{2}\)% they would contribute as employees and the 3% they should contribute as being at the same time employer and employee. Statement of J. D. Kingsley, Hearings, supra note 11, at 102.

\(^{30}\) With $4800 as the upper limit, total wages subject to the contribution rate for 1950 would be about $148 billion; 3% of this would furnish $4.4 billions of the $5.37 billions estimated to be the minimum necessary for early years of operation. Hearings, supra note 11, at 1192.


\(^{32}\) Id., §§ 101, 103.

\(^{33}\) Id., § 201.

\(^{34}\) Id., § 211.
plans. The allotment to each state varies with population and income, and the state must provide matching funds sufficient when added to the federal allotment to carry on the state plan.

S. 1456, the Voluntary Health Insurance Act, is intended to encourage the growth of voluntary prepaid health insurance plans. It would amend the Public Health Service Act so as to authorize grants from general revenue to states which have submitted approved plans. The state would have to provide medical care and hospital care for persons unable to pay all or part of the charges for prepaid voluntary health plans.

**Comparison of the Remedies Proposed**

Attacks on national health insurance have come on many fronts. Opponents of the bill claim that the cost of the plan in general will be too high, that there will be difficulties in administering the plan, especially within the states, that there will be government waste in the huge number of government employees needed to administer the plan, and that even if S. 1679 were passed, the government would be unable to furnish the promised care. The chief criticism voiced is that there will be deterioration of the high standards of quality of American medical care under "socialized medicine." In answer to the acknowledged need for some form of prepaid medical care, those not in favor of national health insurance all advocate the spread of voluntary health insurance plans.

**Costs**

The arguments about high costs, government waste, and socialization of medicine are the most heated points of debate. The estimated annual cost of a national health insurance plan, based on 1948 price-levels and contemplating coverage of 100% of the population, ranges from $5,370 millions in early years, to $7,270 millions in later years when expansion of facilities and a greater supply of personnel make more services available. The Government's estimate probably falls short of what the final

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36 Id., §§ 213(a), 212(a)(9).
38 Id., § 701.
41 Id., § 701(c).
cost will be, as has been the experience with the British Health Plan. However, the overhead costs due to multiplication of administrative personnel in competing independent voluntary health insurance plans would perhaps be more wasteful, should voluntary health insurance plans become part of the nation’s policy. Moreover, no sound comparison can be made between total costs under a national health insurance plan and total costs under a voluntary health insurance plan. No voluntary health insurance plan offers complete coverage (medical, dental, nursing, hospital, and auxiliary services) to all applicants (including the chronically ill), as would national health insurance. If it were at all possible that such a plan could be operated on an actuarial basis, the risk involved would dictate a premium far too high for the resources of most American families. If complete coverage is to be provided, it seems that a state or federal fund, as under the social security system, is the only answer. The unpredictable costs incident to such a plan would probably be too much for a privately administered fund to handle, or even for a state fund, unless heavily supported by federal grants. Even if it were financially able to give complete coverage, no state would demand the heavy taxes necessary to support such a plan. To do so would be to drive business out of the state, adding to the state’s problems rather than relieving them.

**Government Control of Medicine**

On the other hand, the danger of deterioration of the quality of medical care when subjected to government control is very real. If for no other reason, the apparent dissatisfaction of doctors with the provisions of Title VII would hinder the smooth-working operation of the plan. Also, if doctors became virtual government employees, the profession would not attract the independent type of man who has done so much for medicine in the past. No one can deny the zeal and generosity of American family doctors. Their independence is as vital to the nation’s health as the solution to their patients’ financial problems.

How to provide adequate medical care to all, and at the same time guard the independence of American medicine, is a political problem to be resolved by Congress. S. 1679 answers the first requirement of the problem, but the agreements, standards, and responsibilities called for

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43 Cost for the first fiscal year of operation (beginning July 5, 1948) was estimated at £150 million. However, the final cost was £208 million. N. Y. Times, Feb. 10, 1949, p. 11, col. 2.
in regard to medical personnel[44] are means by which unscrupulous administrators could someday control the practice of medicine.

Although S. 1679 is sound in its principle that a federal fund is the only means to provide health insurance for the entire nation, its provisions in regard to the relations between administration and medical personnel do not fully safeguard the independence of American doctors.

**Administration**

In regard to administrative provisions of S. 1679, entrusting federal administration of the plan to the Federal Security Agency,[45] which also has charge of the Public Health Service, appears to be the best move at present. S. 1581 provides for a centralized health agency in the Government.[46] However, when reorganization of the Federal Government's many health services into one agency is to be accomplished, it would be better to follow the recommendations of the Hoover Commission, rather than to make piecemeal changes.[47] In state administration, just as federal, there are often distinct state agencies carrying on health work in different fields. Federal subsidies for hospital construction, maternal and child welfare, and other health purposes even now go to different agencies in some states. Many states do not have one agency supervising public health services in the whole state, but provide local supervision by county and municipal boards. Adding another state agency to supervise administration of national health insurance would add to the hodge-podge in these states. Handling of federal health subsidies and funds through a single state agency would be more efficient, and would result in a saving to the Federal Government. The provision in S. 1679 that a single state agency be specified for state-wide administration of the plan[48] eliminates the possibility of any unnecessary duplication, but should allow the state agency to make use of existing county and municipal boards where this would promote efficient administration,[49] as recommended in S. 1581.[50]

In regard to the ability of the Government to fulfill the promises of

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[45] Id., § 751.
Title VII, even if it became law, critics of national health insurance point out that in areas where there are shortages of medical personnel and services, doctors and hospitals would not spring up overnight by legislative fiat when the Congress declares that the people of that area are entitled to adequate medical care and services. It will be several years before the aims of the first six titles of S. 1679 will be achieved. In recognition of this fact, Title VII provides that the benefits be made available "as rapidly and as completely as possible having regard for the availability of the . . . personnel and . . . facilities needed. . . ." Thus, even the sponsors of the bill recognize that the aims cannot be accomplished overnight, and do not promise an immediate cure to all the nation's ills. Therefore, until such time as the auxiliary programs for education of health personnel and construction of hospitals and other facilities are well underway, ample time exists which should be devoted to a consideration of the most advisable plan.

Constitutionality of Title VII

So far, in discussing the need of national health insurance and the merits of Title VII of S. 1679, we have assumed that, if passed, Title VII would be upheld as constitutional. Congress is given in the Constitution no specific grant of police power over the nation's health. Health problems generally are local problems whose supervision is reserved to the police power of the states. Congress may, under the Commerce Clause, acquire jurisdiction of local health problems, insofar as they affect interstate commerce. Title VII, however, is not an exercise of police power under the commerce clause; it assumes direct control of local health problems within the states without reference to their effect on interstate commerce. Yet administration of Title VII is not made contingent upon state consent to federal control. There is no government by indirection, by laying down standards of eligibility for a federal grant, or for a credit on a federal tax, in the exercise of the regulatory power incidental to Congress' taxing and spending power. The bill does call for the states' submission of approved plans of state administration, but

51 S. 1679, 81st Cong., 1st Sess. § 702(a) (1949).
56 S. 1679, 81st Cong., 1st Sess. § 742(a),(b) (1949).
this is not made a condition of federal control. In the absence of state cooperation, the National Health Insurance Board would assume responsibility for the administration of Title VII within the state.57

Justification for this assumption of police power over the nation’s health will be found, if anywhere, in Congress’ determination that the health problem affects the general welfare and is therefore a proper subject of Congress’ power to tax and spend “for the . . . general welfare. . . .”58 The powers embraced within the meaning of the general welfare clause cannot be exactly defined. The Supreme Court has always refused to give an exact definition of the general welfare; each case testing Congress’ discretion under this grant of power must be decided on its facts, as the case arises.59 As the needs of the nation change, so also do the limits of Congress’ power to enact laws to provide for those needs. However, while determining what affects the general welfare, Congress must also observe the limitations of the Tenth Amendment.60

The question of constitutionality will depend upon whether the facts show that health problems are still merely of local concern, reserved to the police power of the states, or whether the multiplication of local health problems has caused a national health problem which affects the general welfare and therefore gives the Federal Government precedence over the states in acting to solve the problem. In deciding the question, the determination of Congress will enjoy a presumption of constitutionality. In the zone of uncertainty lying on either side of the line dividing local from general welfare, discretion belongs to Congress. As long as the court finds that Congress has a basis for its belief, the legislative determination will not be disturbed. “When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.”61

The circumstances in which the National Health Insurance Act is being

57 Id., § 742(d), (e).
59 “The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. . . . Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation.” Helvering v. Davis, 301 U. S. 619, 640, 641 (1937).
60 U. S. Const. Amend. X: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”
proposed are very similar to the circumstances attending passage of the Social Security Act, 62 and any test of the constitutionality of a system of a national health insurance such as that proposed by Title VII seems to be governed by the principles laid down in Steward Machine Co. v. Davis 63 and Helvering v. Davis, 64 in which the constitutionality of Social Security legislation was upheld.

In the Steward and Helvering cases, the Social Security Act was attacked as a violation of the Tenth Amendment. In the decisions, the Supreme Court took judicial notice of the national depression following the crash in 1929, and decided that the spread of unemployment from state to state, and the plight of the aged throughout the country, were problems which transcended mere local concern, and affected the general welfare of the nation. Therefore Congress, through its taxing and spending power, was competent to deal with the problems, and the Social Security Act did not violate the Tenth Amendment.

"The problem is plainly national in area and dimensions. . . . Apart from the failure of resources states and local governments are at times reluctant to increase so heavily the burden of taxation to be borne by their residents for fear of placing themselves in a position of economic disadvantage as compared with neighbors or competitors [in a state not providing social security for its citizens]. . . . The existence of such a system [of social security] is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose. Only a power that is national can serve the interests of all." 65

There is a line of division, indistinct though it may be, between the powers reserved to the states and the powers of Congress under the general welfare clause. As a problem spreads from state to state and becomes more intense, at some point it passes the line separating local welfare from general welfare. When it passes that line, jurisdiction of the problem is no longer within the reserved rights of the states but has become one of general welfare, subject to the taxing and spending power of Congress. Opponents of Title VII have contended that it is unconstitutional. 66 However, the question of whether the nation's health problems affect the general welfare seems to be one which is within the discretion of Congress. There has been no doubt since the Steward case that the

63 301 U. S. 548 (1937).
64 301 U. S. 619 (1937).
65 Helvering v. Davis, 301 U. S. 619, 644.
Congress can use its taxing and spending power to alleviate serious national economic problems. The widespread need of medical care and health services, acknowledged even by opponents of national health insurance, along with the considerations relied upon in the Steward and Helvering cases of the states' reluctance, or even inability, to provide state-supported systems which will answer the needs of their residents, should be ample grounds to support the legislative determination that the nation's health problems affect the general welfare.

Conclusions

There is widespread need for medical care and health services. The poorer states have critical deficiencies, and even in the prosperous states there are many who cannot obtain or cannot afford adequate medical care and services. The plan for building up the nation's health resources by constructing hospitals, subsidizing medical schools and students, and giving federal grants for local health work and research will go a long way towards solving the nation's health problem. However, that plan will not break down the financial barrier which prevents many from obtaining sufficient care even when it is available. Voluntary health insurance plans are a partial answer. They afford partial coverage. But the families which need health insurance most are those who can afford only low-premium plans, whose coverage is very inadequate. A voluntary health insurance plan giving complete coverage to all applicants is out of the question. Very few could afford such a plan, even if any group or insurance company would bear the risk. Federal subsidies to voluntary health insurance plans, to pay the premiums of the needy, as suggested in S. 1456 and S. 1581, do not meet the problem squarely. Such a plan would meet the need of charity cases, and would relieve the doctors and charitable agencies who now take care of such cases. The plans are commendable for that. But they do not answer the needs of the far greater number of people who are not indigent, but cannot afford the medical care they need. Federal support for a nationwide distribution of medical care and services is needed. Whether the Federal Government should administer the plan directly is open to question. It would perhaps be better to foster the spread of state systems of health insurance. However the difficulties a state would face in instituting such a system unaided by federal support make it necessary that the Federal Government take action of some kind if the problem is to be solved.

The direct federal control imposed in Title VII of S. 1679 is within
the constitutional powers of Congress, because of the proportions of the national health problem. However, the restrictions, or possible restrictions, it may impose on American medicine are highly objectionable. The past record of independent American medicine calls for more consideration than that shown by S. 1679. There is no need for such strict control of the persons or agencies receiving medical or health services.

Under the educational benefits of the G. I. Bill\(^{67}\) there has been due regard for the independence of the person or agency furnishing the services, yet the Veterans' Administration has found it possible to protect the Government from unscrupulous persons seeking to take advantage of the Government's generosity. The same regard for the independence of doctors and health personnel and agencies should apply to national health insurance.

JOHN D. CRAWFORD

NOTES

IMPUTING BAILEE'S CONTRIBUTORY NEGLIGENCE UNDER AUTOMOBILE FINANCIAL RESPONSIBILITY LAWS

The fairness of the doctrine of contributory negligence has commanded the attention of legal writers and the courts since its inception.\(^1\) Contributory negligence is again before us but primarily our task is to examine the propriety or impropriety of applying that doctrine to a given fact situation in light of legislative enactments concerning vicarious liability and not to evaluate the merits and demerits of the doctrine itself.

Issues concerning vicarious liability most frequently find their origin in relationships involving principal and agent, master and servant, or a joint enterprise. It will be recalled that the common law rule in the United States is that when such relationships exist the negligence of the agent,\(^2\) servant,\(^3\) or joint enterpriser,\(^4\) is imputed to the principal, master, or co-joint enterpriser, making them legally responsible. This is not true though in the case of a bailor-bailee relationship. The prevailing view does not hold the bailor responsible for the negligence of the bailee\(^5\) nor, since the turn of the century, does it impute the contributory negligence of the bailee to the bailor who brings suit to recover damages from a negligent third party.\(^6\)

With the advent of the automobile this rule which immunized the bailor from the acts of his bailee created an alarming problem involving a serious matter of public policy. An automobile owner found the law most favorable; with impunity he could permit others to use his car, gratuitously or for hire, for as bailor he was not responsible if the bailee collided with a third party. but he could sue the third party regardless of the bailee's contributory negligence. Attention was focused on the injustice done to the third party who possessed a valueless judgment against a "judgment-proof" bailee. The great number of traffic accidents led to the passage of laws which would clear the highways of financially irresponsible drivers. At the same time the financial irresponsibility of many bailees, created a demand for placing the responsibility on the owner. not only because

\(^1\) Prosser, Torts 394 (1941).
\(^2\) Mechem, Law of Agency 351 (1923).
\(^3\) Ibid.
\(^4\) Prosser, Torts 491 (1941).
\(^5\) Gregory, Legislative Loss Distribution 149 (1936).
\(^6\) Ibid.
the owner made it possible for the car to be driven but also because normally the owner would be far more capable of paying damages than the bailee.

Today many states have enacted automobile financial responsibility laws which are intended to clear the roads of financially irresponsible drivers by revoking their operator’s permit usually for failure to pay a judgment against them or for failure to place security after the occurrence of an accident. In many states amidst the many pages of the financial responsibility law there is a paragraph which serves to allow imposition of liability on the owner for the negligence of his bailee—in some states by the express statutory creation of a principal-agent relationship between bailor and bailee. The question has arisen as to what extent does this principal-agent relationship exist. Was it meant for all legal purposes arising from an accident or merely when the bailor is being sued, thus only to provide a financially responsible defendant? If the relationship exists for all purposes then the contributory negligence of the bailee can be imputed when the bailor is suing a negligent third party, which imputation will prevent recovery. That poses the precise question with which this writing deals: Under the automobile financial responsibility laws is the contributory negligence of the bailee to be imputed to the bailor where the bailor sues to recover damages?

A comparison of the laws and decisions arising out of four different jurisdictions offers an excellent basis around which to build this discussion. The exact cases in point are the New York case of Mills v. Gabriel, the Minnesota case of Christensen v. Hennepin, the Iowa case of Secured Finance Co. v. Chicago R. I. & P. Co., and the District of Columbia case of National Trucking & Storage Co. v. Driscoll. In the

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7 Note, 33 IOWA L. REV. 522 (1948).
8 Id. at 525.
9 In California the statute imputing the negligence of a driver of an automobile to the owner for all purposes of civil damages is not limited to actions by third person against the owner, but includes actions by the owner against third persons. Milgate v. Wraith, 19 Cal. 2d 297, 121 P. 2d 10 (1942).
Indiana does not impute the contributory negligence, but it is not clear whether the case relied on the financial responsibility law of the state or not. Gagle v. Heath, 114 Ind. App. 566, 53 N. E. 2d 547 (1944).
13 National Trucking & Storage Co. v. Driscoll, 64 A. 2d 304 (1949).
first two jurisdictions, New York and Minnesota, the courts have held that even under the financial responsibility law the contributory negligence of the bailee is not imputable to the bailor and that the bailor may recover damages against a third party. Courts in Iowa and the District of Columbia have decided the very opposite, ruling that the contributory negligence of the bailee is imputable to the bailor. The comparison becomes even more interesting when it is realized that the Minnesota statute is very similar to the District of Columbia statute and that the Iowa and New York statutes are nearly alike, so even though these jurisdictions have statutes with similar wording there is a direct split as to their legal implications.

The Minnesota Safety Responsibility Act reads:

"When any motor vehicle . . . shall be operated upon any public street or highway of this state by any person other than the owner with the consent of the owner, express or implied, the operator thereof shall, in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof."14 (Emphasis supplied.)

The District of Columbia statute says:

"Whenever any motor vehicle, after the passage of this chapter, shall be operated upon the public highways of the District of Columbia by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall, in case of accident, be deemed to be the agent of the owner of such motor vehicle, and the proof of the ownership of said motor vehicle shall be prima facie evidence that such person operated said motor vehicle with the consent of the owner."15 (Emphasis supplied.)

Thus in Minnesota and the District of Columbia an agency relationship is expressly created in the statute. In the question, to what extent did the legislature desire such a relationship to exist, lies the answer to our problem which involves statutory interpretation based on legislative intent.

New York and Iowa do not use the word "agent" in their acts. The New York statute reads:

"Every owner of a motor vehicle or a motor cycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motor cycle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner."16 (Emphasis supplied.)

14 MINN. ST. § 170.04 (1941).
15 D. C. CODE § 40-403 (1940).
16 N. Y. VEHICLE AND TRAFFIC LAW § 59 (1941).
The Iowa statute states:

"In all cases where damage is done by any car driven by any person under fifteen years of age and in all cases where damage is done by the car, driven by consent of the owner, by reason of negligence of the driver, the owner of the car shall be liable for such damage."17 (Emphasis supplied.)

**IOWA AND NEW YORK POSITION**

Iowa first had this matter before its courts. In the *Secured Finance Co.* case, one Hutt, plaintiff's assignor, was the owner of a certain Star touring car which he loaned to one Thomas, who while driving the car on business of his own had a collision with a freight train of the defendant. The defendant claimed that Thomas was contributorily negligent and since Thomas drove with Hutt’s consent that the contributory negligence was imputable to Hutt. The court so held. It arrived at this conclusion in two ways:

First, the court analyzed the common law rules of an early date which did not impute the negligence of the bailee but did impute the contributory negligence until about the beginning of this century when it was decided that consistency dictated that as long as the bailee’s negligence wasn’t imputed his contributory negligence shouldn’t be imputed either. This has come to be known as the “two-way” rule. In other words the reason for not imputing the contributory negligence was that the negligence itself was not imputed. With the statutory change made in Iowa law, whereby the bailee’s negligence is imputed to the bailor, the Iowa court concluded that the common law reason for not imputing contributory negligence was gone and therefore contributory negligence should be imputed to the bailor. This is purely a historical argument.

Secondly, in an earlier case in which the bailor was being sued for the negligence of his bailee, the Iowa Supreme Court said:

"The statute defines a new relation or situation of the parties, where a liability on the part of one for the negligence of the other shall exist. It, in effect, makes the one who uses an automobile with the consent of the owner, the agent of the latter. It may be said to be a statutory extention of the doctrine of respondeat superior to a relation to which, under the common law, it did not apply or to create a liability on the part of one for the negligent act of the other analogous to that expressed in that phrase."18

Therefore in Iowa a bailor-bailee arrangement involving a motor vehicle

17 Iowa Code § 5026 (1927).
creates a principal-agent relationship. It should be noted that the Iowa court used as authority *Psota v. Long Island R. Co.*\(^{19}\) which is no longer the law in New York.

There is little foundation for the extension which the Iowa court made. The law merely states that the owner shall be liable; it does not say that the operator shall be deemed the agent. To take a law which places the risk of damage on the owner and then say because of that the owner becomes the principal and the driver his agent and that therefore all the rules of agency apply, appears to transgress the normal legitimate functions of statutory interpretation and may well be branded as "judicial legislation".

The New York courts have been grappling with the problem since 1928.\(^{20}\) Dicta in an even earlier case, *Psota v. Long Island R. Co.*,\(^{21}\) interpreted the statute as creating an agency relationship. Consequently several subsequent cases applied the rules of agency and imputed the contributory negligence of the bailee to the bailor,\(^{22}\) although a like number of cases disagree.\(^{23}\) The *Gochee* case\(^{24}\) squarely differed with the language of the *Psota* case, declaring that there was no agency relationship involved. The court stated:

"One who borrows a car of the owner for his own use is a gratuitous (commodatum) bailee. He is not an agent of the owner. He uses the car for his own business or pleasure, and not for any purpose in which the owner is interested. Neither is he a servant of the owner. He is not subject to his direction or control. True it is that, in discussing the effect of § 282-e [now § 59], it has been said that the borrower occupies the relation of a servant or agent of the owner, and that the owner's liability in case of an injury incurred by the borrower's negligence is the same as it would have been if caused by an agent

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21 246 N. Y. 388, 159 N. E. 180 (1927).
or servant acting in the owner's business within the scope of his employment.

Such expressions indicate the nature and extent of the liability but not the basis or principle upon which the liability is predicated.\(25\)

The conflict in New York has now been settled by \textit{Mills v. Gabriel} where it was held that the purpose of the statute was to give injured innocent third parties a right of action as against the owner but leaving unchanged the common law rule allowing the owner to recover from a negligent defendant, even though the owner's bailee be guilty of negligence contributing to the accident.\(26\) In this case the action was to recover for damage to the plaintiff's motor vehicle while it was being operated by another, with her permission but in her absence. Defendant is the owner and was the operator of the automobile with which plaintiff's automobile collided. The evidence justifies the finding of the trial court that both operators were negligent and that at the time of the accident the operator of plaintiff's automobile was using it for his own private purpose and not for the benefit and upon the business of the plaintiff.

It should be kept in mind that although the New York and Iowa statutes are almost identical in that the user of the automobile is not specifically made an agent, the courts of the two states have rendered antithetical opinions.

\textbf{MINNESOTA AND DISTRICT OF COLUMBIA POSITION}

As previously mentioned, Minnesota and the District of Columbia do have statutes with very similar wording in which the operator of the automobile is \textit{deemed the agent} of the owner. Likewise, these jurisdictions have reached opposite conclusions. In the Minnesota case, \textit{Christensen v. Hennepin Transp. Co.}, the owner sued to recover damages for personal injuries suffered in a collision while riding as a passenger in her own car but driven by her husband. The Minnesota court refused to impute the contributory negligence of the driver-husband to the owner-wife.\(27\) On the basis that the answer involved a question of statutory construction

\(25\) 257 N. Y. 344, 347, 178 N. E. 553, 554 (1931).

\(26\) "The statute does not change the common-law rule respecting the owner's right to recover from third persons under the circumstances disclosed by this record. Nor may it be invoked for the purpose of imputing the operator's negligence to the owner. It is applicable for that purpose only in actions brought by third parties against the owner." 259 App. Div. 60, 63, 18 N. Y. S. 2d 78, 80 (1940).

\(27\) "Where the owner is the guest of the operator of his automobile, the operator's contributory negligence is not imputable to the owner, except where the operator is the owner's servant or agent or where the operator and the owner are engaged in a joint enterprise." 215 Minn. 394, 404, 10 N. W. 2d 406, 413 (1943).
the court made its decision on the ground that (1) it was the sole intent of the legislature to find a financially responsible defendant which led to passage of the statute and not to create an agency relationship between bailor and bailee, and (2) the legislature never intended to extend the rules of contributory negligence, for the policy of the legislature has, in fact, been to restrict the application of the doctrine of contributory negligence. The Court sums up its reasoning by saying:

"An intent to extend the doctrine of imputed contributory negligence so as to bar the owner because of the driver's negligence should not be inferred, because it is not comprehended within the express provisions of the statute; because such an extension of the doctrine of imputed contributory negligence defeats the purpose of the statute to impose liability for irresponsible drivers by enabling a class of drivers, liable under rules in existence when the statute was adopted, to escape liability; and because it is entirely unlikely that the legislature would extend the doctrine in any instance, since its general policy has been to restrict and qualify it as an unjust, if not discredited, one."^{30}

The District of Columbia case of National Trucking & Storage Co. v. Driscoll is the most recent decision on this point, being handed down in the early part of 1949. Driscoll, the plaintiff, was the owner of a fleet of taxicabs and had rented a cab to a driver for twelve hours at a fixed sum. The driver was to have complete control for that period. The cab and a truck driven by an employee of the defendant collided. The jury might have found negligence by one or the other or both, but the trial court removed from consideration of the jury the question of the contributory negligence of the taxicab driver by giving an instruction that the negligence of the driver could not be imputed to the plaintiff, as owner of the taxicab. The Municipal Court of Appeals ruled that the instruction was an error and after analyzing the existing case law on the subject agreed with Iowa by writing:

^{28} "Express manifestation of legislative intent is confined to establishment of financial responsibility on the part of the owner to injured persons and to securing satisfaction to their claims by payment in money." Id. at 409, 10 N. W. 2d at 415.

"... the provision of § 170.04 (§ 2720-104), that the driver causing an accident shall be deemed the owner's agent, is to be taken as meaning that he is the agent for purposes only of holding the owner liable to person's injured by the driver's negligence." Ibid.

"The only legitimate inference permissible is that the legislative intent was to provide for financial responsibility of the bailor in favor of third parties injured by the bailee's negligence without changing the rule that a bailee's contributory negligence is not imputable to a bailor." Id. at 414, 10 N. W. 2d at 417.

^{29} Ibid.

^{30} Id. at 416, 10 N. W. 2d at 418.
“While we believe the question is not entirely free from doubt, we hold that the better reasoned view is that the contributory negligence of a bailee is attributable to a bailor under our Automobile Financial Responsibility Law.”

The first case to interpret this section of the District of Columbia Automobile Financial Responsibility Law involved a suit by the third party against the bailor for damages caused by the bailee’s negligence. In attempting to determine the legislative intent the reports of the congressional committees were of little aid. The court on its own initiative concluded that Congress intended to create:

“... a new rule of liability in which agency is based on consent”, and that therefore the bailee, under the provisions of the statute, became the bailor’s agent.

With this decision in mind the court in the recent Driscoll case reasons that since an agency relationship is created it exists whether bailor is the plaintiff or defendant:

“We find nothing in the act to indicate that Congress intended that a person driving an automobile with the owner's consent is the owner's agent when the owner is being sued, but is not his agent when the owner is suing.”

Furthermore, the court in the Driscoll case determined that the purpose of the statute was twofold:

“(1) To furnish a financially responsible defendant in case one driving a car with the owner's consent negligently caused damage to another, and
(2) to promote more careful driving.”

31 64 A. 2d 304, 307 (1949).
33 “The question is interesting, and we have thought it desirable to examine the available reports of the committees having the bill in charge, but there is nothing there to aid us in answering the question.” Id. at 168, 90 F. 2d at 413. The only hearings available are those held by prior Congresses but likewise they are of no help on the interpretation to be given to this section of the law. U. S. Congress, House, The Committee on District of Columbia, Automobile Safety Responsibility Legislation, hearings on H.R. 4015, 71st Cong., 2nd Sess. (1930); U. S. Congress, Senate, Committee on the District of Columbia, Financial Responsibility of Motorists, hearings on S. 3053, 72nd Cong., 1st Sess. (1932).
34 “The section in the act creating the new liability goes a step further and makes the person to whom the owner has lent the automobile the agent of the owner, and the result of this is to make the owner liable, upon analogy to the principles of agency, for any injury negligently inflicted by a person using the automobile with his consent.” Id. at 169, 90 F. 2d at 414.
36 Ibid.
Then the court goes on to say:

"Both of these purposes are served by imputing to the owner the negligence of one driving with the owner's consent, in all circumstances, whatever the legal relationship between them."\(^{37}\)

These purposes were apparently derived from the title of the statute which reads:

"An act to promote safety on the public highways of the District of Columbia by providing for the financial responsibility of owners and operators of motor vehicles for damages caused by motor vehicles on the public highways in the District of Columbia; to prescribe penalties for the violation of the provisions of this Act, and for other purposes."\(^{38}\)

The court then reasons that if safety is one of the purposes of the statute then it is in the interest of safety to impute the bailee's contributory negligence to the bailor for the owner would be more careful to whom he entrusted his car.\(^{39}\) This might be true but did Congress think of this or was it merely the court's conclusion? Just because Congress chose to use the word safety doesn't mean that any rule of law that might tend to promote safety can be read into the statute. From a reading of the act it appears to the writer that Congress used the word safety in the title because such would be promoted by: (1) depriving those under the influence of alcohol, narcotic addicts, and those leaving the scene of an accident of the right to drive without proof of financial responsibility, (2) by providing for the financial responsibility of owners and operators who cause damage,\(^{40}\) and (3) by making an owner responsible for the

\(^{37}\) Ibid.

\(^{38}\) 49 Stat. 166 (1935).

\(^{39}\) "But if the negligence of the driver is not imputable to the owner in all cases where consent to drive has been given, then an owner could collect damages from another even though his own driver's negligence was partially responsible for the accident. It seems clear to us that this would lead to the exercise of less care on the part of owners in entrusting their cars to others. Thus, under such an interpretation, one of the purposes of the act would be defeated." 64 A. 2d 304, 308 (1949).

\(^{40}\) Gregory points out: "It is interesting to observe what has happened in jurisdictions adopting statutes rendering the bailor of an automobile responsible for the harm caused by the negligent driving of the bailee. In some, the bailor suing for damages to the bailed chattel is subject to the plea of his bailee's contributory negligence by automatic application of the 'both ways' test, while in others the plea is denied on the ground that the statutes were intended only to furnish, if possible, a financially responsible defendant. The latter view seems most sensible, since the legislature's chief object must have been to overcome the serious social menace of financially irresponsible drivers of such dangerous instrumentalities as automobiles." Gregory, op. cit. supra note 5, at 150.
negligence of his driver. When Senator McNary on the floor of the Senate asked the Chairman of the Judiciary Committee to define the bill and its purposes, Senator McCarran replied:

"Mr. President, this bill is in the interest of public safety on the highways and streets within the District of Columbia."  

Likewise in the House it was stated by the chairman of the committee in charge of the bill that one of the advantages of the legislation would be that:

"It would provide an incentive for careful and safe driving and control or eliminate the reckless and irresponsible operator."  

While such statements lead to the conclusion that safety was one of the purposes of the District of Columbia statute, they form a somewhat insecure basis for saying that in the interest of safety Congress intended that the contributory negligence of the bailee should be imputed to the bailor.

A strong case can be made for the District of Columbia decision. The main arguments are:

(1) The language of the statute is clear and unambiguous and to apply the literal meaning is in harmony with the intent of Congress, in absence of any definite showing to the contrary. The statute specifically says that the operator shall in case of accident be deemed to be the agent of the owner. It is no less a rule of agency that the contributory negligence of the agent shall be imputed to the principal than that the negligence shall be imputed.

(2) Regardless of what may be the purpose of statutes in other jurisdictions, the purpose of the Automobile Financial Responsibility Law for the District of Columbia is to provide safety as well as financial responsibility and that to impute contributory negligence to the bailor is in the promotion of safety.

(3) The cases of other jurisdictions are clearly distinguishable. In New York the statute does not say that the operator shall be deemed the agent of the owner but merely states that the owner shall be liable in case of accident; there is no express creation of an agency relationship. The Minnesota legislature, although expressly stating that the operator shall be deemed the agent of the owner, is against the extention of the

41 79 Cong. Rec. 272 (1935).
42 79 Cong. Rec. 4627 (1935).
doctrine of contributory negligence, while in the District of Columbia the doctrine is accepted and formed a part of the background of the statute.

(4) The doctrine of contributory negligence would be circumvented if the bailor were allowed to sue. The doctrine prevents suit by a negligent party. The statute results in declaring the bailor negligent if his agent has been negligent. Whether the bailor is plaintiff or defendant the negligent act remains the same. If the bailor is negligent as the defendant, he is no less negligent as the plaintiff, and if negligent as a plaintiff the doctrine of contributory negligence prevents recovery.

(5) The most just result is to impute the contributory negligence. This will be discussed in more detail below.

On the other hand it can be argued that it is fundamental that statutes in derogation of the common law are to be strictly construed, and although the statute before us is remedial and thus is to be liberally construed, it is to be liberally construed only as to the remedy which it is to effect, and that is to provide a financially responsible defendant; not to change the common law rule of allowing a bailor to recover from a negligent third party even though the bailee was also negligent.

It is evident that the courts of these four jurisdictions all agree that a fundamental purpose of the statutes is to provide for a financially responsible defendant, but Iowa and the District of Columbia claim that the legislature in setting up the mechanics for providing a financially responsible defendant created an agency relationship between bailor and bailee which exists whether bailor sue or be sued and not merely for finding a financially responsible defendant. Consequently identical factual situations give rise to different legal implications in the various jurisdictions where the bailee and the third party (or his agent or servant) have both been negligent. An examination will be made of the three factual situations which might arise.

**Bailee and Third Party Are Both Negligent**

![Diagram](Bailee_and_Third_Party_BAILEOR V BAILEE BOTH NEGLIGENT THIRD PARTY)

*If contributory negligence is not imputed* (as at common law) — The third party cannot recover from the bailor for the bailor can use the
contributory negligence of the third party as a defense. But the bailor can sue the third party in negligence or his own bailee on the contract of bailment. Result: Only bailor can recover.

*If contributory negligence is imputed* (as in Iowa and D. C.)— The third party cannot recover from the bailor for the bailor has the defense of contributory negligence and likewise the bailor cannot recover from the third party for the imputation of the bailee's contributory negligence to the bailor gives the third party the same defense. Result: Neither bailor nor third party can recover from the other. The bailor can sue his bailee.

With considerable logic it can be stated that the financial responsibility laws were not created to deal with this sort of situation for the question of public concern, that of finding a financially responsible defendant, is not involved. The result of imputing the contributory negligence of the bailee to the bailor is to deprive an innocent bailor of his right to recover from a negligent third party. The common law recognized the justice of permitting the bailor to recover. That the financial responsibility laws were meant to change this rule is nowhere evident in the statutes. There is little justification for placing the burden of the loss on the bailor when the act of two others caused the damage, particularly in the District of Columbia where contribution may be enforced between concurrent tort-feasors,43 thus the third party can hold the bailee liable for one-half of the damages. Justice can not be better administered than to have those who are responsible for the loss jointly contribute to paying for the damage.

Yet it was the bailor who created the bailment, he chose the driver and placed the car in his hands. He is not free from fault. Perhaps the best result would be to restrict the bailor to recovery from his own bailee, thus he will be more careful in his choice thereby providing safer drivers.

**Bailee and Agent of Third Party Are Both Negligent**

\[
\begin{array}{c}
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\text{BAILEE} \quad \text{both negligent} \\
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\[
\begin{array}{c}
\text{AGENT of third party} \\
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43 George's Radio, Inc. v. Capital Transit Company, 75 U. S. App. D. C. 187, 126 F. 2d 219 (1942). Here the court said: "... we adopt for the District of Columbia the rule that when the parties are not intentional and wilful wrongdoers, but are made so by legal inference or intendment, contribution may be enforced." This principle was accepted and broadened in Knell v. Feltman, 174 F. 2d 662, 666 (1949), 38 Geo. L. J. 161 (1949).
If contributory negligence is not imputed (as at common law)—Bailor can recover from third party for bailee's contributory negligence is not imputed, but the third party can't sue for he is liable for the acts of his agent within the scope of his employment. Result: Only bailor can recover from third party. Each can sue his own driver, the bailor suing on the contract of bailment and the third party suing on the basis of agency.

If contributory negligence is imputed (as in Iowa and D.C.)—The third party cannot recover from the bailor for the agent's contributory negligence is imputed to the third party. The bailor cannot recover from the third party for the bailee's contributory negligence is imputed to the bailor. Result: Neither bailor nor third party can recover from the other. Each can sue his own driver.

This problem was emphasized in the Driscoll case:

"This situation is vividly illustrated in the present case. The taxicab was driven by a bailee with the owner's consent. The truck was driven by an employee of the owner engaged upon the owner's business. The evidence probably would support a finding that both drivers were negligent and that the negligence of both contributed to the accident. Yet, if the truck owner sued the taxi owner the former could not collect damages because the negligence of the truck driver would be imputable to the owner under the doctrine of respondeat superior. The truck owner would thus have to suffer his own loss. On the other hand, if the negligence of the taxi driver is not imputable to the taxicab owner, then such owner could collect damages from the truck owner on the theory that the truck driver's negligence is imputable to that owner while the taxi driver's negligence is not imputable to the cab owner.

"If, however, the negligence of the taxi driver is imputable to the owner, just as the negligence of the truck driver is imputable to the truck owner, then, under the circumstances of this case, neither owner could collect from the other. The result would be that each owner would pay for his own damage. Such is the result of the doctrine of contributory negligence."

With force it can be argued that to apply the doctrine of contributory negligence where both parties are negligent and thus deny recovery to either may or may not have merit, but to extend the doctrine to deny a bailor recovery simply because a principal would be denied recovery as a result of the negligent act of his agent is a non sequitur. The agent is working in behalf of and in the interest of the principal. The principal has control. Altogether different is the legal relationship between the bailor and the bailee. The bailor lacks control. The reasons for denying the principal recovery have no application to a bailor and to attempt to

44 64 A. 2d 304, 308 (1949).
place a principal and a bailor in the same position is to brazenly disregard well established legal doctrines.

**Bailee of X and Bailee of Y are Both Negligent**

\[ \text{BAILEE-X} \leftarrow \text{v.} \rightarrow \text{BAILEE-Y} \]

\[ \text{BAILEE-X—both negligent—BAILEE-Y} \]

*If contributory negligence is not imputed* (as at common law)—Bailor-X and Bailor-Y can sue each other for by statute each is vicariously negligent only in the role of defendant, although such is an anomalous result in light of the doctrine of contributory negligence. Result: Both can recover from each other, each paying for the damage suffered by the other. Or each can sue his own bailee on the contract of bailment.

*If contributory negligence is imputed* (as in Iowa and D.C.)—Neither bailor can recover from the other for both are subject to the defense of contributory negligence. Each would be left to pay for the damages done to his own car or to recover from his own bailee. Result: Neither bailor can recover from the other. They could only sue their own bailees.

To allow each party to collect from the other has some merit, especially in jurisdictions such as the District of Columbia, where the bailor-defendant can force contribution on the bailee of the bailor-plaintiff. Following our simple diagram above it would appear by the application of the principles of indemnity and contribution that BAILOR-Y as defendant could in turn obtain judgment on the basis of indemnity from his own bailee, BAILEE-Y, for the entire damages, or could get contribution from BAILEE-X and the remainder of his damages from BAILEE-Y. These same rights would be available to BAILOR-X if confronted by a counterclaim. Thus by not imputing the contributory negligence it is possible in the end result to distribute the loss to the two parties actually at fault.

If neither bailor can sue the other, that is if BAILOR-X cannot sue BAILOR-Y and conversely, where contributory negligence is imputed, then for the same reason BAILOR-X cannot sue Y’s bailee who was responsible in part for the damage done. The only alternative is for each bailor to sue his own bailee.

Again it can be stated that perhaps the best result is to allow the bailor recovery only from his own bailee, for reasons previously stated. Further-
more, under the statute both bailors are vicariously negligent. One negligent party cannot sue another negligent party where the doctrine of contributory negligence is in effect. Certainly the complexity of the factual situations which might arise by letting each bailor sue the other, as illustrated above, serves to discourage such a procedure.

**Conclusion**

The different results which the courts have reached in the determination of the question before us and likewise all matters which entail statutory interpretation have their foundation in the jurisprudence which the courts choose to follow. Those courts which desire to remain close to the words of the legislature will not permit themselves to wander where the legislature never intended to step. Other courts find it a simple task to grasp the words of the legislature and mold them to fit circumstances which perhaps never entered the legislature’s mind. In some cases there may be justification for this latter approach, as where an entirely new field of law is involved, but certainly not where well established rules of common law exist. If courts wish to change the common law by judicial decision it is certainly within their *power* to do so, even though such is normally the task of the legislature, without trying to hide behind the skirts of legislative intent.

Although the arguments for imputing contributory negligence are strong and that such may be a good public policy, yet nowhere in the expressed language of the financial responsibility laws under consideration is there anything which would permit one to say that the legislatures intended that the contributory negligence of the bailee be imputed to the bailor. In light of this and the foregoing discussion, there should be no imputation of the contributory negligence of the bailee to the bailor until the legislatures expressly decide to make the change. The decision of the District of Columbia court may best serve the public, provide consistency, and result in a reduction of suits, and such considerations probably prompted the court in its conclusion, but meritorious as these results may be, there is in the final analysis an absence of legal justification.

**John C. Mitchell**
LEGISLATIVE COUNSEL IN CONGRESS

An important office in the legislative branch of our government is becoming increasingly more valuable and essential to the proper exercise of the lawmaking function. Nonexistent until modern times and unpublicized to any extent even today, the Office of the Legislative Counsel is finally receiving the appreciation of our legislators.

The Office was created by the Revenue Act of 19181 and except for minor adjustments2 has remained substantially unchanged to the present day. In its inception the organic act3 represented the culmination of a practical demonstration of the desirability of objective aid in the drafting of legislation.4 As many innovations in the legal field, the attempt to make the Office permanent did not go uncontested, even leading one congressman Senator Bacon of Georgia, to exclaim,

"... let the gentlemen who are so deficient in the ordinary rudiments of the English language and who are so ignorant of law, that which exists and is found in the statute books and as well in the decisions of the courts, go home, and let this schoolmaster and this all-wise man perform our functions for us."5

The apprehensions of the most contemptuous were dissolved, however, when the Act provided that the counsel were to "aid in drafting public bills and resolutions or amendments thereto on the request of any committee of either House of Congress."6 The duties of the Office were then explicitly made to depend upon a request from a committee.

The employment of legislative draftsmen, while of recent development in the federal government, had already proven successful in England, where it was established in 1869. The Parliamentary Counsel to the Treasury, as it is called, is responsible for the drafting of all government bills.7 Many of our states have also incorporated drafting bureaus into their legislative systems.8 These states have established independent offices or have provided for the employment of draftsmen when needed.

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3 See note 1, supra.
4 29 Col. L. Rev. 379, 385 (1929).
5 50 Cong. Rec. 2377 (1913).
8 Wisconsin, Ohio, Illinois, Indiana, Pennsylvania are but a few of the states having such bureaus.
The inaugurating act of 1918 provided that there were to be two branches of the Office of the Legislative Counsel, one for the Senate and one for the House of Representatives. The counsel were to be appointed on a permanent basis without regard to political affiliations and solely on the basis of fitness to perform the duties of the Office. That these requirements have been met is evidenced by the testimony given before a committee by one who was the original appointee in the branch for the House of Representatives that, "... it may interest you to know that since I was appointed, which was at the time the law was enacted some twenty-six years ago, I have never had anybody ask me my politics."

It is interesting to note that the speaker, Mr. Beaman, has recently retired after thirty years of service, which implies a presumption that the requirement "fitness for duty" has been fulfilled.

Before proceeding, it is necessary to emphasize the proper scope of the work of the legislative draftsman, for legislating and drafting have separate and distinct functions. Since the power to make law is entrusted to the representatives of the people, this power cannot be delegated. However, it is obvious that it is one thing to know what is intended in a law, and another to express that intent. It is not to be concluded that a legislator has not the ability to draw the law he has in mind, but that the task does call for a specialist. As one legal authority states it,

"... what is commonly called the technical part of legislation, is incomparably more difficult than what may be called the ethical. In other words, it is far easier to conceive justly what would be useful law, than so to construct that same law that it may accomplish the design of the lawgiver."13

Questions of substantive policy are the problems of the legislature and aside from knowing what such policies are, their formulation is segregated from the duties of the draftsman. As Professor Freund comments.

"The draftsman should not be called upon to assume responsibilities until after the social and economic issues have been disposed of and a policy has been agreed upon. It then becomes a distinct function to translate the legislative policy into the terms of a statute, and the question is what an expert service can contribute to the successful accomplishment of this task."14

13 2 Austin, Jurisprudence 1136 (4th ed. 1873).
14 Freund, Legislative Drafting 4 (1916).
The statute did not specify the scope of duties to be performed other than could be implied from the use of the word "aid", but the Office of the Legislative Counsel has been called upon to supply almost every type of legal legislative assistance conceivable. Primarily, the task of the Office is to aid committees in drafting public bills, and this constitutes its most extensive work. Anyone familiar with the extended sessions of committee hearings and with the variegated issues that arise in such hearings will readily understand the complex and difficult problems that confront the authors and proponents of incipient legislation.

The legislative counsel assists on bills and resolutions, such assistance varying from a mere inspection of a bill to check the sequence of numbers to what is termed a "complete job",15 which extends to conference meetings. The counsel helps prepare amendments to existing bills and puts bills in their proper form; he may be called upon to give advice to a chairman of a committee or subcommittee on some question as to which the latter is in doubt without actually working with these committees; he works on committee reports, helps committees in conferences and even assists in writing conference reports. At times, the Office is called upon to support a position of the committee on the floor in debate without ever having worked with such committee. This usually consists in written legal opinions and memoranda which at times represent the judgment of the Office and at times the judgment of the committee alone. The above illustrates the independent status of the Office. In support of this practice a legislative counsel appearing before a joint committee16 testified,

"To show you the nonpolitical nature of it (the Office), we have constantly worked, as some of you gentlemen know, for both sides on the same question at the same time, without any suspicion on the part of either that we are betraying their secrets to the other."17

The counsel rarely sits in on appropriation hearings nor assists such committees. Such exclusion was specifically provided for by statute.18 The reason for this is evident, for appropriation bills rarely contain legislation, strictly speaking, and thus the need for drafting aid is limited.

15 A "complete job" embraces working with a subcommittee, meeting with it as often as it meets; going with them before the full committee when they present their report and then aiding the full committee until they make a report; then going to the floor with the committee to advise the men in charge of the bill as to the effect of amendments offered and to help them explain the bill in detail.
16 Hearings, supra note 11.
17 Hearings, supra note 11.
Although committee work accounts for the largest part of the duties of the Office, no insignificant amount is performed for individual congressmen. Such aid was not provided for when the Office was created, but the statute has never been construed to exclude it.\footnote{“Really, there is no authority in law for our doing work for individual members, but for 25 years . . . it was understood, and we have been operating under that understanding ever since, that we would do work for individual members if, as and when our committee work would make it possible. We have, by and large, done a large amount of it.” Hearings before Committee on Appropriations on H.R. 3109, 78th Cong., 2nd Sess. 42 (1945).} In the Senate branch of the Legislative Counsel’s Office, much more individual work can be maintained because of the lesser number of members and since committee action in the Senate is not as extensive as committee action in the House.\footnote{“I suppose over the course of a session we work for all but possibly 1 or 2 Members of the Senate.” Hearings before Committee on Appropriations on H.R. 6429, 79th Cong., 1st Sess. 99 (1946).} In the House of Representatives, individual work has to give way at times to the committee priority.

The first task of the counsel concerns itself with constitutional problems. One would think possibly that the requirements of a grammarian would be those necessary for a legislative draftsman, and although sentence structure, word connotation and grammatical skill are essential, the prerequisites of a draftsman cover a field as broad as the field of legislation itself. In the constitutional phase, he must have the knowledge of a specialist in this area. On those provisions of the Constitution which are constantly subject to changing interpretations, \emph{e.g.}, the Interstate Commerce clause, the counsel can only give his opinion of the success of the proposed legislation. He must know the existing law where any bill purports to change it; he must know the common law and the statutory ramifications of it; he must know the rules for statutory interpretation that the courts employ in their attempts to ascertain the legislative intent, and in particular, the new trends in such interpretation. For example, he would have to know that in one case,\footnote{Thomas Paper Stock Co. v. Porter, 328 U. S. 50, 54 (1945).} involving an amendment to the Emergency Price Control Act,\footnote{57 Stat. 566, 50 U. S. C. App. sec. 902 (J).} Mr. Justice Frankfurter in construing the statute used the President’s understanding of the bill \emph{after he signed it} as part of the legislative history of the act. His knowledge of administrative procedure and law must be both varied and extensive. It must include Treasury Department rulings, regulations of the Bureau of Internal Revenue and the Com-
missioner's rulings, and he must be familiar with all the rulings, regulations and decisions of the other administrative bodies. At times a lawyer from the Office is attached to one of the government departments to aid in revising the rules and regulations of that agency and to assist the department in drafting its rules and regulations. The growth of administrative law has practically made this a field in itself. The enumeration above lists but a few of the essentials that a draftsman must possess in light of the mass of legislation today.

Since the courts presume that the legislator is acquainted with existing legislation, it is apparent why so much is expected of a draftsman. It may be well to refer here to the testimony given by the former Ambassador of Great Britain, Mr. Bryce, who, invited to give a committee his views on the Parliamentary Counsel, remarked,

"He is in no way responsible for the policy of a bill. That is entirely a matter for the department or for the cabinet. His function is merely to carry out their wishes, but he has opportunities of the greatest possible value for representing to them the difficulties which may arise in carrying out any scheme which they propose to enact by a bill. If the bill proposes to create new administrative machinery, it would be his duty to point out any difficulties in the working of that machinery. . . ."24

In keeping with the rapid increase of legislation, the respective branches, that of the Senate and of the House of Representatives, have found it necessary to increase their staffs. The policy of both branches is to employ lawyers trained in the drafting phase of law. One of the most difficult problems that has confronted the Office has been the lack of draftsmen capable of qualifying for any openings in the staff. At the present time each branch has one Chief-Counsel, ten assistants and a small clerical staff.

Any attempt to demonstrate accurately the amount of work undertaken by the Office would be an oversimplification of its operation. The extent of any particular assistance rendered would vary considerably with the scope of the subject matter. Obviously, the technical details and analyses of the problems involved in the Taft-Hartley Act are con-

23 SUTHERLAND, STATUTORY CONSTRUCTION 129 (3d ed. 1943).
24 Hearings before a Committee on the Library on H.R. 18720, 62nd Cong., 2d Sess. 11 (1912).
25 Within the last decade, the staff has increased from five to eleven lawyers.
26 "There are very few people in the country qualified to do this work, and the ordinary lawyer cannot do it without some special training." Hearings before Committee on Appropriations on H.R. 13926, 67th Cong., 2d Sess. 54 (1923).
siderably more complex than any simple piece of legislation. However, to demonstrate in general terms the increase in the amount of work of the Office a chart, from statistics obtained from both branches of the Office, has been devised showing the progression. No effort has been made to show the assistance rendered in each branch for the opposite legislative body. This practice of complete collaboration between the respective branches has led to greater efficiency. In brief, where a bill arises in the House, for example, the legislative counsel who has worked with the bill from the committee stage to its final form, and who is familiar with its intricacies, will go over to the Senate and work with their committee on the bill instead of having the counsel in the Senate take the time to familiarize himself with it. This cooperation insures the proper understanding of the proposed act and also provides for greater economy in the legislative process. But such practice is not the only evidence of economy that the Office provides. During congres-

27 Session of Congress

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28 "At the last session of Congress we inaugurated a new procedure, ... what seemed to us a system that would lead to greater efficiency by the exchange of services. For instance, I had been working ... on the revenue bill. After the House passed the bill and it went to the Senate, instead of taking over there a man who was not familiar with it, I went over there and worked with the Finance Committee." Hearings before Committee on Appropriations on H.R. 12101, 68th Cong., 2d Sess. 26 (1926).

29 "In connection with the transportation act of 1920, when that bill went to conference the conferees agreed upon a provision giving certain relief to some railroad companies that had not been properly taken care of. There was submitted a provision which was intended to carry out the terms of the payments agreed upon. When it came down, we examined it and discovered that, on account of the peculiar way in which it was worded, it did not do at all what the committee wanted done. The difference in the payments under the wording as it was submitted, and which unquestionably would have been agreed to but for our examination of it, and the payments under the provision as it was finally written amounted to somewhere between four and five million dollars in cold cash." Hearings, supra note 28, at 27.
sional vacations, members of the Office are either doing research on current problems or are engaged in preparing bills that committees have instructed them to have ready when the next session starts. The staff is always harassed for time when bills start flowing in on which immediate action is desired. And these occasions are the rule instead of the exception. The task of the counsel would evidently be lighter if not confronted by the doctrine of judicial supremacy. In England, in conformity with its unwritten constitution, an act, clearly inconsistent with a prior one, repeals the latter. Such a rule of construction has no counterpart in the legal system in the United States. This difference was succinctly stated by Mr. Bryce as follows:

"It seems to me that this is one of the facts that makes legislation need so much care in the United States, because with us you have only got to consider whether a law is wise in substance and whether it is properly drawn, but here you have a question to consider in addition, namely, whether it is compatible with the Federal Constitution or that of the State, as the case may be."

SUMMARY

Laws, in general, are not simple to draft, nor easy to apply, but since every man is presumed to know the law, he must know what the law means. In one act, well known at the time, this vague language appeared:

"No person . . . shall knowingly or wrongfully alter, deface or destroy, or fail to deface or destroy, any of the marks, stamps, tags, labels, or other identification devices provided for in this Act . . . ."

In the Revised Statutes of 1873, it was provided that the salaries of surveyors in the customs service should not exceed $2000 per annum, and on no pretense whatever were they to receive more than $4500 per annum; another act authorized the sale of the old Chicago postoffice to the "lowest and best bidder". The days of simple legislation have changed since Gulliver's Brobdingnag.

"No law of that country must exceed in words the number of letters in their alphabet, which consists only of two and twenty. But, indeed, few of them extend even to that length. They are expressed in the most plain and simple terms wherein those people are not mercurial enough to discover above one interpretation."

30 Hearings, supra note 24, at 21.
31 34 STAT. 674 (1906) (Meat Inspection Act).
32 34 STAT. 677 (1906).
33 REV. STAT. § 2720 (1873), repealed by 47 STAT. 1430 (1933).
34 28 STAT. 664 (1895), repealed by 29 STAT. 669 (1897).
Today, laws, more often than not, are intricate and complex because the policy to be accomplished in the sifting of economic and social issues is involved. The modern legislator is increasingly being burdened with new and complicated problems which demand immediate and sensible solutions. His energies must be devoted to the substantive policy of prospective legislation and to a great extent this has become a fulltime job. While not divorced from the technical phases of legislation, the contemporary lawmaker's real task, the determination of policies, would be strained by complying with all the scientific requirements of drafting those policies. It is to supply such needed assistance that the Office was established. As long as the best of legal talent is going to construe the laws, it seems desirable that the best of legal talent be utilized in drafting laws. There is no dearth of lawyers in Congress, of course, but as has been noted, the time of these legislators is well occupied with the wisdom of proposed legislation.

The Office is, and always has been, an instrument for legislative assistance. Its operation has effected economy and improvement in the form of statutes. The services of the Office, once feared as an encroachment on the functions of the Legislature, are now seen as an essential part of the lawmaking organism.35

35 "Mr. Speaker, yesterday I omitted one matter in the way of doing justice to some of those who have been of importance in the preparation of the revenue bill. I refer to the drafting bureau, or, as it is now called, the legislative counsel. Without their valuable assistance it would have been utterly impossible for either the House or the Senate to have brought this bill in at the time that we did. It would not only have taken weeks or even months more, but even then we never would have had the assurance of accuracy and correctness in the bill that we have at this time. This drafting bureau saves the Government not merely thousands, but millions of dollars every year in getting these provisions in the bill correct, so that there is no chance for evading them under the wording that is finally put into the bill. . . . These gentlemen have been working nights, days, and Sundays, with very slight intervals for rest, ever since the House committee started its work on the technical features of the bill. The conflict over matters of policy absorbed all the time of the members of the committee and the services of these men were absolutely indispensable." 67th Cong. Rec. 4499 (1926).

JAMES P. GLEASON
RULES OF PROOF EMPLOYED BY FEDERAL APPELLATE COURTS IN REVIEWING CRIMINAL CONVICTIONS

A MAN convicted of a crime in a federal district court appeals on the ground that the evidence against him was insufficient to warrant conviction. What yardstick should the appellate judges use to measure the adequacy of the evidence? One might suppose that the law on so basic a question is well settled, but there has been great confusion on the subject for half a century and the situation today can fairly be described as chaotic. Some circuits hold that competent and substantial evidence against the accused is sufficient. Another holds that if the evidence is wholly circumstantial and is as consistent with innocence as with guilt the conviction cannot stand. Still others hold that circumstantial evidence must not only be consistent with guilt but inconsistent with any reasonable hypothesis of innocence.

HISTORY OF AN ERROR—1898-1930

Prior to 1898 the United States Supreme Court had held that it would not reverse a conviction on the ground that the verdict was against the weight of the evidence if there was any evidence proper to go to the jury in support of the verdict,¹ and that the jury must be satisfied as to guilt beyond a reasonable doubt.² But the reasonable doubt must exist in the minds of the jurors, and the mere fact that the Court had such a doubt from a review of the record was not enough to warrant reversal.³ Circuit courts held that the jury’s verdict is conclusive if the evidence tends to sustain it⁴ or if there is any legal evidence to sustain it,⁵ and that the credibility of witnesses and probative force of facts are matters solely within the jury’s province.⁶ No federal appellate court had ever suggested that it should apply a different and more stringent test to circum-

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³ "The impression has been made upon us, by our examination of the evidence, that there was room for a reasonable doubt of the defendant's guilt. But the jury that found him guilty saw and heard the witnesses, and we must infer from the conduct of the court in overruling the motion for a new trial that it was satisfied with the verdict..." Johnson alias Overton v. United States, 157 U. S. 320, 326 (1895).
⁴ Kellogg v. United States, 103 Fed. 200 (6th Cir. 1900).
⁵ Dimmick v. United States, 135 Fed. 257 (9th Cir. 1905).
⁶ Ibid.
stantial evidence cases than to others. Such a distinction had sometimes been made, however, by trial judges in charging juries to the effect that circumstantial evidence in order to produce a conviction must be consistent with guilt and must, to a moral certainty, exclude the idea of innocence, or that it must exclude every reasonable hypothesis of innocence. Such a charge is designed to impress jurors with the high degree of proof needed to convince beyond a reasonable doubt, and is still so used today.

In 1898, Judge Acheson, dissenting in Hart v. United States, first advanced the concept that appellate judges should themselves apply the reasonable hypothesis test in reviewing convictions in which the question of the sufficiency of evidence was raised. The authorities cited by Judge Acheson failed utterly to support his position, for they were clearly discussing the test only in connection with instructions to juries. Eight years later, however, in Vernon v. United States, the Circuit Court of Appeals for the Eighth Circuit reversed a conviction by invoking the reasonable hypothesis rule, and the real confusion began. The court cited many cases in support of its ruling, but here again they were not in point for they concerned only jury instructions. Nevertheless, the case was on the books and was to serve as a precedent for later similar rulings not only in the Eighth Circuit but in other circuits. An interesting history of the origin and spread of the error is detailed by the Court of Appeals for the District of Columbia Circuit in the case of Curley v. United States. Judge Wilbur Miller, dissenting, contends that it was not an

9 United States v. Dried Fruit Ass'n of Calif., 4 F. R. D. 1, 6 (N. D. Cal. 1944); United States v. Yetter, Criminal No. 643 D. Del., June 20, 1949.
10 84 Fed. 799, 808 (3rd Cir. 1898).
11 I Greenleaf, Evidence § 13 (14th ed., 1883); Wills, Circumstantial Evidence, 149.
12 146 Fed. 121 (8th Cir. 1906).
14 Isbell v. United States, 227 Fed. 788 (8th Cir. 1915).
15 Sherman v. United States, 268 Fed. 516, 518 (5th Cir. 1920); Graceffo v. United States, 46 F. 2d 852 (3rd Cir. 1931).
16 160 F. 2d 229, 233-35 (D. C. Cir.), cert. denied, 331 U. S. 837 (1947). Care should be exercised in analyzing this case to distinguish between (1) the function of a trial judge on motion for acquittal and (2) the appellate function on review of the evidence.
17 Id. at 239.
error but that the reasonable hypothesis rule was adopted deliberately after careful consideration. This is, of course, possible, but is rendered dubious by the fact that the courts applying the rule for the first time did not indicate that it was an innovation of which they approved, but cited as authorities cases which either were not in point or depended, directly or indirectly, upon cases not in point. In other words, this confusion in the minds of appellate judges between the principles that should guide a trial judge in instructing a jury and those which should guide him in ruling on a motion for acquittal can be traced back to the Hart and Vernon cases, and no further. Prior to 1898 there was no misconception of this sort anywhere in the federal courts.

The reasonable hypothesis rule was not in direct conflict with any holding of the United States Supreme Court at the time of its first adoption by appellate courts and made steady progress in a number of circuits, though sometimes meeting with strong opposition from dissenting judges. By 1928 one appellate judge was able to say:

"It is a well-recognized rule in all jurisdictions that, to warrant a conviction upon circumstantial evidence alone, the facts proven must not only be consistent with the guilt of the accused, but they must also be inconsistent with any rational theory of his innocence."20

This was an overstatement, for the rule had never been invoked in the First, Fourth, Sixth, or Seventh Circuits, and had been used only in modified form in the Second and District of Columbia Circuits. Nevertheless the quotation was symptomatic of the growing use of the rule and of its firm lodgment in federal criminal law. By 1930 the reasonable hypothesis rule was definitely the law in the Third, Fifth, Eighth, Ninth, and Tenth Circuits. It was to be invoked in the First Circuit two years later. It had appeared in modified form once in the Second

19 Judge Carland dissenting in Isbell v. United States, 227 Fed. 788, 794 (8th Cir. 1915); Judge Stone dissenting in Ezzard v. United States, 7 F. 2d 808, 812 (8th Cir. 1925).
20 Philyaw v. United States, 29 F. 2d 225, 227 (8th Cir. 1928).
21 Nosowitz v. United States, 282 Fed. 575 (2nd Cir. 1922).
22 Cady v. United States, 293 Fed. 829 (D. C. Cir. 1923).
23 McLaughlin v. United States, 26 F. 2d 1 (3rd Cir. 1928).
24 Tomplain v. United States, 42 F. 2d 205 (5th Cir.), cert. denied, 282 U. S. 886 (1930).
25 Beck v. United States, 33 F. 2d 107 (8th Cir. 1929).
26 Ferris v. United States, 40 F. 2d 837 (9th Cir. 1930).
27 Leslie v. United States, 43 F. 2d 288 (10th Cir. 1930).
Circuit\(^{29}\) but had been overruled by implication\(^{30}\) and was destined never to return to the bailiwick of Judge Learned Hand. The rule in the Fourth\(^{31}\) and Sixth\(^{32}\) Circuits was that on appeal the evidence must be considered most favorably to the Government, obviously a far cry from the reasonable hypothesis rule. It is apparent that by 1930 there was a sharp conflict of authority on the question.

**The Reasonable Hypothesis Rule Discredited**

Meanwhile the United States Supreme Court was handing down decisions from time to time which, while they did not go to the precise question of the validity of the reasonable hypothesis rule, should have indicated by their tenor that there was no such requirement. In 1918 in the case of Goldman v. United States\(^{33}\) the Court held that the objection that there was no evidence of guilt for the jury was based upon the false assumption that the power to review includes the right to invade the province of the jury by determining questions of credibility and weight of evidence. The following year the Court laid down the substantial evidence rule. Discussing appellant's contention that there was not sufficient evidence in the record to support a conviction, the Court said:

"A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict.\(^{34}\)

This rule was extended to guide trial judges in ruling on motions for acquittal in 1920\(^{35}\) and in 1940 the Court held that denial of a motion for a new trial on the ground that the verdict was against the weight of the evidence is not subject to review.\(^{36}\) In the case of Gorin v. United States\(^{37}\)


\(^{30}\) Rumely v. United States, 293 Fed. 532, 551 (2nd Cir., cert. denied, 263 U. S. 713 (1923).

\(^{31}\) Dowdy v. United States, 46 F. 2d 417 (4th Cir. 1931).


\(^{33}\) 245 U. S. 474 (1918).

\(^{34}\) Abrams v. United States, 250 U. S. 616, 619 (1919).

\(^{35}\) "There being substantial evidence in support of the charges, the court would have erred if it had peremptorily directed an acquittal upon any of the counts. The question whether the effect of the evidence was such as to overcome any reasonable doubt of guilt was for the jury, not the court, to decide." Pierce v. United States, 252 U. S. 239, 251 (1920).


\(^{37}\) 111 F. 2d 712 (9th Cir. 1940), aff'd, 312 U. S. 19 (1941).
a circuit court had held that if there is substantial evidence to support charges, a peremptory instruction of acquittal should not be given, but it is for the jury to determine whether the evidence is sufficient to overcome any reasonable doubt of guilt. In affirming the conviction the Supreme Court said:

"It is not the function of the court, where reasonable men may differ, to determine whether the acts do or do not come within the ambit of the statute."\(^{38}\)

In 1942 the Court handed down the decision that should have stamped out the reasonable hypothesis rule permanently. In the case of Glasser v. United States\(^{39}\) two of the petitioners argued that their conviction had been based only on circumstantial evidence and that the evidence adduced at the trial was inadequate to support the jury's verdict of guilty. The petitioners cited a number of reversals which had been predicated on the reasonable hypothesis rule. The Government contended that substantial evidence of guilt was sufficient on appeal to sustain the conviction. The Court upheld the Government, stating:

"It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. United States v. Manton, 107 F. 2d 834, 839 and cases cited."\(^{40}\)

In 1944 the Court may be said to have modified the rule slightly by indicating that the substantial evidence must also be competent.\(^{41}\) The Court had previously defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."\(^{42}\)

Now it should be obvious that there is a direct conflict between the substantial evidence rule laid down by the Supreme Court and the reasonable hypothesis rule. The latter is unpleasant to the Government insofar as it sets up a stiffer test which the record must pass on appeal. Naturally, a judge applying the substantial evidence test is more likely to favor affirming a conviction than a judge who feels he must reverse if the evidence does not exclude every hypothesis of innocence which, in his opin-

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38 Gorin v. United States, 312 U. S. 19, 32 (1941).
39 315 U. S. 60 (1942).
40 Id. at 80.
42 NLRB v. Columbian Enameling and Stamping Co., 306 U. S. 292, 300 (1939) and cases cited.
ion, is reasonable. Application of the latter test puts a heavier burden on the Government; it must convince not only the jury but also the appellate judges beyond a reasonable doubt. No longer is the jury the sole judge of the facts and the credibility of witnesses.

The reasonable hypothesis rule is based on the notion that a higher degree of quantum of proof is required in cases depending wholly upon circumstantial evidence than in cases where the evidence contains some direct testimonial evidence. This notion has been branded as false by eminent authorities. Wigmore, speaking of the difference between testimonial and circumstantial evidence, has this to say:

"... it is out of the question to make a general assertion ascribing greater weight to one class or to the other. The probative effect of one or more pieces of either sort of evidence depends upon considerations too complex. Science can only point out that each class has its special dangers and its special advantages."

And Greenleaf says:

"... the law does not attempt to tell the juror what amount or kind of evidence ought to produce such a belief in his mind, nor what kind of doubt is reasonable. To do so is to try to give a specific meaning to the word 'reasonable' and is... 'trying to count what is not number, and to measure what is not space.'"

The Court of Appeals for the Second Circuit has recently stated the same view even more strongly:

"But as we have so often pointed out, there is no such differentiation in types of evidence and no such requirement of degrees of quantum of proof as is indicated in the defendants' contentions. ... Once the court concludes that there is a sufficient basis in the evidence for reasonable men to draw natural inferences of facts establishing the crime, the function of deciding upon the facts then rests with the jury and the court cannot properly take the case from it... by using such expressions as that each element of the case must be proved beyond a reasonable doubt or every reasonable hypothesis of innocence must be excluded. There are no such requirements."

Other cases, too, have held that no separate charge is to be made suggesting that circumstantial evidence is on a different and lower plane than other forms of evidence.

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43 For this reason it is sometimes referred to as the "circumstantial evidence rule." See United States v. Gasomiser Corp., 7 F. R. D. 712 (D. Del. 1947).
45 I GREENLEAF, EVIDENCE § 13(a) n. 22 (14th ed., 1883).
The foregoing authorities agree that the trial judge should not draw a distinction between testimonial and circumstantial evidence when charging the jury. How much less should appellate judges, having nothing before them but a printed record, attempt to draw that line, and give greater or lesser weight to one or the other in deciding whether the evidence was sufficient to sustain the verdict? Yet that is exactly what they must do every time they apply the reasonable hypothesis rule. This does not mean that every reversal based on that rule is wrong. It naturally tends to be invoked in cases where the Government’s evidence is weakest and some judges no doubt drag out the hackneyed old wording they have read so often before and incorporate it into their opinions, when perhaps all they mean is that there simply was not enough competent, substantial evidence to make out a prima facie case against the accused. But to the extent that the reversals depend upon the reasonable hypothesis rule itself, they are in conflict with repeated holdings of the United States Supreme Court and are therefore wrong.

Later History of the Error—1931-1948

An error, once it gets into the books, sometimes has an amazing vitality. The reasonable hypothesis rule is in conflict with higher authority, but it is still solemnly relied upon by some defense attorneys and unless Government counsel can discredit it on the spot a judge may succumb to so imposing an array of precedents, especially when he has been hearing and reading the rule for decades. In spite of the Glasser case, the reasonable hypothesis rule has lived on to plague the Government. In most circuits it has been discredited and abandoned, but since its first appearance in 1906 in the Vernon case, the rule has appeared in some form and at some time in every circuit except the Fourth.

In the First Circuit the reasonable hypothesis rule made its first appearance in 1932 but has not been invoked since. In a 1946 case, the court tried to harmonize it with the substantial evidence rule by holding there is no conflict between the two, but this is not true.

The rule has not been invoked in the Second Circuit since 1922 and,

48 This, no doubt, tends to explain the persistence of the error. The Government naturally does not want to carry a weak case to the Supreme Court and risk losing there. As a result the Court has never found it necessary to disclaim the rule specifically.

49 See note 28 supra.

50 Yoffe v. United States, 153 F. 2d 570 (1st Cir. 1946).

51 See note 29 supra.
what is more, has been specifically attacked and rejected on more than one occasion.\textsuperscript{52} Judge Learned Hand has gone so far as to hold that the standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases and the accused must be content with the instruction that before finding him guilty the jury must exclude all reasonable doubt.\textsuperscript{53}

In the Fourth Circuit the rule has always been that on appeal the evidence must be viewed in the light most favorable to the Government\textsuperscript{54} and this has never been departed from.

In the Sixth Circuit, until April, 1949, the rule has always been that on appeal the court must determine whether there is substantial evidence, taking the view most favorable to the Government, to sustain the conviction.\textsuperscript{55}

The Seventh Circuit, until November, 1949, has consistently taken the view that the appellate court's duty is limited to a determination of whether there was any substantial evidence to sustain the jury's verdict.\textsuperscript{56}

After having fallen into the reasonable hypothesis error by 1930,\textsuperscript{57} the Eighth and Ninth Circuits gradually modified it\textsuperscript{58} and today employ the competent and substantial evidence rule.\textsuperscript{59} In one case the Court of Appeals for the Eighth Circuit went to the extreme and held that it might interfere only when findings of fact are wholly unsupported by the evidence, but never where this does not clearly appear.\textsuperscript{60}

At one time the Tenth Circuit\textsuperscript{61} indicated a departure from the reason-

\textsuperscript{52} United States v. Spagnuolo, 168 F. 2d 768, 770 (2nd Cir.), \textit{cert. denied}, 335 U. S. 824 (1948); United States v. Becker, 62 F. 2d 1007, 1010 (2nd Cir. 1933).


\textsuperscript{54} But see notes 25 and 26 supra.

\textsuperscript{55} Battjes v. United States, 172 F. 2d 1 (6th Cir. 1949); American Tobacco Co. v. United States, 147 F. 2d 93 (6th Cir. 1944), \textit{aff'd}, 328 U. S. 781 (1946).


\textsuperscript{57} See notes 25 and 26 supra.

\textsuperscript{58} Shama v. United States, 94 F. 2d 1 (8th Cir.), \textit{cert. denied}, 304 U. S. 568 (1938); Hemphill v. United States, 120 F. 2d 115 (9th Cir.), \textit{cert. denied}, 314 U. S. 627 (1941).

\textsuperscript{59} Shama v. United States, 94 F. 2d 1 (8th Cir.), \textit{cert. denied}, 304 U. S. 568 (1938); Hemphill v. United States, 120 F. 2d 115 (9th Cir.), \textit{cert. denied}, 314 U. S. 627 (1941).

\textsuperscript{60} Blodgett v. United States, 161 F. 2d 47 (8th Cir. 1947).

\textsuperscript{61} Wilder v. United States, 100 F. 2d 177 (10th Cir. 1938).
able hypothesis rule\textsuperscript{62} but in 1947 they re-adopted it in modified form.\textsuperscript{63} The court, however, seems badly confused, for it cites four civil cases which fail to support its position.

The Court of Appeals for the District of Columbia Circuit is probably the only federal appellate court which ever came out frankly and discussed its confusion over the origin and application of the reasonable hypothesis rule. That court had been vacillating between a modified form of the rule,\textsuperscript{64} the rule itself,\textsuperscript{65} and the substantial evidence rule.\textsuperscript{66} Finally, in the case of Curley v. United States,\textsuperscript{67} the court brought the whole problem into the open and overruled the reasonable hypothesis rule, one judge dissenting. The court stated:

"The decision in the case rests squarely upon the rule of law governing the action of the trial judge upon the motion for directed verdict of acquittal and the action of an appellate court upon a verdict of conviction. We agree, as Curley contends, that upon the evidence reasonable minds might have had a reasonable doubt. As much could be said in many, if not in most, criminal cases. The jury, within the realm of reason, might have concluded that it was possible that Curley was merely a figurehead... If the jury had concluded that such was a reasonable possibility, it might have had a reasonable doubt as to guilt. But, as we have stated, that possibility is not the criterion which determines the action of the trial judge upon the motion for directed verdict and is not the basis upon which this court must test the validity of the verdict and the judgment. If the evidence reasonably permits a verdict of acquittal or a verdict of guilt, the decision is for the jury to make. In such case, an appellate court cannot disturb the judgment of the jury."\textsuperscript{68}

The rule laid down in the Curley case has been followed in a later case by the same court.\textsuperscript{69}

The situation in the Third and Fifth Circuits in the past twenty years has been chaotic. The Third Circuit adopted the reasonable hypothesis rule prior to 1930\textsuperscript{70} and has reaffirmed that position twice\textsuperscript{71} since the

\textsuperscript{62} See note 27 supra.
\textsuperscript{63} "To sustain a verdict of guilty based on circumstantial evidence, the circumstances must not only be consistent with guilt but they must be inconsistent with innocence." Morgan v. United States, 159 F. 2d 85, 87 (10th Cir. 1947).
\textsuperscript{64} See note 22 supra.
\textsuperscript{65} Hammond v. United States, 127 F. 2d 752 (D. C. Cir. 1942).
\textsuperscript{66} Morton v. United States, 147 F. 2d 28 (D. C. Cir. 1945); Mendelson v. United States, 58 F. 2d 532 (D. C. Cir. 1932).
\textsuperscript{68} Id. at 237.
\textsuperscript{69} McGuire v. United States, 171 F. 2d 136 (D. C. Cir. 1948).
\textsuperscript{70} Ridenour v. United States, 14 F. 2d 888 (3rd Cir. 1926). See also note 23 supra.
\textsuperscript{71} United States v. Tatcher, 131 F. 2d 1002 (3rd Cir. 1942); United States v. Laffman, 152 F. 2d 393 (3rd Cir. 1945).
Glasser decision. Needless to say, the district judges in the Third Circuit simply do not know what rule to apply when faced with a motion for acquittal or in arrest of judgment and/or for new trial. Some of them\textsuperscript{72} ignore the Court of Appeals holdings and cite the Glasser case as controlling. Another\textsuperscript{73} holds the Court of Appeals decisions controlling and attempts to distinguish the Glasser case. The Court of Appeals for the Third Circuit has never cited the Glasser holding as controlling,\textsuperscript{74} though it has been so cited in the Sixth,\textsuperscript{75} Seventh,\textsuperscript{76} Eighth,\textsuperscript{77} and District of Columbia\textsuperscript{78} Circuits.

The Glasser rule has never been cited in the Fifth Circuit, and one can only assume that the judges there, for some unexplained reason, do not regard it as binding on them. The decisions there have swung unpredictably between the substantial evidence rule\textsuperscript{79} and the reasonable hypothesis rule,\textsuperscript{80} then back to the substantial evidence rule,\textsuperscript{81} and finally back to the reasonable hypothesis rule.\textsuperscript{82} In the past decade the latter rule has been invoked far more often in the Fifth Circuit than in any other.

It seems clear from the foregoing that as of March, 1949, the reasonable hypothesis rule had been either discreetly abandoned or flatly over-


\textsuperscript{73} A very able judge wrestles endlessly with the reasonable hypothesis rule, concludes that he is still bound by it and, despite the jury's verdict of guilty, grants the defense motion for acquittal on which he had reserved decision. United States v. Gasomiser Corp., 7 F. R. D. 712 (D. Del. 1947).

\textsuperscript{74} But as to credibility of witnesses see United States v. Michener, 152 F. 2d 880, 885 (3rd Cir. 1945).

\textsuperscript{75} Beuchamp v. United States, 154 F. 2d 413, 416 (6th Cir. 1946).

\textsuperscript{76} United States v. Empire Packing Co., 174 F. 2d 16, 18 (7th Cir. 1949).

\textsuperscript{77} Wright v. United States, 159 F. 2d 8, 9 (8th Cir. 1947).

\textsuperscript{78} Hardeman v. United States, 163 F. 2d 21 (D. C. Cir. 1947).

\textsuperscript{79} Schefano v. United States, 84 F. 2d 513 (5th Cir. 1936); Beland v. United States, 100 F. 2d 289 (5th Cir. 1938), \textit{cert. denied}, 306 U. S. 636 (1939); Sanchez v. United States, 108 F. 2d 735 (5th Cir. 1939), \textit{cert. denied}, 309 U. S. 679 (1940).

\textsuperscript{80} Weiss v. United States, 122 F. 2d 675, 692 (5th Cir.), \textit{cert. denied}, 314 U. S. 687 (1941); Thompson v. United States, 145 F. 2d 826 (5th Cir.), \textit{cert. denied}, 324 U. S. 861 (1945); Hubby v. United States, 150 F. 2d 165 (5th Cir. 1945).

\textsuperscript{81} Hargrove v. United States, 139 F. 2d 1014 (5th Cir.), \textit{cert. denied}, 321 U. S. 797 (1944); Roberts v. United States, 151 F. 2d 664 (5th Cir. 1945).

\textsuperscript{82} Strickland v. United States, 155 F. 2d 167 (5th Cir. 1946); Garrison v. United States, 163 F. 2d 874 (5th Cir. 1947); Bryan v. United States, 175 F. 2d 223 (5th Cir.), \textit{cert. granted}, 70 Sup. Ct. 69 (1949).
ruled in every circuit except the Third and Fifth, and, in modified form, possibly the Tenth.83

THE ERROR GETS A NEW LEASE ON LIFE—1949

In April, 1949, any student of the problem might have concluded that the reasonable hypothesis rule was in its death throes and that soon it would be ignored everywhere. But on April 11 the Court of Appeals for the Sixth Circuit in the case of Epstein v. United States84 adopted the rule in reversing a judgment. The court stated:

"For it is the rule 'where guilt depends entirely upon circumstantial evidence, that the burden rests upon the Government to prove its case not only beyond a reasonable doubt but to the exclusion of every reasonable hypothesis of innocence.'"85

In support of its holding, the court cited an old case from the Fifth Circuit and a later case from the Sixth Circuit86 which held precisely the opposite of what the court implies. Never before had the Sixth Circuit invoked the reasonable hypothesis rule. Six months later, however, the same court employed the rule again.87

On November 4, 1949, the Court of Appeals for the Seventh Circuit invoked the rule in reversing a conviction in the case of United States v. Fenwick.88 This was an income tax evasion case and the conviction had been had solely on circumstantial evidence. The court stated:

"Such proof . . . must be such as will exclude every reasonable hypothesis except that of guilt."89

The court ignored the Glasser case, which it had very recently twice cited as controlling.90 Never before had the Seventh Circuit invoked the reasonable hypothesis rule.

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83 See note 63 supra.
84 174 F. 2d 754 (6th Cir. 1949).
85 Id. at 769.
86 American Tobacco Co. v. United States, 147 F. 2d 93 (6th Cir. 1944), aff'd, 328 U. S. 781 (1946).
87 Dawes v. United States, 177 F. 2d 255 (6th Cir. 1949).
88 177 F. 2d 488 (7th Cir. 1949). The decision was clearly right, and it is regrettable that the court invoked an incorrect rule of law to accomplish the reversal. The Government's case was woefully weak and the court could simply have held that there was no competent and substantial evidence to make out a prima facie case against the accused.
89 Id. at 490.
Meanwhile, in May, 1949, in the case of *Bryan v. United States*,\(^{91}\) the Court of Appeals for the Fifth Circuit had applied the rule to arrive at what appears to be an absurd result. Appellant had been convicted of income tax evasion for 1943 and 1944. The Government's evidence proved that his expenditures for those years were about $100,000 in excess of his available declared resources.\(^{92}\) The defense introduced only one witness, appellant's wife, who testified\(^{93}\) that her husband had $180,000 in cash (apparently profits from bootlegging) hidden in the house between 1926 and 1940, when it was transferred to a safe deposit box, and that much of this cash was brought out during the war for investments and current business expenses. The trial judge instructed the jury to acquit if they believed the wife's testimony or if it created a reasonable doubt in their minds,\(^{94}\) but the jury obviously did not believe her for they brought in a verdict of guilty. The Court of Appeals, in reversing the judgment (one judge dissenting), held that the Government's evidence failed to exclude the hypothesis that appellant's expenditures and net worth increases might have come from cash on hand before the years in question, that it had therefore failed to make out a prima facie case, and that defendant's motion for acquittal should have been granted. The cause was remanded for a new trial. Bryan has appealed to the United States Supreme Court, claiming that he is entitled to an acquittal rather than a new trial, and certiorari has been granted.\(^{95}\) The Government did not cross-petition for certiorari, perhaps because it felt the case was not strong enough to risk such an appeal, and also because of a technicality.\(^{96}\)

The *Bryan* case is an excellent example of the results that may follow from the application of this incorrect rule of law. One hypothesis which would tend to explain appellant's ability to spend $100,000 more than his declared resources is that he had on hand a large amount of currency earned in previous years which, naturally enough, was not discovered dur-

\(^{91}\) 175 F. 2d 223 (5th Cir. 1949).

\(^{92}\) The courts use the term "available declared resources" to signify the taxpayer's net worth at the beginning of the period in question, plus all income reported on his tax returns during the period. The total presumably gives the total net assets the taxpayer had available to him if his returns included all his income.

\(^{93}\) Transcript of Record, p. 201-05.

\(^{94}\) Id. at 212.

\(^{95}\) 70 Sup. Ct. 69 (1949).

\(^{96}\) Bryan was convicted by eleven jurors, the twelfth having been excused during the trial on mere oral agreement of counsel without written stipulation. Transcript of Record, p. 14.
ing the Government’s investigation. His wife testified that he had such currency, but the jury in finding him guilty rejected that testimony and thereby would seem to have excluded that hypothesis of innocence. But the Court of Appeals revives it by giving full probative value to her testimony, which was clearly an invasion of the jury’s province and violated the fundamental rule that the jury is the sole judge of the weight of evidence and the credibility of witnesses. Now let us suppose that by some miracle the Government had been able to prove conclusively that appellant did not have $180,000 hidden in his house. Under the broad language of the reasonable hypothesis rule the Court of Appeals could still have reversed the conviction on the theory that the excess expenditures might have come from an inheritance or a gift. Surely the possibility of an inheritance is more reasonable than the possibility that a man kept $180,000 hidden in his home for fourteen years. Nor would it be necessary for the defense to adduce testimony to establish the inheritance. The court could simply hold, as it did here, that the Government had not made out a prima facie case which excluded every reasonable hypothesis of innocence. Faced with this sort of legal reasoning, the Government would practically be precluded from successfully prosecuting income tax evaders. Of course, the court was right in holding that in net worth-expenditures cases there must be a solid foundation laid by arriving accurately at the defendant’s net worth at the beginning of the period in question, but surely there comes a point when it is incumbent upon the defendant to adduce credible evidence in his own behalf or run the risk of having the jury accept the Government’s evidence at face value. Under similar facts other tax fraud convictions have been sustained by Courts of Appeals and by the United States Supreme Court. It is plain that

97 The whole difficulty here lies in expecting the Government to prove a negative fact. There is no Supreme Court case on the precise point. The Court has held, however, that a prosecution need not adduce positive evidence to support a negative averment, the truth of which is fairly indicated by established circumstances, where the averment, if untrue, could readily be disproved by evidence probably within the defendant’s control. Rossi v. United States, 289 U. S. 89 (1933). See also note 99, post.


99 “The evidence of the Government does not exclude the possibility that the defendant had some substantial accumulation of capital on December 31, 1941. . . .” Yet the conviction was affirmed. Schuermann v. United States, 174 F. 2d 397, 399 (8th Cir.), cert. denied, 70 Sup. Ct. 69 (1949). See also United States v. Skidmore, 123 F. 2d 604 (7th Cir., 1941), cert. denied, 315 U. S. 800 (1942); Gleckman v. United States, 80 F. 2d 394 (8th Cir. 1935), cert. denied, 297 U. S. 709 (1936).

100 United States v. Johnson, 319 U. S. 503, 517 (1943). The main difference between this
if the substantial evidence rule laid down in the Glasser case had been followed, the Bryan reversal could not have been entered, for in the face of the Government's proof of excess expenditures\(^{101}\) it could not be contended that there was not competent and substantial evidence in support of the jury's verdict.

**Conclusion**

The amazing resurgence of the reasonable hypothesis rule in 1949 has some Government officials worried, and justifiably so. The main reason is the fact that the post-war drive against income tax evaders is imperilled. Such prosecutions almost invariably depend upon circumstantial evidence, and it can readily be seen that the reasonable hypothesis rule, if strictly applied, would result in a reversal of almost every such conviction. There would usually be some possible explanation of unaccounted-for funds which might appear reasonable to appellate judges (guided only by a printed record) even if not to juries. The danger of having the Bryan decision on the books is not so much the harm done in the individual case as it is the confusion which it adds to the law. The Bryan case has already been strongly urged upon courts in at least two other circuits\(^{102}\) and is probably directly responsible for the first acceptance of the fallacious rule in the Seventh Circuit.\(^{103}\)

It is most unfortunate that the merits of the Bryan case are not before the United States Supreme Court, rather than the mere procedural question. All the confusion and error resulting from the use of the reasonable hypothesis rule might soon have been obviated. The argument was heard on December 13-14, 1949, and the decision should be handed down early in 1950. There is a remote possibility that the Court will go into the merits, for they have the power to do so,\(^{104}\) even though as a matter of practice they consider only the questions before them in order to expedite the work of the Court. The Government, having failed to cross-petition for certiorari, could urge upon the Court in support of the judgment below any grounds appearing in the record, but it could not attack

and the Bryan case is that the Government introduced into evidence a statement signed by Johnson purporting to bind him to total cash on hand of $78,000 as of January 1, 1932.

\(^{101}\) Transcript of Record, p. 24-199.

\(^{102}\) United States v. Fenwick, 177 F.2d 488 (7th Cir. 1949); United States v. Vassallo, Criminal No. 644, D. Del., October 25, 1949.

\(^{103}\) United States v. Fenwick, 177 F.2d 488 (7th Cir. 1949).

\(^{104}\) **Robertson and Kirkham, Jurisdiction of the United States Supreme Court** §§ 142, 148 (1936).
the judgment below. Under these circumstances it will be interesting to see what comment, if any, the Court may make on the reasoning employed by the Court of Appeals for the Fifth Circuit in reversing the judgment. If the merits are ignored, the Government should seize the next opportunity to have the precise question of the validity of the reasonable hypothesis rule passed upon by the United States Supreme Court.

RICHARD B. BUHRMAN

RECENT DECISIONS

ADMINISTRATIVE LAW—THE POSTMASTER GENERAL MAY BAR DELIVERY OF MAIL AS FRAUDULENT WHEN ADVERTISING INDUCEMENTS TEND TO DECEIVE THE PUBLIC DESPITE SUBTLE QUALIFYING PHRASES INCLUDED THEREIN.

The respondent sold an anti-fat treatment, nationally advertised as "Dr. Phillips' Kelp-I-Dine Reducing Plan." The product was said to be an effective weight remover. Starches and fats were allowed by the plan which stated, "you merely cut down on them." No tortuous diet was said to be necessary. The main ingredient of the medicine was kelp, a natural seaweed product containing iodine. The Postmaster General issued an order restraining the Postmaster of Newark from delivering mail of the respondent and ordering him to return any such mail to the sender marked fraudulent, under the authority of 28 STAT. 964 (1895), 39 U. S. C. § 259 (1946) and 26 STAT. 466 (1890), 39 U. S. C. § 732 (1946). The District Court for the District of New Jersey granted a temporary injunction followed by a summary judgment making permanent the injunction. The court of appeals affirmed and the Supreme Court granted certiorari. Held, respondent materially misrepresented its product in its advertising as to deceive the public by clever qualifying phrases so that some purchasers might be injured physically and therefore the Postmaster General had sufficient ground to order the mail of respondent returned. Reilly, Postmaster of the City of Newark v. Pinkus, 70 Sup. Ct. 110 (1949). This case is the latest in a line of decisions relating to the authority of the Postmaster General to bar mail upon his conclusions that there were fraudulent misrepresentations which were injurious to the public.

Originally it was felt that since use of the mails is a privilege the Postmaster General could revoke that privilege. Dauphin v. Key, MacArthur & M. (11 D.C.) 203 (1880). The first decision which limited the Postmaster General's power was American School of Healing v. McAnulty, 187 U. S. 94 (1902). There the question of the value of electric treatments to heal the mind was declared to be unanswerable because of lack of an exact standard of absolute truth by which to prove the assertion false and a fraud. The majority opinion stated that an order based on the opinion of the Postmaster General would do irreparable harm to the school, therefore, the action of the Postmaster General was a proper subject for the equitable relief of injunction.

At the time of the decision the general impression was that the Court was putting a severe limitation upon the Postmaster General, restricting him to cases of actual fraud. 12 Yale L. J. 241 (1902). It was thought that the courts were opposed to Congress, which apparently favored broad powers in this administrative department. 27 Harv. L. Rev. 27 at 42.

Some years later the Supreme Court held that if a manufacturer of a medicine
proposed his product as a panacea, the Postmaster could act, despite the evidence that the product was of some value in some cases, expressly upholding the McAnnulty decision but distinguishing it on the facts. *Leach v. Carlile*, 258 U. S. 138 (1922).

The courts have had trouble deciding whether or not the McAnnulty and Leach doctrines oppose each other in part. *Reilly v. Pinkus*, 170 F. 2d 786 (3 Cir. 1948), indicated they were somewhat divergent doctrines. The Supreme Court in the present case states that it upholds the McAnnulty doctrine, holding that it is not an inexorable rule which would defeat the order of the Postmaster General because of the presence of advocates of a curative technique thoroughly discredited. The Court after defining the McAnnulty decision, feels that the present case falls within the rule in the Leach holding.

The facts of the instant case place it in the middle ground between the two last named decisions. In this respect it is more akin to *Donaldson v. Read Magazine*, 333 U. S. 178 (1948), where the Court upheld the Postmaster General in refusing to handle a puzzle contest, stating that, whereas the public might be led to think that they could win a contest for $3.00, the fine print, if read carefully, would show that $9.00 undoubtedly would be needed. The Court there followed *Leach v. Carlile*, supra.

In the present decision the Court has attempted to reconcile the McAnnulty and the Leach holdings, thereby overruling the court of appeals from whence the case came. It seems to feel that the two cases are similar in theory of law, but cover different situations: the one, where the evidence is conflicting, i.e., there is no defined, accepted belief or proof of falsity or worthlessness; the other, where the claims are not reasonably consistent with what is actually offered. There must be a conclusion of law fairly arrived at with substantial evidence. *Bates v. Payne*, 194 U. S. 106 (1904).

There is obvious reluctance on the part of the Court to overrule any of its own previous decisions. However, in interpreting the rules of the two earlier holdings, it appears that the Court, consciously or not, has done away with the strict interpretation of *American School of Healing v. McAnnulty*, supra, and at the same time has extended the holding of *Leach v. Carlile*, supra, beyond panacea fact situations.

That the Postmaster General has such authority in general seems to be questioned no more, *Fields v. Hannegan*, 162 F. 2d 17 (D. C. Cir. 1947), in contrast to the belief of Justices Holmes and Brandeis who felt that the statutes were an encroachment upon freedom of speech, as expressed in the former's dissent in the Leach case. At any rate there has been a gradual but definite growth in the authority of the Postmaster General over doubtful advertising.

HARRY H. HEFFERAN, JR.
CIVIL PROCEDURE—MATERIAL CONTAINED IN FEDERAL BUREAU OF INVESTIGATION FILES SOUGHT TO BE REACHED BY INTERROGATORIES FILED UNDER THE FEDERAL RULES OF CIVIL PROCEDURE HELD TO BE UNAVAILABLE TO THE PARTY SEEKING IT ON THE BROAD GROUNDS OF PUBLIC POLICY.

The Government sought to enjoin defendant from restraining commerce in a suit under the antitrust laws. A part of the evidence upon which the Government based its claim was obtained by Federal Bureau of Investigation Agents from confidential sources and is contained in FBI files. When defendant attempted to reach this material by interrogatories filed under Rule 33 of the Federal Rules of Civil Procedure, the Government filed objections based on a claim of privilege to which defendant filed a motion to compel answers. The motion was denied. Held, although the FBI files were probably privileged within the meaning of Rule 26(b), incorporated by reference in Rule 33 of the Federal Rules of Civil Procedure, disclosure was forbidden by much broader considerations of public policy as stated by the Attorney General, 40 Ops. Att’y Gen. 8 (1941), to the effect that disclosure of FBI reports, which contain much information obtained on pledge not to disclose the source, would be of serious prejudice to the future usefulness of the FBI. United States v. Kohler Co., 9 F.R.D. 289 (E. D. Pa. 1949).

By statute, the head of each administrative agency in the United States Government has authority to prescribe regulations not inconsistent with law, for the custody, use and preservation of records appertaining to his agency, Rev. Stat. § 161 (1795), 5 U. S. C. § 22 (1940). The Department of Justice’s Order No. 3229 (1939), implements this statute insofar as their files are concerned. Of the recent cases involving production in court of FBI files, the following have followed the lead of Ex parte Sackett, 74 F. 2d 922 (9th Cir. 1935), wherein an order substantially the same as the above order was given the force and effect of law, and the files were excluded without examination by the court to see if the matter contained therein was, in fact, of such a confidential nature as to be privileged: Walling v. Comet Carriers, Inc., 57 F. Supp. 1018 (S. D. N. Y. 1944); United States ex rel Bayarsky v. Brooks, 51 F. Supp. 974 (D. N. J. 1943); O’Neill v. United States, 79 F. Supp. 827 (E. D. Pa. 1948). In the latter case, decided by the same court as the instant case, the FBI files were held subject to discovery because the Suits in Admiralty Act, 41 Stat. 525 (1920), 46 U. S. C. § 743 (1940), destroyed the privilege. However, the Court noted that had the statute, Rev. Stat. § 161, supra, and the above order stood alone, the privilege would have existed and there would have been nothing more of the case.

A different result was reached in Zimmerman v. Poindexter, 74 F. Supp. 933 (D. Hawaii 1947). This case held that since the statute, Rev. Stat. § 161, contemplates departmental regulations not inconsistent with law, it is a judicial question whether such regulations should be applied or enforced. The court reasoned that this interpretation, plus the breadth of the scope of the Federal
Rules of Civil Procedure concerning discovery, justified its determination that certain FBI files were subject to discovery because their disclosure was not inimical to national security or the best interests of the FBI.

It seems that the instant case arrives at the same result as the cases which hold that FBI files are privileged from discovery by the Federal Rules of Civil Procedure, Rev. Stat. § 161, and the order cited above. However, it established a somewhat novel quasi-privilege based on public policy as expressed by the Attorney General. It does not, therefore, establish, as contended by the court, a basis for the privilege (or quasi-privilege) which is essentially broader than that established by the Federal Rules of Civil Procedure and Rev. Stat. § 161. Both methods of determining the privilege, or quasi-privilege, rest on a ruling by the head of an administrative agency that certain matters are beyond the scope of the discovery process because disclosure of such matter would be inimical to the best interests of the FBI.

The instant discussion may be considerably enlarged if reference is made to the cases involving the files of administrative agencies generally. See 56 Harv. L. Rev. 1125 and 36 Geo. L. J. 656. However, it appears from an examination of the cases, supra, that the privilege afforded FBI files is more nearly that afforded state secrets than the somewhat optional privilege afforded the files of other administrative agencies. This latter privilege depends on a determination by the Court that the subject matter is of such a confidential nature as to give rise to the privilege, regardless of agency regulations, and is illustrated by Cresmer v. United States, 13 F.R.D. 34,42 (E. D. N. Y. 1949), and United States v. General Motors Corp., 26 F. Supp. 353 (N. D. Ill. 1942), cited in 56 Harv. L. Rev. 1125 as the majority rule. Hence, the niceties as to whether the United States is a party to the suit, is acting in a supervisory or in its sovereign capacity, or is exercising its police power, are not examined into as carefully by the courts when discovery of FBI files is sought under pertinent Federal Rules of Civil Procedure.

WILLIAM C. PLOTT

CIVIL PROCEDURE—STAY OF STOCKHOLDER’S DERIVATIVE SUIT IN FEDERAL DISTRICT COURT CONDITIONED ON DEFENDANTS’ AGREEMENT TO ALLOW SAME RIGHTS OF DISCOVERY IN SUIT IN STATE COURT ON THE SAME CAUSE OF ACTION AS PLAINTIFF WOULD HAVE IN FEDERAL COURT.

Plaintiff petitioned for mandamus; previously she had initiated a shareholder’s derivative suit on diversity grounds in the United States District Court for the Southern District of New York on behalf of the San-Nap-Pak Corporation against certain directors of that corporation and against other corporations alleging misuse of corporate funds. At the time the plaintiff filed that suit there was pending in the state court a consolidated action based upon the identical
issues involved in the plaintiff’s suit and against the same defendants generally. The first individual suit in the state court had been filed more than a year previous to the plaintiff’s action, and all were consolidated approximately eight months before the plaintiff brought her suit. Judge Kaufman, the respondent in this petition, stayed the proceedings in the plaintiff’s action, but before the order to stay was entered the petitioner had served notice of the taking of depositions on certain of the corporate defendants and these defendants had moved to vacate the deposition notices, which motion Judge Kaufman held in abeyance. The plaintiff then appealed from the stay, but the circuit court dismissed the appeal for the reason that the stay was not a “final order” from which the plaintiff could appeal. Petition for mandamus was then brought. Held, where suits in a state court involve the same issues and substantially the same defendants, federal court action was properly stayed and defendants’ motion to vacate the deposition notices was correctly held in abeyance, provided defendants agree to as full an examination in the state court as the plaintiff could obtain in the federal court: however, if the defendants do not so agree, their motion to vacate should be decided, and if it is granted the stay should remain effective unless grounds for federal court intervention appear later: if the defendants’ motion is denied as a matter of federal procedure the plaintiff should be allowed to proceed with the examinations and if the defendants then consent to the use of these examinations in the state court no further steps need be taken in the case at bar; if defendants refuse to allow the examination, if permissible under federal procedure, to be used in the state court action, the federal court action should proceed. Mottolese v. Kaufman, 176 F. 2d 301 (2d Cir. 1949).

The right of access to a federal court was originally regarded as absolute, notwithstanding resultant disadvantages to a defendant. One of the major exceptions which has been developed to this technical right is the doctrine of forum non conveniens, a problem which arises in those cases in which the federal venue restrictions as to residency do not apply. As a defined concept in the federal court system this problem has received some clarification in two Supreme Court decisions, Koster v. Lumbermens’ Mutual Casualty Co., 330 U. S. 518 (1947) and Gulf Oil Corp. v. Gilbert, 330 U. S. 501 (1947). Both of these cases concerned actions brought in a forum far removed from the place where the transactions complained of took place. Some of the criteria which the court set down as aids in determining when the doctrine should be applied are: (1) private interest of the plaintiff in choosing the forum under consideration, (2) efficacy of the court’s process in compelling witnesses to attend, (3) access to proof, (4) conflicts of law problem and the attendant difficulty faced by the court of the questioned forum in applying unfamiliar law, (5) vexatious and oppressive nature of the choice of the forum to the defendant.

In the instant case the court applied the doctrine of forum non conveniens equated and coupled with the equitable rule against multiplicity of suits. The
factual situation does not seem to warrant the use of either of these principles. The suit does not concern transactions which took place in some distant forum, but depredations upon the treasury of a New York corporation which, so far as was shown, took place in that state, and if a similar suit was proper in the state court it would certainly seem to be so in a federal court located in that state. Although the plaintiff is not a resident of New York, the corporation in whose behalf the derivative suit was brought is such a resident. The difficulties contemplated in the Koster and Gulf Oil cases, supra, in regard to witnesses and evidence do not seem to be present in this case because apparently the alleged illegalities took place in New York. On the basis of these factors the plaintiff’s choice of forums would seem to be as convenient as possible for the defendants, rather than vexatious and oppressive. Another factor to be considered is that the district court could apply the state law with which it is most familiar. The majority opinion in effect contradicts its use of forum non conveniens by the last condition imposed upon the defendants because if the examination is proper and the defendants do not consent to the use of the information obtained thereby in the state court then the federal court action is to proceed. The breach of this condition will convert the inappropriate forum into the appropriate one, a possibility which to date has gone unnoticed on those rare occasions when the doctrine of forum non conveniens has been utilized. In an effort to buttress the decision, the court also employed the equitable principle against multiplicity of suits; this does not seem sound for the reason that there are only two suits to be considered—the consolidated state court action and the instant federal court action. The analogy drawn by the court in comparing its position with the state court which consolidated the nine state court actions would also fail because of the manifest difference in the number of suits.

However, the court modified the decision somewhat by examining the New York procedure for depositions, concluding that it was not adequate, and handing down the conditional decision as to the depositions and the use of the information obtained thereby in the state court action. In this respect the decision is extremely novel, for the usual position of the federal court in regard to information obtained under the federal procedure for depositions is that it may be used in a state court action if the federal court action was not begun solely to employ the more liberal federal deposition procedure to obtain evidence in connection with a similar state court suit. DeSeversky v. Republic Aviation Corp., 2 F.R.D. 183 (E. D. N. Y. 1941); Empire Liquor Corp. v. Gibson Distilling Co., 2 F.R.D. 247 (S. D. N. Y. 1949). The position of the courts in the DeSeversky and Empire Liquor Corp. cases, supra, was entirely passive; in the case at bar the court, assuming that the defendants’ motion to vacate is denied, has actively interfered with the state court procedure by acting indirectly through the parties in a manner somewhat comparable to the classical equity in personam injunctions which affected proceedings in law courts.

It is clear that this decision has resulted in a most unusual requirement of
adherence to federal procedure in a state court, enforced against the defendant by the provision that otherwise the action will be continued in the federal court. Obviously the decree is not intended to bind the state court itself, but the practical effect on the defendants seems to be the same as though the state court was bound. This is a novel condition, particularly in the light of the Supreme Court decisions concerning the doctrine of *Erie R.R. v. Tompkins*, 304 U. S. 64 (1938), which have gone far in requiring federal courts, sitting in diversity of citizenship cases, to apply state law even as to rules which have long been considered as merely procedural. *E.g.*, *Woods v. Interstate Realty Co.*, 69 Sup. Ct. 1235 (1949); *Ragan v. Merchants’ Transfer and Warehouse Co.*, 69 Sup. Ct. 1233 (1949); *Cohen v. Beneficial Industrial Loan Corp.*, 69 Sup. Ct. 1221 (1949). For discussion of the *Erie* doctrine and these three cases in particular, see 38 Geo. L. J. 115. It appears reasonably clear, nevertheless, that the rules as to depositions and discovery are merely matters of the inner detail of the court and not within the *Erie* doctrine.

Although the decision is open to criticism because of the previously mentioned attempt to apply the doctrine of *forum non conveniens*, the result seems practical and equitable to all parties concerned in the action. The decision may be rationalized as the exercise of the discretionary power of a court, *Landis v. North American Co.*, 299 U. S. 248 (1936), to control proceedings on its docket for the convenience of the court and the litigants.

LEE E. HIGGINS

CONSTITUTIONAL LAW—A PERIOD OF FIFTEEN MONTHS’ STORAGE AT THE PORT DUE TO THE UNAVAILABILITY OF WATER TRANSPORTATION RENDERS THE EXPORT OF GOODS UNCERTAIN SO AS TO HALT THE PROCESS OF EXPORTATION AND BAR IMMUNITY FROM THE TAXING POWER OF THE STATE.

On December 29, 1945, the Joy Oil Company, a Canadian corporation, purchased 1,500,000 gallons of gasoline from Mid-West Refineries, Inc., of Grand Rapids, Mich. Shipments were made from Grandville and Alma, Mich., consigned to the Joy Oil Co. at Detroit, Mich., on bills of lading marked “For Export Only”. To secure the benefits of lower freight rates and exemption from federal transportation and manufacturer’s excise taxes, the Joy company furnished the vendor and the carrier with prescribed forms certifying that the gasoline was purchased for export. The rail shipments were begun in January and completed in February of 1946, and the gasoline so shipped was accumulated in tanks leased by the Joy company at Dearborn, Mich., a Great Lakes port. On April 1, 1947, the city of Dearborn assessed an *ad valorem* property tax on the gasoline, all of which, with the exception of 50,000 gallons shipped to Canada by truck, had then been in Dearborn for fifteen months. Shipment of the balance by truck had been prevented by a federal regulation prohibiting the transport of inflammables over any international bridge. Shipment by water began
in July, 1947, the last shipment being made August 22, 1947. The oil company explained the delay as due to the unavailability of shipping space prior to the actual date of shipment, and resisted payment of the tax on the ground that the gasoline was immune from local taxation as an export under Article I, Section 10, of the Constitution. The State Tax Commission and the Michigan Supreme Court sustained the levying of the tax by the municipality. The Supreme Court of the United States granted certiorari. Held, the period of storage was so long as to break the "process of exportation" and bar the immunity of the property from local taxation as an export under Art. I, § 10, cl. 2. Joy Oil Company Ltd. v. State Tax Commission, 69 Sup. Ct. 1075 (1949).

The situation here presented is one which involves the accommodation of state and federal interests under the Constitution. The historical atmosphere in which like cases have been considered is one of liberal protection for property in foreign and interstate commerce. See Speulding & Bros. v. Edwards, 262 U.S. 66, 70 (1923). The same principles are held to govern, whether immunity is claimed as an export or as an article in interstate commerce under Art. I, § 9, cl. 5. See Richfield Oil Corp. v. State Board, 329 U. S. 69, 75 (1946). The power of the state to levy non-discriminatory taxes on the general mass of property within it is recognized where property either has failed to acquire or has lost its character as property in the "process of exportation" or in interstate commerce.

One of two questions is ordinarily posed by cases in which the immunity here claimed is sought to be asserted. The first is: Has transportation begun so that the goods have ceased to be a part of the general mass of property within the state, subject as such to its jurisdiction and taxation? The majority opinion in the principal case, delivered by Mr. Justice Frankfurter, makes it clear, supra at 1076, that the court regarded exportation as having begun when the gasoline was shipped from Grandville and Alma:

"It is of course true that commodities destined for shipment by water must be transhipped at the water's edge and so may require a brief period of storage at that point which will not be deemed a delay sufficient to interrupt the continuity of the export process. . . . But here the period of storage at Dearborn was so long as to preclude holding that the first step toward exportation would inevitably be followed by others."

Where the process of exportation is regarded as having begun, the second question arises: Has the continuity of transit been interrupted so as to give the property a taxable situs within the state? The Court rested its decision here on the various factors, principal among them the fifteen months' delay in transshipment, which, in its view, tended to render the exportation of the gasoline uncertain. Four other factors were cited in support of the conclusion that the property had lost its character as an export. Among these was the possibility that the gasoline might have been diverted to a domestic market without a breach of any commitment for delivery to a foreign purchaser, or disruption of any existing arrangement for its transshipment. It might be pointed out here
that the oil company was not licensed to do business in the state, and that the inability to make arrangements for transshipment was the very cause of the delay. In the instant case, the Court further stated, *supra* at 1077:

"Neither the character of the property nor any event equivalent to its redelivery to a common carrier made export certain for all practical purposes."

The fact that property sought to be taxed was of a character regularly consumed within the state where the delay occurred does not appear to have barred immunity heretofore. *E.g., Kelley v. Rhoads*, 188 U. S. 1 (1902). Neither has the mere fact that the property remained within the control of the owner during the interruption, where the interruption was not for any beneficial purpose of the owner, been held to destroy such immunity. *Champlain Realty Co. v. Town of Brattleboro*, 260 U. S. 366 (1922). If, however, transportation has been interrupted for any beneficial purpose of the owner, such as sale, processing, or transfer to smaller containers for distribution to purchasers, the local tax is upheld, *e.g.*, *General Oil Co. v. Crain*, 209 U. S. 211 (1908). The latter factor mentioned may be an implication that a more expensive method of transportation might have been used to eliminate or shorten the delay, and that therefore the storage was for the convenience and profit of the taxpayer. The taxpayer does not appear to have been obliged heretofore to employ economically disadvantageous means in order to preserve immunity under the Export-Import Clause. *Carson Petroleum Co. v. Vial*, 279 U. S. 95 (1929). In the light of this review of the other factors cited in the instant case, it appears probable that the period of storage was chiefly relied on by the majority as barring immunity.

The rule as hitherto applied in cases of this kind found expression in *Minnesota v. Blasius*, 290 U. S. 1, 10 (1933):

"If the interstate movement has begun it may be regarded as continuing ... despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement."

The rule was most recently cited with approval in *Independent Warehouses v. Scheele*, 331 U. S. 70, 73 (1947), and has been applied in the majority of cases involving interruptions. *E.g.*, *Hughes Brothers Timber Co. v. Minnesota*, 272 U. S. 469 (1926), *Kelley v. Rhoads*, *supra*. A liberal construction of what is continuity of a journey has been applied "where the Court finds from the circumstances that export trade has been actually intended and carried through." *Carson Petroleum Co. v. Vial*, *supra*, at 105.

It would seem clear that the rule indicated in the principal case, that a fifteen months' interruption in the process of exportation ends the immunity of property from local taxation under the Export-Import Clause, is a departure both from the principle of liberal protection for exports, and the rule as established by the weight of decisions in like cases. If the doctrine here promulgated is carried to its logical extension it may be found that a delay of a specified period of time
will not bar immunity, while one additional day will serve to do so, no matter what the purpose or nature of the interruption. It is to be hoped that at an early opportunity the Court will reconsider the criterion here established and reaffirm the principle expressed in the Minnesota v. Blasius, supra.

MARTIN P. DETELS JR.

CONSTITUTIONAL LAW—Refusal to Rent an Apartment to a Negro by a Private Corporation Which Has Been Financially Aided by the State in the Development of a Housing Area Does Not Constitute State Action, and is Therefore Outside the Fourteenth Amendment of the United States Constitution.

Defendant corporation refused to rent an apartment to plaintiff in pursuance of its policy excluding all Negroes from its housing development. This housing area was built up with considerable aid from the State of New York. The power of eminent domain was used to provide the site, tax exemptions for twenty-five years were granted, and aid was provided by the city planning commission. Plaintiff claimed that this project was the result of state action, and the guarantees of equal protection under the Fourteenth Amendment to the Constitution were violated by the discrimination practiced by defendant in renting apartments. Held, state action herein involved ceased with the completion of the building of the project and thereafter management of the housing development was strictly in the hands of a private corporation, and as such, was outside the Fourteenth Amendment. Dorsey v. Stuyvesant Town Corporation, 299 N. Y. 512, 87 N. E. 2d 541 (1949).

The Supreme Court long ago determined that the prohibition of the Fourteenth Amendment applied only to state action, not to discrimination by and between individuals. Civil Rights Cases, 109 U. S. 3 (1883). The important question raised by this decision is whether the definition of state action, as developed in recent cases before the Supreme Court, should be extended to encompass such situations as exist in this case, involving matters of public importance.

The courts have continued to support the proposition that under the Constitution a private individual is free to discriminate against members of any race, class, or group. Kemp v. Rubin, 188 Misc. 310, 69 N. Y. S. 2d 680 (1947); Ridgeway v. Cockburn, 163 Misc. 511, 296 N. Y. S. 936 (1937). However, in recent years the Supreme Court has seemingly expanded the concept of state action so that a more liberal interpretation of the Fourteenth Amendment could be invoked, and even more protection against unfair practices and discrimination accorded American citizens. Thus an effective blow has been struck by the courts against restrictive covenants in contracts pertaining to real property. The Supreme Court has held that the state courts may not enforce discriminatory
covenants between individuals. Such enforcement by the courts would constitute state action, and is not to be allowed. Shelley v. Kraemer, 334 U. S. 1 (1949). In Hurd v. Hodge, 334 U. S. 24 (1949), the Court extended this same rule to the federal jurisdictions. This, in effect, allows the continued existence of restrictive covenants by private persons, but robs them of their effectiveness by denying them enforcement by state or federal courts.

State statutes denying Negroes the right to vote in a primary election have been held unconstitutional. This decision was reached despite the fact that primaries are run by political parties which are essentially private organizations. However, these statutes were found repugnant to the Fourteenth Amendment. Nixon v. Hodges, 273 U. S. 536 (1927).

Two other cases, decided in federal courts, are quite analogous to the case at hand. One of these, decided in the District Court of the Southern District of West Virginia, concerned the lease by the state of a swimming pool to private parties. As in the Dorsey case, supra, the management of the pool was completely private, and a policy of discrimination against Negroes was instituted. The court held that the leasing of the pool by the state to private individuals did not permit it to avoid its obligations to its citizens. This discrimination was therefore proclaimed state action and unconstitutional in view of the equal protection clause. Lawrence v. Hancock, 76 F. Supp. 1004 (S. D. W. Va. 1948).

The other case also resembles the Dorsey case. The Enoch Pratt Free Library in Baltimore, Maryland, was founded under an endowment by Enoch Pratt. Subsequently, the city expanded the library, adding various branches throughout the city, and utilizing for this purpose public funds. The business affairs and management of the library, however, are still in the hands of a private board of directors, according to the original wish of its founder. The board has no affiliation with the city government. When, however, an otherwise qualified Negro was barred from taking a librarian's course, strictly on the grounds of racial disqualification, the court held that this was state action and unconstitutional. The court refused to apply strict rules of agency, but declared that the separation of functions of financial support and business management was not enough to divorce this from state action. Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F. 2d 212 (4th Cir. 1945).

Other decisions have been handed down in which the state itself was not actually involved, but the courts felt that the situations were of such public importance and of such a nature as to invoke the Fourteenth Amendment. The action of executive committees of political parties in restricting membership, or the right to vote for a candidate, has been held unconstitutional. Nixon v. Condon, 286 U. S. 73 (1932); and Smith v. Altwight, 321 U. S. 649 (1944). In the former case the Court said that a resolution restricting voting to white members was "authority independent of the group" and, as such, similar to the action of state organs.

A most important decision, in respect to the instant case, was reached in
Marsh v. Alabama, 326 U.S. 501 (1946). Plaintiff was prosecuted as a trespasser when he attempted to distribute religious pamphlets on the streets of a company town. All the streets, buildings, etc., were the private property of the company. However, the Court declared that when a property owner opens his property to the use of the general public, his private rights become circumscribed by the statutory and constitutional rights of the users. His own actions must therefore be in accordance with the Constitution.

Thus the groundwork has been laid for a possible reversal of the Dorsey case. It is true that such action might be considered more extreme than past decisions have been; however, it could also be considered the logical follow-up to Marsh v. Alabama, Lawrence v. Hancock, and Shelley v. Kraemer, supra. Moreover, it would be in line with the trend of the courts to interpret liberally what is the field of action encompassed by the Fourteenth Amendment, to prevent racial discrimination.

Samuel Intrater

Contracts—Veteran Who Makes Contract of Employment to Include On-the-Job Training on Basis of Representation by Employer That It Is an Approved On-the-Job Training Institution Can Recover from Employer the Amount of Subsistence Payments He Would Have Received from the Federal Government If Employer's Representation Had Been True.

Plaintiff and assignors, as veterans entitled to the benefits of the Servicemen's Readjustment Act, 58 Stat. 284 (1944), as amended, 38 U.S.C. § 693 et seq. (1946), made contracts of employment with defendant, to include on-the-job training under the provisions of the act entitling plaintiff and his assignors to payment of subsistence benefits from the federal government. To induce them to enter its employment, defendant represented to plaintiff and his assignors that it was an approved on-the-job training institution in Nebraska, when in fact it was not, and that they would receive the above mentioned subsistence payments from the United States in addition to their base pay. Plaintiff and his assignors entered into the employ of defendant, but by reason of the fact that defendant was not a qualified on-the-job training institution, did not become entitled to the subsistence allowances which defendant stated would be received. Plaintiff brought an action to recover from defendant the amount of the subsistence payments to which he and his assignors would have been entitled had defendant been an approved on-the-job training institution in Nebraska. The trial court rendered a judgment for the plaintiff, and defendant appealed. Held, plaintiff can recover from defendant as a part of the consideration of the contract of employment that which defendant promised would be paid by the United States, and which would have been paid had defendant's representations been

The plaintiff alleged facts which would have supported a decision based on contract or tort. The trial court in special findings of fact which accompanied the general verdict for plaintiff, found that the defendant's representations were made to induce the plaintiff and his assignors to enter the defendant's employ; that these representations were in fact not true; that defendant was under a duty to know, and should have known the truth of the representations, but made them lacking such knowledge. No mention was made in the special finding of facts of a promise by defendant regarding subsistence payments.

The appellate court, however, in affirming the judgment, relied on the rule of contract law that one who makes a promise which cannot be performed without the consent or cooperation of a third person is not excused from liability because of inability to secure the required consent or cooperation. Sparks v. Cater Electrical Construction Co., supra, at 275. See 6 Williston, Contracts § 1932. (Rev. Ed. 1936).

Although great variety of definition exists, it is true that promise and representation are at least not synonymous. The former generally applies to contractual situations, and binds the person making it to do or refrain from doing a certain act, BLACK'S LAW DICTIONARY 1443 (3d Ed. 1933), or is an undertaking by the promisee that something shall or shall not happen in the future. 1 Williston Contracts § 1A (Rev. Ed. 1936); RESTATEMENT, CONTRACTS § 2 (1932). Strictly speaking, a promise is not a representation. Cunyus v. Guenther, 96 Ala. 564, 11 So. 649 (1892). A representation normally is considered as a statement, express or implied, manifesting to another the existence of a fact; but it is a precursor to and does not enter into the contract. Murphy v. Giford, 228 Mich. 287, 200 N.W. 263 (1924). It is influential in bringing about the contract, Krankowski v. Knapp, 268 Ill. 183, 108 N.E. 1006 (1915), but falls short of a warranty, which is an undertaking that certain facts exist, Christian v. City of Eugene, 49 Ore. 170, 89 Pac. 419 (1907), and which is always a matter of contract. Berger v. Standard Oil Co., 126 Ky. 155, 103 S.W. 245 (1907). Although it may arise out of contractual dealings, misrepresentation is generally a part of tort law, and is the basis of the action of deceit.

In view of the established precedents, it would seem that representations by the defendant company that it was an approved on-the-job training institution, and that the federal government would pay subsistence to plaintiff and his assignors, could not be interpreted as promises or undertakings by defendant which would bind it on a contractual basis, unless it was found as fact that the representations amounted to warranties or guarantees by the defendant. For discussion of liability in warranty outside the law of sales, see 1 Williston, Sales, § 242 (Rev. Ed. 1948); 5 Williston, Contracts, § 1934 (Rev. Ed. 1936). See also Danenhower v. Hayes, 35 App. D. C. 65 (1910), where it was held that defendant's representations that customers of his would occupy rooms in plaintiff's hotel amounted to a guaranty.
That the rule of law relied on by the court was not conceived for and has not been applied to situations involving misrepresentations of existing facts or statements that third parties would perform certain acts in the future, unless such statements amounted to warranties or guarantees, is plain from an examination of the treatises and cases cited by the court in support of the rule. Each of the cases cited involved promises by the defendant himself to perform certain acts which, due to the acts of third parties, he failed to perform. *Hokanson v. Western Empire Land Co.*, 132 Minn. 74, 155 N.W. 1043 (1916); *Frenzer v. Dufrene*, 58 Neb. 432, 78 N.W. 719 (1899); *City of Topeka v. Industrial Gas Co.*, 135 Kan. 646, 11 P. 2d 1034 (1932). Similarly, the treatises cited 6 Williston, *Contracts* § 1932 (Rev. Ed. 1936); 12 *Am. Jur., Contracts* § 370 (1938); 17 *C. J. S., Contracts* § 459 (1939); apply the rule to inability of the promisor to perform the act he himself has undertaken due to his failure to secure the necessary consent or cooperation of third parties, and not to a situation where the actual performance itself was to have come from the third party. In *American Jurisprudence, supra*, it is said that one who engages for the act of a stranger must procure the act to be done, and the refusal of the stranger without the interference of the other party to the contract is no excuse. The case there cited in support of the rule, however, involved a contract of fire insurance, in which it was provided that the insured should, if required, furnish a certificate from a certain magistrate regarding the extent of loss, and that no suit on the policy could be brought unless this provision was satisfied. *Lane v. St. Paul F. & M. Ins. Co.*, 50 Minn. 227, 52 N.W. 649 (1892). Such an engagement obviously is not analogous to the representations of the defendant in the instant case.

In addition, the special finding of facts by the trial court indicates that recovery was allowed there on the theory of tort. That defendant made representations as to certain facts which were not true; that it had a duty to know such facts; and that it made representations as to those facts lacking such knowledge, for the purpose of inducing plaintiff and his assignors to become employees of or to remain in the employ of defendant, certainly are more consonant with a recovery on the theory of tort than on the theory of contract.

Since apparently no other case has been decided on a similar set of facts in this country, and because of the importance of questions regarding veterans' rights, the instant case is one of general current interest. Plaintiff's just claim for redress should be recognized and satisfied within a growing system of law. But it is submitted that the ends of justice would have been as well served, and the decision would have been on firmer legal ground if recovery had been permitted under another theory than that of contract relied on by the court.

RICHARD L. BRAUN
CREDITORS RIGHTS—TREASURY REGULATIONS PROVIDING THAT SURVIVING BENEFICIARY OF UNITED STATES SAVINGS BONDS WILL BE RECOGNIZED AS THE SOLE AND ABSOLUTE OWNER OF BONDS WERE NOT INTENDED TO PREVENT A LEGAL REPRESENTATIVE FROM PURSUING IN THE INTEREST OF CREDITORS THE PROCEEDS OF BONDS FRAUDULENTLY TRANSFERRED TO A BENEFICIARY WITHOUT CONSIDERATION.

Laundree died insolvent and intestate. Prior to his death he had purchased certain United States Savings Bonds, Series E, naming thereunder as beneficiary, his brother. For this favor the brother apparently gave no consideration. A few of the said bonds were in the actual possession of the brother while the greater part of them were being held by the decedent’s widow who had been named administratrix. Treasury regulations based on the Second Liberty Bond Act provide that registration is conclusive of ownership. Decedent’s brother as registered beneficiary sought to reach the bonds in the possession of the administratrix. The latter, in turn, sought a decree that all said bonds both in her possession and in the possession of decedent’s brother, or the proceeds thereof, be declared the property of the estate for the benefit of creditors since at the time of his death her husband was insolvent, and since there is a presumption of fraud raised by a debtor’s transfer of property without consideration under those circumstances. Held, although bonds became the property of the beneficiary at the testator’s death, treasury regulations were not intended to prevent a legal representative from pursuing, in the interest of creditors, the proceeds of bonds fraudulently transferred to a beneficiary without consideration. In Re Laundree’s Estate, 195 Misc. 754, 91 N. Y. S. 2d 482 (N. Y. 1949).

United States Savings Bonds are issued by virtue of the authority of § 22 of the Second Liberty Bond Act, as amended, 59 Stat. 47 (1945), 31 U. S. C. § 757c (1946). These bonds are issued only in registered form, and that registration is considered conclusive of the ownership and the interest therein. Series E bonds may be registered in the name of the sole owner, two co-owners, or an owner and a beneficiary, 31 C. F. R. § 315.4. A bond of this type, registered in the name of one person, payable on death to another, will be paid to the registered owner during his lifetime upon his properly executed request as though no beneficiary had been named in the registration, but nevertheless the owner may not eliminate or change the beneficiary without the latter’s consent, 31 C. F. R. § 315.46 b 2.

Public policy behind the treasury regulations governing these non-transferrable bonds had its origin in the unfortunate experiences associated with the transferrable type bonds of the first World War era. Therefore these bonds were intended to be non-transferrable in order to protect the registered owner as well as the government, In Re Estate of Wallace, 266 Ill. App. 500 (1932); to encourage thrift and savings by small investors, H. C. Moore’s Administrator v. Helen Marshall, 302 Ky. 729, 196 S. W. 2d 369 (1946); and to restrict ownership and public transfer, In Re Owens’ Estate, 177 Misc. 1006, 32 N. Y. S.
2d 747 (1941). To protect and hold the federal government immune from any attack on its performance of the contract as made in the bond, to aid in the promotion of sales, and to guarantee the performance of the government in strict accord with the contract, these were the aims of the regulations.

However, it was never intended that these regulations should be used as instrumentalities of fraud by those who would defeat their creditors, and, to this end the instant court, without impinging on the contractual integrity of the bonds themselves, enlists the power of equity to pursue the proceeds of any bonds which had been transferred in fraud of creditors.

Throughout the nation courts have sustained as a matter of federal law and contract the right of surviving beneficiaries and co-owners established by savings bond regulations, United States v. Dauphin Deposit Trust Company, 50 F. Supp. 73 (D. C. Pa. 1943); Conrad v. Conrad, 66 Cal. App. 2d 280, 152 P. 2d 221 (1944); In Re Karlinski, 180 Misc. 44, 43 N. Y. S. 2d 40 (1943); In Re Prijer's Estate, Pa. D & C 103 (1945).

The New York court in the instant case, in harmony with these decisions, held that according to the personal property law of that state, bonds issued in beneficiary form are not the assets of the estate but belong to the surviving beneficiary, Matter of Deyo's Estate, 180 Misc. 32, 42 N. Y. S. 2d 379 (1943); Matter of Amols' Will, 184 Misc. 364, 47 N. Y. S. 2d 636 (1944). But none of the cases adjudicated on this particular point considered the rights of creditors of a bond purchaser who died insolvent.

Moreover the New York personal property statute itself sets out that nothing contained therein should limit article ten of the debtor and creditor law, an article wherein the Uniform Fraudulent Conveyance Act is included and was designed to protect creditors against fraudulent conveyances, New York Personal Property Law § 24 as amended by Laws of 1943, ch. 632, April 19, 1943. Jacoby v. Loewenberg, — Misc. —, — N. Y. S. 2d — (N. Y. 1949), was the only case which considered both the rights of a creditor and the rights of a beneficiary where the purchaser died insolvent. The creditor was there informed that suing individually he could not hope to set aside the fraudulent transfer, but the court indicated that one suing in a capacity representative of the interests of all creditors would have standing in court.

That the transfer was fraudulent in the instant case is arrived at by the court determining that there was a transfer of the bonds to the beneficiary at the death of the purchaser, that this very transfer rendered the purchaser insolvent, that the transfer was admittedly without consideration and hence raised a presumption of fraud on which the creditor is entitled to stand. In Re Laundree's Estate, supra, at 487, 484, and 488. The court then pointed out that two types of transfers which do not conclude the rights of a creditor are those made by the debtor with the actual intent thereby to impede or altogether defeat the efforts of creditors and those which, regardless of the intention of the debtor in fact operate to make the debtor insolvent and thereby defeats the claims of
The latter type is exemplified by the instant case and includes transfers made without consideration or without fair consideration which render the debtor insolvent.

However, both a practical and equitable policy is effectively upheld in the instant case and its rationale is best stated by the court when it quotes the California Court of Appeals in *Katz v. Driscoll*, 88 Cal. App. 2d 313 at 320, 194 P.2d 822 at 827 (1948): “Even in the case of fraud, the contract made by the government with the bond purchaser to pay his survivor cannot be changed or interfered with, but principles of equity and fair dealing require that the person benefiting by such fraud may be required to disgorge the proceeds of such fraud independently of the contract between him and the federal government, and without interference in its performance.”

Except for this equitable check on the transfer of bonds of this type, an effective instrumentality for defeating the claims of honest creditors would be available in those cases in which before, during, and after insolvency, savings bonds with another named beneficiary could be acquired without consideration by that beneficiary to the prejudice of bona fide creditors simply by the accident of death of the purchaser before legal proceedings for the recovery of the bonds could be instituted. This is definitely not in keeping with the policy of the law that a debtor be just before he be generous.

JOSEPH M. F. RYAN, JR.

EVIDENCE—TESTIMONY AGAINST AN ACCUSED HUSBAND BY A WIFE WHO IS NOT THE VICTIM OF THE OFFENSE IS INADMISSABLE IN A FEDERAL CRIMINAL PROCEEDING.

The accused, Walker, was convicted of transporting in interstate commerce money taken feloniously by fraud with intent to steal. The victim of the offense, Mary Ashe, whom Walker had bigamously married, and his lawful wife, Clara Walker, who had instituted a suit for divorce prior to trial, testified against the accused. *Held*, that the admission of testimony by a wife against her husband without his consent where the offense was against another than herself was reversible error. *United States v. Walker*, 176 F.2d 564 (2d Cir. 1949).

The rationale of the common law principle that neither husband nor wife could testify for or against the other has been stated to be the unity of husband and wife, 1 Blackstone’s *Commentaries* 443, and the preservation of marital harmony. 8 Wigmore, *Evidence* §§ 2227, 2228 (3d ed. 1940). The application of this principle has been steadily restricted. The disqualification of husband or wife on the other's behalf in civil and criminal cases has practically disappeared and the privilege of parties in civil cases has been swept away. The courts of England, most Canadian provinces and a number of states have abolished the privilege against adverse testimony by a spouse in both civil and
criminal cases. 2 Wigmore, op. cit. supra, § 488 n. The abolition of this privilege was recommended by the American Bar Association, 63 A. B. A. Rep. 594 (1938), and it was omitted from the American Law Institute's, Model Code of Evidence, Rules 215, 216.

Where the wrong was against a spouse, the privilege has been abrogated on the basis of necessity that the prosecution must fail without the testimony of the victim. State v. Marriner, 93 N. J. L. 273, 108 Atl. 306 (1919) (assault and battery); United States v. Mitchell, 137 F. 2d 1006 (2d Cir. 1943) (prostitution in interstate commerce). In Funk v. United States, 290 U. S. 371 (1933), the testimony of the wife for the husband was held admissible in a federal criminal proceeding. The United States Courts of Appeals have divided on the admissibility of the wife's adverse testimony where she was not the victim. In Yoder v. United States, 80 F. 2d 665 (10th Cir. 1935), the testimony was admitted, but in Paul v. United States, 79 F. 2d 561 (3d Cir. 1935); Brunner v. United States, 168 F. 2d 281 (6th Cir. 1948); and the instant case the testimony was inadmissible.

The majority in the instant case held that the concept of necessity was not applicable and excluded the wife's testimony. A pending suit for divorce or the disintegration of the marital relationship did not make admissible this testimony. In the absence of legislation or general state acceptance of the abolition of this privilege, the majority felt constrained from overruling the settled policy of protection of the marital relationship in order to afford a more adequate access to truth during a trial. Nor did they consider it practicable or desirable to have the trial judge determine the admissibility of such testimony through a prior determination of the degree of marital discord then existent.

The dissent criticized the majority's holding as an attempt to support an outmoded rule of exclusion in disregard of the practical conditions of modern life as interpreted in the light of reason and experience. The only realistic ground for the privilege is the preservation of marriage and the minority considered the trial judge to be in the best position to ascertain the probabilities for the continuation of this relationship. On his findings should rest the admissibility of the spouse's adverse testimony.

The instant case thus revealed basic differences in judicial thought and interpretation. The majority believed a settled rule should not be changed by judicial action, while the minority construed Rule 26 of the Federal Rules of Criminal Procedure as conferring the right and the duty upon the courts themselves to examine independently the reason for a rule of exclusion with a view to its validity under modern conditions. If the reason is no longer valid, the rule should be adjusted in conformance with present-day standards of wisdom and experience.

The trend in recent federal criminal cases of close scrutiny of the admission of testimony adverse to the accused has been directed toward the manner in which the testimony has been obtained, particularly as to coerciveness and violation of due process, and not to the competency of the testimony as such
and the privileges attached thereto. The trend pertinent to competency and privileges has been the enlargement of the domain of competency, through legislation and judicial construction, by substituting impeachment of credibility for exclusion and by broadening the scope of the trial judge's discretion as to the admissibility of evidence and the conduct of his court. 2 Wigmore, op. cit. supra, § 288.

It is submitted that justice would better be served if the rule governing admissibility of a spouse's adverse testimony was one of privilege only when the trial judge, in the exercise of sound discretion and with opportunity to observe the actual marital status, had resolved the conflict between this avenue of access to the truth and the protection of marital harmony in favor of the party claiming the privilege. The rule would prevent the endangering of a harmonious marriage by making inadmissible testimony which would have this effect.

THAYER DAVID MOSS

INSURANCE—Under a Clause in an Automobile Insurance Policy Binding the Company to Defend All Actions against the Insured, the Company May Investigate the Case, and if Satisfied that the Case is not Within the Policy, May Refrain from Defending the Action against Their Insured.

The company sought a declaratory judgment that a policy of insurance issued by it to Wagner did not cover the damages suffered by five persons who were killed or injured in a collision between Wagner's truck and an automobile in which they were riding, because Wagner intentionally caused the collision. The policy provided that the company would pay all judgments against the insured for damages sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile, qualified however, by the exclusion of intentional injury by the insured from the coverage of the policy. Another clause stated that the company would defend any suit against the insured alleging an injury covered under the policy, even if such suit is groundless, false, or fraudulent.

Prior to the initiation of this action Wagner was convicted of murder in the second degree for intentionally and maliciously causing the death of one of the five persons. Appellees defended the instant action on the ground that they were not bound by the criminal conviction, and that subsequent thereto it was adjudged in civil suits brought by them, and tried on the theory of negligent injury, that the injuries were accidental; and they contended that the company was therefore obligated within the limits of liability of its policy to pay the judgments recovered against Wagner. Wagner made no defense in the negligence actions, and the attorneys for the company withdrew from the case before trial with leave of court. In the present action the lower court granted the ap-
pellees a summary judgment on the ground that since the company had notice of the suits, it was bound to defend them under the provisions of the policy, and that it was bound by the findings in the civil suits. Held, that the insurer was not bound to defend the previous negligence actions, and is entitled to its day in court to show that the policy did not cover the injurious acts which the insured committed. *Farm Bureau Mutual Automobile Insurance Company v. Hammer*, 18 U. S. L. Week 2168 (4th Cir. Oct. 3, 1949).

The appellees placed their reliance mainly on the case of *Miller v. United States Fidelity and Casualty Co.*, 291 Mass. 445, 197 N. E. 75 (1935). The case is directly in point, and the court there stated that the insurance company was required to defend the action against their insured, and since they refused, they were bound by the decision in that suit. The court here, however, stated that it extends the principle to a situation to which it does not apply and overlooks the true ground on which the principle is based. However, upon the examination of the leading cases on the subject the conclusion cannot be escaped that the *Miller* case, supra, represents the law as sustained by the majority of the courts.

It has been held in such instances that the insurer is bound by the material facts which were tried and settled in the suit against the insured unless the judgment is collusive and fraudulent. *Fistel v. Car and General Insurance Corporation, Limited*, 304 Mass. 458, 23 N. E. 2d 895 (1939). So also was it held in *Sheehan v. Goriansky*, 321 Mass. 200, 72 N. E. 2d 538 (1947). The cases of *Joyce v. London and Lancashire Indemnity Company of America*, 312 Mass. 354, 44 N. E. 2d 776 (1942), and *Sweeney v. Frew*, 318 Mass. 595, 63 N. E. 2d 350 (1945) held in similar situations that the insurance company was bound by the judgment, that the matter was res judicata, so that the companies could not object to the findings in those cases.

A leading case on the subject is *Maryland Casualty Co. v. Moritz*, 138 S. W. 2d 1095 (Tex. Civ. App. 1940) which held that liability depended on the allegations of the petition in the suit against the insured. If the allegations are sufficient to state a cause of action, the insurer is bound to defend the suit under the conditions of the policy. The same rule is expressed in the cases of *Lamb v. Belt Casualty Co.*, 3 Cal. App. 2d 624, 40 P. 2d 311 (1935) and *Christian v. Royal Insurance Co.*, 185 Minn. 180, 240 N. W. 365 (1932). This rule was probably first set out well in the case of *Greer-Robbins Co. v. Pacific Surety Co.*, 37 Cal. App. 540, 174 P. 110 (1918).

Thus from an examination of the cases, it would seem that the generally accepted doctrine on the matter is that the insurance company is bound to defend all actions brought against the insured, if they have a contract provision to that effect, *providing that the allegations of the petition state a cause of action within the coverage of the insurance policy*. If the petition fails to state a cause of action within the policy, then the company has the right to refrain from the defense. However this fact must be ascertained from the petition in the case, for that is the matter to be tried in the case.
The court in the present case placed its reliance partially on the case of *Klefbeck v. Dous*, 302 Mass. 383, 19 N. E. 2d 308 (1939), in which the court said that the company could investigate the claim and determine whether it came within the contract of insurance, and if they were satisfied that the accident was not within the coverage, it could disclaim liability and withdraw from the case. However the court there further stated that whether an action is within the terms of a liability policy is, in the first instance, to be determined by the declaration. In the case of *State Farm Insurance Co. v. Coughran*, 303 U. S. 485 (1938), cited by this court, the petition showed on its face that the car was not being operated by a person within the coverage of the policy.

The petition in the present case stated a claim of negligence, which claim was within the coverage afforded by the policy, and thereby, according to the general rule, the company has no right to withdraw from the action, and should be held bound by the facts adjudicated in the action. To permit the company to deny liability now, on the ground that the injury was not negligent but intentional, as the learned Judge Parker stated in his dissent, is to permit it to litigate again a matter covered by the judgment against the insured, without averring or even suggesting fraud in its procurement. Thus, in effect, the court is allowing the company to refrain from the defense of the action, when by their very contract they have promised to defend such actions. This seems to be clearly contrary to well established law.

However, when examining the results of the holding of this case, it is possible to see how this decision can be justified as a matter of practical business. If the court had held otherwise it would have left the insurance company without any means of showing that these actions were not within the coverage of the policy. If the company's attorneys, supposedly defending the action in behalf of the insured, raised a claim that the acts alleged to be negligent were in fact intentional, such claim would open the insured to a demand for punitive damages. This would be detrimental to the client's rights, and therefore cannot be done. The court here might well have feared the results of an opposite decision in encouraging the bringing of actions on intentional acts, clothed as negligent acts, so that a recovery could be had against the insurer.

But there are also arguments equally cogent, if not more so, why this decision should not stand, even from the practical business or public policy aspect. The insurance company has written its own contract. This contract with the seal of approval of the company, has been given to the public to alleviate the risk of the individual of financial responsibility beyond his means. Since the company wrote the contract it should be bound strictly by the terms. It is not the place of the courts to rewrite a contract for a party. If the company is dissatisfied with these results which flow from the contract, then it is within its power to write a different contract, thus changing the obligation to defend.

If the company does not desire to change its policy there still remains the consideration that the company has included the risk of fraudulent claims in the
LABOR LAW—Circuit Court of Appeals Has Sufficient Discretion Under the National Labor Relations Act to Refuse a Decree of Enforcement of a Board Order in the Absence of Any Showing Whatever, Based on Reasonably Recent Inquiry, That a Decree of Court is Appropriate or Necessary.

In July, 1946, the NLRB found the respondents guilty of unfair labor practices. A Board order followed, ordering the employers to cease and desist from: warning employees to refrain from membership in a labor organization; or in any manner interfering with the activities of the local union to negotiate for or represent the employees. On March 10, 1948, the Board petitioned the court for a decree of enforcement of the order. The decree was refused, and on motion, the Board was granted a rehearing. Held, on the basis of the whole record, a decree ought not to be entered in this case in the absence of any showing whatsoever, based on reasonably recent inquiry, that a decree of court was appropriate or necessary. NLRB v. Eanet, 18 U. S. L. Week 2211 (D. C. Cir. Oct. 31, 1949).

The question presented by the case is whether the circuit court of appeals has a measure of discretion in passing on a petition for a decree of enforcement of an NLRB order. Generally, on the question of discretion, the Supreme Court has said,

"The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority are open to examination by the court." NLRB v. Jones and Laughlin Steel Corp., 301 U. S. 1, 47 (1937).

If the Board has acted within statutory authority, a like obedience to that authority on the part of the circuit court of appeals requires the court to grant a decree of enforcement. NLRB v. Bradford Dyeing Ass'n, 310 U. S. 318 (1940).

The decision in the instant case seems to be based on the facts that the evidence presented was two years old, the evidence was doubtful, and the dispute was of minor significance. Since the case of Consolidated Edison v. NLRB, 305 U. S. 197 (1938), there is no doubt that the findings of the Board are binding on the reviewing court when based on substantial evidence. NLRB v. Bradford
on may, substantial evidence Board that if it evidence determining how that with which reason conflicting court Ass'n, Dyeing situation that would issuance of employees during evidence? substantial or doubtful and Governor Co., Board, the of credibility must slight, evidence? 322 The Georgetown Law Journal [Vol. 38: p. 300
Dyeing Ass'n, supra; NLRB v. Link Belt Co., 311 U. S. 584 (1941); NLRB v. Padin Co., 161 F. 2d 353 (1st Cir. 1947). The majority opinion refers to the evidence as shadowy and doubtful. It was held in a proceeding to review a Board order that the Board's findings, supported by substantial evidence, however slight, must be affirmed. Texas Co. v. NLRB, 119 F. 2d 23 (7th Cir. 1941). A court may not overturn a finding of the NLRB if the finding is supported by substantial evidence although the court might reach a different conclusion on the conflicting evidence. Continental Oil Co. v. NLRB, 113 F. 2d 473 (10th Cir. 1940). It is not the province of the court to weigh evidence nor to consider the credibility of witnesses nor to substitute its views as to the facts for those of the Board, but inquiry must be limited to whether there is substantial competent evidence to sustain the charge found true by the Board. NLRB v. Fisher Governor Co., 163 F. 2d 913 (8th Cir. 1947). In the light of these holdings, the reason for the decision here would seem to be the fact that the evidence upon which the Board order was based was two years old, and for that reason was doubtful and insufficient. The question then resolves into whether by substantial evidence is meant such evidence at the time when the Board issues its order, or substantial evidence at the time the Board files its petition for enforcement with the court. Can the court deny a decree on the basis of the recency of the evidence?

The dissent, after a finding that there was substantial evidence, cited the case of Frank Bros. Co. v. NLRB, 321 U. S. 702 (1944). In that case the union designated by the Board as a bargaining agent had lost its majority of the employees during the seven month period between the filing of charges and the issuance of a complaint by the Board. The circuit court enforced the order. The Supreme Court affirmed, on the basis that there was no requirement that the union membership be kept intact during delays incident to the hearing, for that would allow employers to profit from their own wrongful conduct in refusing to bargain. Thus, in a case where there was an obvious change in the situation since the issuance of the order, the Supreme Court affirmed a decree enforcing that order. Loss of membership is not a bar to action by the Board in determining how the effect of prior unfair labor practices may be effaced. NLRB v. Andrew Jergens Co., 175 F. 2d 130 (9th Cir. 1949). In another case the Supreme Court said:

"It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged." International Ass'n of Machinists v. NLRB, 311 U. S. 72, 82 (1940).

The act makes provision for the taking of additional evidence. The court may, on application of one of the parties, order the Board to take such evidence if it be shown to the satisfaction of the court that such evidence is material and that there were reasonable grounds for failure to adduce such evidence at the Board hearing, 49 Stat. 453 (1935), 29 U. S. C. § 160(e) (1946). Where only
the validity of the order is at issue, the question of partial compliance therewith subsequent to the hearing of the Board was not material and cause was not re-
manded for the taking of additional evidence to show what had occurred after the hearing. NLRB v. Swift and Co., 129 F. 2d 222 (8th Cir. 1942). There have been other cases where changes in the situation have not been considered sufficient to warrant denial of enforcement. NLRB v. Air Associates, 121 F. 2d 586 (2d Cir. 1941); NLRB v. Blanton Co., 121 F. 2d 564 (8th Cir. 1941). It is not denied here that there was a refusal to bargain at the time of the Board's order. It would seem, then, where there is no evidence of a change in the situation, and no motion to present additional evidence has been made by either party, it is incumbent on the court to grant the decree. Also, as pointed out in the dissent, if the order involved any injustice to the employer, he could have sought prompt judicial review of the order itself under the act, 49 Stat. 453 (1935), 29 U. S. C. § 160(b) (1946). The same reasoning has previously been followed by this court. NLRB v. Central Dispensary and Emergency Hos-

Since the National Labor Relations Act says nothing concerning the size or importance of the dispute in order that the Board have the right to seek court enforcement, it seems that the question should be one of administrative policy. Because the industry is small, it does not follow that its labor disputes will be insignificant. Because a union is small is no reason why its members should have less rights than members of a larger union. Such discrimination would be arbitrary and unjust.

Considered in toto, this case appears to be an attempt on the part of the court to direct Board policy with regard to the enforcement of orders. If allowed to stand, the judgment may well have a serious effect on labor disputes. If the court is allowed to remand in every case for more recent findings, the adminis-
trative process could possibly go on ad infinitum. With the long periods of time presently required in administrative and judicial proceedings it is probable that some cases might never be determined. The damaging effect of such a delaying procedure on the law is evident. By such action the employer might well carry on his unfair labor practices so long as he desired. It would not contribute to the orderly administration of the law. NLRB v. Swift and Co., supra.

FRANCIS M. O'CONNOR

PATENTS—The Rule That a Patent Claim Is Invalid if Its Language Is Too Broad at the Precise Point of Novelty Does Not Apply to Combination Claims.

In an infringement suit, claims 3 and 6 through 10 of the patent to Gibbs, Number 1,906,260, on a pin ball machine, were held valid and infringed as combination claims not requiring novelty of any particular element. The
combination of these claims included (1) a board, (2) contact devices, (3) indicators, (4) means for connecting said indicators with other circuit elements, (5) means for energizing said indicators, (6) a common electrical circuit, and (7) supplementary means for indicating a winning play. The Court of Appeals for the Ninth Circuit affirmed. Certiorari was granted by the Supreme Court because of an alleged conflict with *Halliburton Oil Well Cementing Co. v. Walker*, 329 U. S. 1 (1946), 35 Geo. L. J. 279 (1947). *Held*, the patent in *Halliburton v. Walker* was held invalid because its language was too broad at the precise point of novelty, but that case is inapposite to the instant case where the patent has been sustained because of the fact of combination rather than the novelty of any particular element. *Faulkner v. Gibbs*, 70 Sup. Ct. 25 (1949).

The claim in the *Halliburton* case, *supra*, recited several “means” clauses, as in the instant case, as well as certain definite structural elements. The court decided that the invention merely consisted in adding one single element to a previously patented invention shown by the art in the case. The one element added was referred to only by the generic term “means.” Such addition was considered to constitute “conveniently functional language at the precise point of novelty,” and to render the claim invalid.

It has long been the law that language rendering a claim broader than the disclosed invention voids the claim. *O'Reilly v. Morse*, 15 How. 62, 113 (1853). Such terminology as “means,” followed by a recital of the function performed by the means, is frequently referred to as “functional.” Since such a term may include many devices not considered by the inventor it may be considered as rendering the claim broader than the disclosed invention and void the claim. *Tyden v. Ohio Table Co.*, 152 Fed. 183 (6th Cir. 1907). The Patent Office will not allow a claim consisting of a single means functionally defined. Ex parte *Bullock*, 1907 Com. Dec. 93. The courts will not uphold a claim to an old structure plus a single means. In re *Gardner*, 32 U. S. App. D. C. 249 (1908). Mere use of broad generic language has, however, been sustained when more than mere functionality resides in fact in the claims. *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263 (1889); *Davis Sewing Machine Co. v. New Departure Mfg. Co.*, 217 Fed. 775, 782-784 (6th Cir. 1914).

*General Electric Co. v. Wabash Appliance Corp.*, 304 U. S. 364 (1938), added a new doctrine, or at least new phraseology. There the court was dealing with claims describing a structure wholly in terms of its appearance. This description was found to constitute “conveniently functional language at the precise point of novelty,” and to render the claim invalid. Perhaps the *Wabash* decision can be regarded as an extension of the single means doctrine of the *Gardner* case, *supra*, by considering that a true combination, *i.e.*, a structure consisting of several related elements, each cooperating functionally with the others, does not exist in the cases to which it is applied.

In holding invalid the claim in the *Halliburton* case, the court merely adopted language applied in the *General Electric* case, *supra*. Cases had previously been
decided in the same way but in slightly different language. For example, the claims in Heidbrink v. McKesson, 290 Fed. 665 (6th Cir. 1923), cert. denied, 263 U. S. 723 (1924), were in much the same form as those in the Halliburton case although they were somewhat simpler. If the court had limited its decision in the Halliburton case to a determination of the issues there involved, no adverse criticism would have been in order. The court, however, in statements which may be considered dicta, since they were not essential to the decision, cast doubt upon the validity of many generic claims couched in functional language. Halliburton v. Walker, supra, at 7, 13. See for example a discussion and criticism at 29 J. Pat. Off. Soc’y 105 (1947).

The present case disposes of any notions derived from the Halliburton dicta. The law is thus returned squarely to where it was, that is, back to the Wabash case. In distinguishing from Halliburton the Court says: “We there held the patent invalid because its language was too broad at the precise point of novelty.” This statement appears to leave little ground for further argument as to the true basis of the decision. Even Mr. Justice Black, author of Halliburton, helped clear the air. He dissented, but was of the opinion that in the Gibbs patent the language of the claim was too broad at the precise point of novelty, if indeed there was novelty anywhere.

It is now clear that a true combination claim is not invalid merely because it contains convenient generic language that happens also to be functional. Doubts as to the validity of such claims may have been unfounded but they existed, and it is as well to have them dispelled.

JAMES H. RYAN

PUBLIC UTILITIES—ELECTRIC AND GAS UTILITY PROPERTIES CANNOT BE RETAINED TOGETHER AS A SINGLE INTEGRATED PUBLIC UTILITY SYSTEM UNDER THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935.

The Philadelphia Company is a registered holding company under the Public Utility Holding Company Act of 1935. 49 Stat. 803 (1935), 15 U. S. C. § 79 (1946). It is in the middle of a large holding company pyramid, having two parent holding companies and a number of subsidiaries which include substantial electric utility holdings (Equitable Gas Company, Pittsburg and West Virginia Gas Company, and Kentucky West Virginia Gas Company). In a hearing before the Securities and Exchange Commission to determine what action the Philadelphia Company should take to bring its system into conformity with the integration and corporate simplification requirements of §§ 11(b)(1) and 11(b)(2) of the act, 49 Stat. 820, 821 (1935), 15 U. S. C. § 79k(b)(1) and § 79k(b)(2) (1946), Philadelphia Company was ordered to dispose of its gas and transportation interests and to dissolve. Petition was made for review of this order. Held, the Public Utility Holding Company Act
defines two types of integrated public utility systems, the gas type and the electric type and, as a matter of law, there is no third type, consequently the commission rightly refused to formulate a third definition to be applied to combinations of electric utility companies and gas utility companies. *Philadelphia Co. v. SEC*, 18 U. S. L. Week 2182 (D. C. Cir. October 19, 1949).

The question of whether gas and electric utility properties may be contained in a single integrated system, as defined in § 2(a)(29) of Public Utility Holding Company Act, 49 Stat. 810 (1935), 15 U. S. C. 79b(a)(29) (1946) has been considered by the Securities and Exchange Commission many times. The instant case, however, is the first in which the problem has been squarely before a court. In *American Water Works and Electric Company, Inc.*, 2 S. E. C. 972 (1937), the commission ruled that the electric and gas operations of the system involved could and did constitute a single integrated public utility system. In *Columbia Gas & Electric Corp.*, 8 S. E. C. 443, 463 (1941), and *United Gas Improvement Co.*, 9 S. E. C. 52, 78 (1941), the commission expressly stated that it has permitted the retention of gas properties in the *American Water Works case*, supra, because they were retainable even under the ABC clauses of § 11(b)(1). In later cases the commission has consistently held, as it did on the hearing in the instant case, SEC Holding Co. Act Release No. 8242, June 1, 1948, that as a matter of law no single integrated public utility system can include both electric and gas operations. *Columbia Gas & Electric Corporation*, 8 S. E. C. 443 (1941), *Standard Power and Light Corporation*, 9 S. E. C. 862 (1941), *North American Company*, 11 S. E. C. 194 (1942), *Engineers, Public Service Company*, 12 S. E. C. 41 (1942).

The holding most nearly in point by a court occurred in *Arkansas Natural Gas Corp. v. SEC*, 154 F. 2d 597 (5th Cir. 1946), cert. denied, 329 U. S. 738 (1946), wherein it was stated that the Public Utility Holding Company Act defines two types of integrated public utility systems, and that the requirements of the gas type differ from those of the electric type, and that there are but two kinds of such systems. The question here before the court was whether or not oil production business could be combined with gas properties into a single integrated system within the meaning of the act. Therefore, the *Arkansas Natural Gas case*, supra, while persuasive, is distinguishable.

What is the effect of the holding in the instant case? The declared policy of the act is "to compel the simplification of public utility holding company systems . . . and to provide as soon as practicable for the elimination of public utility holding companies except as otherwise expressly provided in this title", 49 Stat. 804 (1935), 15 U. S. C. 79a(c) (1946). The heart of the act is § 11, which provides the basic machinery for the implementation of this policy, In view of the holding in the instant case, if any holding company within the jurisdiction of the act desires to retain both substantial electric and gas properties, it can satisfy the requirements of § 11 only by qualifying under the ABC clauses of § 11(b)(1). These clauses lay down the conditions which must exist before
a holding company may retain an additional integrated public utility system. They require (A) that the additional system cannot be operated as an independent system without the loss of substantial economies; (B) that such additional systems are located in one state, or in adjoining states, or in a contiguous foreign country; and (C) that the continued combination of such systems is not so large as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation. In affirming the constitutionality of section 11(b)(2), the Supreme Court presents a full discussion of the broad powers possessed by the commission in determining questions peculiarly fitted for decision by such an administrative agency staffed by experts. *American Power and Light Co. v. SEC*, 329 U. S. 90 (1946).

There have been cases in which an integrated electric system has been permitted under the ABC clauses as an additional system to another integrated electric system, *Engineers Public Service Co.*, 12 S. E. C. 41 (1942), *Federal Light and Traction Co.*, SEC Holding Co. Act Release No. 4960, March 31, 1944, but with the possible exception of the *American Water Works* case, *supra*, the commission has never found a holding company which could justify under the ABC clauses a retention of an integrated public utility system with a principal integrated system of a different type. Therefore, in view of the difficulty experienced in qualifying under the ABC clauses and the holding of the instant case which makes such qualification a condition precedent to any compliance with § 11 of the act, it may be concluded that the ultimate effect of the act is going to be that most, if not all, holding companies within the jurisdiction of the act will be permitted to retain either gas properties or electric properties, but not both.

HUGH M. DURHAM

**TORTS—ATTORNEY GENERAL OF THE UNITED STATES, DIRECTOR OF THE ENEMY ALIEN CONTROL UNIT OF THE DEPARTMENT OF JUSTICE, AND DISTRICT DIRECTOR OF IMMIGRATION ARE IMMUNE FROM LIABILITY IN A SUIT BY AN ALIEN FRENCHMAN WHOM THEY WRONGFULLY ARRESTED AS AN ENEMY ALIEN, EVEN IF THEY ACTED FROM PERSONAL SPITE AND MALICE.**

Armand Gregoire brought suit against two successive Attorneys General of the United States, two successive Directors of the Enemy Alien Control Unit of the Department of Justice, and the District Director of Immigration at Ellis Island, alleging that they arrested him on the pretense that he was an enemy alien. After a hearing by the Enemy Alien Hearing Board which determined he was a Frenchman, the plaintiff charged that the defendants nevertheless kept him in custody from January 5, 1942 until September 18, 1946. In his first count Gregoire alleged the arrest and imprisonment was a wilfull and malicious conspiracy by the defendants to deprive him of his liberty contrary to law. The
District Court Judge dismissed the complaint because of failure to state a claim upon which relief can be granted. Plaintiff appealed. Held, named defendants enjoy the same absolute privileges as judges, notwithstanding the fact that it be alleged that they acted "maliciously and wilfully" and solely out of personal spite, fully aware that they had no legal warrant for arresting and deporting the plaintiff. *Gregoire v. Biddle*, 18 U. S. L. Week 2203 (2d Cir. October 24, 1949).

As observed by the court in the instant case, "... so stated, that seems at first blush a startling proposition." Yet, after a study of the many cases which support this principle, this rule is shown to be necessary in order to protect public officials from a great number of harassing suits by those with whom they deal in their official capacity.

When the courts speak of judicial immunity they refer to the principle that judges are immune from liability in civil actions even where it is charged that their acts were the result of malice, partiality, or corruption. *Bradley v. Fisher*, 13 Wall. 335 (U. S. 1871) (where the presiding judge at the trial of John Sur- ratt for the murder of Abraham Lincoln entered an order depriving defendant's counsel of the right to practice before the court as a result of a threat made to the judge during the trial); *Alzua v. Johnson*, 231 U. S. 106 (1913); *Anderson v. Gorrie*, 1 Q.B. 668 (1895); *Cooke v. Bangs*, 31 Fed. 640 (C. C. D. Minn. 1887) (where a justice of the peace was held to enjoy judicial privilege). However, if a judge acts illegally where he has no jurisdiction or in the performance of ministerial functions, he may be held to answer civilly. *Sullivan v. Jones*, 2 Gray 570 (Mass. 1854).

The reason for granting immunity to judges applies almost equally to public prosecutors. *Smith v. Parman*, 101 Kan. 115, 165 Pac. 663 (1917). Since the grand jury is not liable to the individual, the prosecutor should not be held liable either. *Griffith v. Slinkard*, 146 Ind. 117, 44 N. E. 1001 (1896); *Copeland v. Donovan*, 124 Misc. 553, 208 N. Y. Supp. 765 (N. Y. 1925). In the *Copeland* case, *supra*, the point is made that any other rule would compel the public prosecutor to devote most of his time to defending himself instead of prosecuting others. The judicial privilege has been extended to county attorneys also. *Price v. Cook*, 120 Okla. 105, 250 Pac. 519 (1926). As in the case of a judicial officer, there is no immunity when a prosecuting attorney acts outside his jurisdiction. *Schneider v. Shepherd*, 192 Mich. 82, 158 N. W. 182 (1916). Jurisdiction in this sense has come to encompass acts which the law will protect on the grounds of public policy. In the instant case, the court discussed the limitation in these words:

"What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act if he had been using his power for any of the purposes on whose account it was vested in him."

As in the case of judges, there is no protection in the performance of ministerial acts by other officials, a ministerial act being one which is absolute, clear cut, and imperative, involving the mere execution of a set task where nothing

The decision in the *Gregoire* case was based on the authority of *Vaselli v. Goff*, 275 U. S. 503 (1927) a memorandum decision in which the Supreme Court affirmed the decision of the Court of Appeals for the Second Circuit, 12 F. 2d 396 (1926), on the authority of *Bradley v. Fisher, supra*, and *Ahsua v. Johnson, supra*. The opinion in the *Vaselli* case, *supra*, held that the absolute privilege of judicial officers from civil liability, regardless of malice and improper motives, extends to a special assistant to the Attorney General of the United States. The underlying reason for denying recovery was that a public official owes his duty to the people as a whole, and a wrong done by him injures the public. A failure to perform a duty or an erroneous performance is redressable by some form of public action. The Court stated in the *Vaselli* case, *supra*, at 406, that

"The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act fearlessly in the discharge of their official functions."

Other officials who are not as closely associated with the "judicial departments of the government" have been covered by judicial privilege. In the case of *Spalding v. Vilas*, 161 U. S. 483 (1895), the Supreme Court granted judicial immunity to the Postmaster General, adding that the doctrine covered heads of Executive Departments. The Court of Appeals for the District of Columbia Circuit has extended this doctrine to a number of other executive officers, some of whom are not heads of Executive Departments. *Mellon v. Brewer*, 18 F. 2d 168 (1927) (Secretary of the Treasury); *Brown v. Rudolph*, 25 F. 2d 540 (D. C. Cir. 1928) (Commissioners of the District of Columbia); *Standard Nut Margarine Co. v. Mellon*, 72 F. 2d 557 (D. C. Cir. 1934) (Secretary and Assistant Secretary of the Treasury); *Smith v. O'Brien*, 88 F. 2d 557 (D. C. Cir. 1937) (Chairman of the Tariff Commission); *Lang v. Wood*, 92 F. 2d 211 (D. C. Cir. 1937) (Attorney General and members of Parole Board).

The opinion in the instant case represents the following of a clearly indicated path of judicial decision. The Attorney General of the United States was already covered under the principle of judicial immunity for quasi-judicial officers. *Lang v. Wood, supra*. The principal case thus extends to two more officers the judicial privilege: the Director of the Enemy Alien Control Unit and the District Director of Immigration. To some, the idea that a quasi-judicial officer of the government may act in a wilful and malicious manner so as to deprive an individual of his liberty and not be held to answer for damages may appear to be a grossly unfair proposition. However, as stated by Judge Learned Hand in the instant case,

"As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

ROBERT A. MARMET
TORTS—LIABILITY OF DOMESTIC CARRIERS UNDER THE CARMACK AMENDMENT
DOES NOT EXTEND TO SHIPMENTS ARISING IN A FOREIGN COUNTRY AND
INTENDED FOR THROUGH SHIPMENT TO A POINT WITHIN THE UNITED STATES.

Action was brought under the Carmack Amendment, against the trustee of
the Missouri-Pacific Railroad, for alleged damage by the carrier to a shipment
of skins and wool, which had been shipped from Buenos Aires, Argentina, to
Boston, Massachusetts, by way of the Port of New Orleans, Louisiana. Two
bills of lading were issued; one by the shipper in Buenos Aires to cover the
ocean voyage and the other by the carrier to cover the remaining distance. The
ship issued no through bill of lading to Boston, agreeing only to deliver to the
order of the bank at New Orleans, giving notice of arrival to the petitioner.
From the bill of lading issued by the carrier, it appeared that the goods were
received at New Orleans on August 10, 1944, from “H. P. Lambert Co. Inc.”
and the S.S. Rio Parana and that they were consigned to “H. P. Lambert Co.
Inc. (shipper) c/o Manufacturers Whse Destination Boston, State of Mass-
achusetts. In Bond to Collector of Customs”. Petitioner’s contention is that
the carrier received the goods at New Orleans “consigned in bond, to the Col-
lector of Customs at Boston, Mass.”, that upon arrival the goods were damaged
and that under the Carmack Amendment the respondent carrier is liable there-
for. The district court dismissed the complaint and the plaintiff appealed. Held,
the Carmack Amendment does not extend the liability of domestic carriers to
cover shipments arising in a foreign country and intended for through transpor-
tation to a point within the United States. Reider v. Thompson, 176 F.2d 13
(5th Cir. 1949).

provides:

“Any common carrier, railroad or transportation company subject to the
provisions of this Act receiving property for transportation from a point in one
State . . . to a point in another State . . . shall issue a receipt or bill of lading
therefor, and shall be liable to the lawful holder thereof for any loss, damage,
or injury to such property, caused by it or by any common carrier . . . over
whose line or lines such property may pass within the United States . . . when
transported on a through bill of lading. . . .”

The question presented by the instant case is whether the above portion of
the Carmack Amendment is applicable to a domestic carrier which, upon its
receipt of the goods, has issued its bill of lading to cover the remainder of the
distance, where the original shipment commenced in a foreign country, and
where the original foreign carrier has issued no through bill of lading. In Alwine
v. Pennsylvania R. Co., 141 Pa. Super. 558, 15 A.2d 507 (1940), it was held
that the Carmack Amendment did not apply to a delivering carrier where the
goods were shipped from Canada to the United States on a through bill of lading.
In denying recovery in the *Alwine* case, the court felt that since the act was such a radical departure from the common law, its effect ought not to be extended beyond the plain meaning of the language employed and its evident purpose, and that the act could not be deemed to take effect at the boundary of the United States, so as to hold the delivering domestic carrier liable where the shipment originated in an adjacent foreign country on a through bill of lading. Would the act be applicable where there has been no through bill of lading issued by the foreign carrier but where the initial domestic carrier has, upon its receipt of the goods, issued its through bill of lading to cover the remaining distance? The decision in the *Reider* case has answered this question negatively.

In denying liability, the court refused to look merely at the bill of lading issued by the carrier but, instead, held that such must be read together with the original bill issued by the shipper in Buenos Aires. When so done, it showed that there was to be a continuous shipment in bond from Buenos Aires to Boston. This element of continuity was not discussed in the *Alwine* case, for in that case there was no such necessity since the original foreign carrier had issued a through bill of lading. The applicability of the Carmack Amendment to a case arising upon a foreign shipment from without the United States to a point within the United States would appear to depend upon a break in the continuous aspect of the shipment. In the *Reider* case the court, in support of its theory that the mere issuance of a supplemental bill of lading by a domestic carrier to cover its portion of the transportation and delivery of a through foreign shipment does not interrupt or affect the continuity and foreign character of the shipment, cites *Mexican Light & Power Co. v. Texas Mexican Ry. Co.*, 331 U.S. 731 (1947). This case arose, however, on a through bill of lading issued by the Pennsylvania Railroad Co. on a shipment from Sharon, Pennsylvania, to Laredo, Texas, for "export into Mexico". In deciding this case, the court held that the shipment originated under the Carmack Amendment, Mexico being a foreign adjacent country, and that the supplemental bill of lading issued by the Texas Mexican Ry. Co. was void, since it was issued without further consideration. As noted in the dissent in the *Reider* case, this case should not be controlling as to a shipment originating in Mexico or any other foreign country. In addition, in the *Mexican Light & Power Co.* case, the initial carrier had issued a through bill of lading, whereas, in the instant case no such bill of lading was issued by the original carrier at Buenos Aires.

It would appear that by virtue of the decision in the *Reider* case, the controlling element on the question of liability of a domestic carrier on a shipment originating in a foreign country is whether or not there was to be a continuous, uninterrupted shipment. Where such can be shown, whether the domestic carrier has issued a bill of lading or not is immaterial. No liability will attach under the Carmack Amendment where this element of continuity is present, and this in spite of the clear and unambiguous language of the act set forth above.

THOMAS S. HOGAN
TORTS—Viable Child Has Cause of Action for Injuries Inflicted Prior to Birth.

This action was originated by an infant, through her next friend, in the Court of Common Pleas of Marion County, Ohio, to recover for permanent injuries received while a viable child en ventre sa mere. The petition averred certain injuries to the mother which were eventually fatal and resulted in the plaintiff being born two months prematurely. It was further averred that as a direct and proximate result of the injuries plaintiff sustained through the fall of her mother and the premature birth, she was born suffering from heart trouble, has since been anemic, unable to walk and talk as a normal person and that she is permanently and incurably crippled. Plaintiff alleges her injuries were caused by certain specific negligent acts of defendant's employees, and resulted in her damage in the sum of $50,000. The defendant filed a general demurrer which was sustained; the cause was reversed and remanded by the Court of Appeals and certified to the Supreme Court of Ohio for review and final determination. Held, injuries inflicted by the negligence of another upon a viable child en ventre sa mere are injuries done in his person within the constitutional provision giving every person a remedy for injury done him in his person, so as to allow the child to maintain an action thereon subsequent to birth. Williams v. Marion Rapid Transit, Inc., 87 N. E. 2d 334 (Ohio 1949).

This case represents the first instance in which an appellate court has allowed a child to recover for injuries sustained prior to its birth without benefit of a statutory provision. Denial of such recovery is generally based on the ground that an unborn child is part of its mother. Dietrich, Adm'r. v. Inhabitants of Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884); Buel v. United Railways Co. of St. Louis, 248 Mo. 126, 154 S. W. 71 (1913); Lipps v. Milwaukee Electric R. & Light Co., 164 Wis. 272, 159 N. W. 916 (1916).

The majority rule in the United States stems from the landmark case of Dietrich, Adm'r. v. Inhabitants of Northampton, supra. In the Dietrich case the fall of the mother resulted in a miscarriage, but the child received no direct injuries. The child was, however, insufficiently advanced in foetal life to survive its premature birth caused by the shock to the mother. The court denied recovery to the administrator of the child. Subsequent cases have invariably cited and relied upon the Dietrich case to deny recovery, often with a complete disregard to the essential facts that the decision involved a non-viable child, and that the injuries sustained by the child were indirect. See, Allaire v. St. Luke's Hospital et al., 184 Ill. 359, 56 N. E. 638 (1900); Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567 (1921); Berlin v. J. C. Penny Co., 339 Pa. 547, 16 A. 2d 28 (1940); Stemmer v. Kline, 128 N. J. L. 455, 26 A. 2d 489 (1942).

In the law of property a child en ventre sa mere is considered in esse, as to purposes for the benefit and interest of the child. Chandler v. Chandler, 147 Ga. 561, 94 S. E. 995 (1918); Barr v. Gardner, 259 Ill. 256, 102 N. E. 287 (1913); Aubuchon v. Bender, 44 Mo. 560 (1869). The criminal law also
recognizes the existence of a child before its birth and protects foetal life. The courts have long held that it is a crime to kill a child within its mother's womb, by an injury upon the mother, the crime being murder if the child is born alive and later dies of the prenatal injuries, or to destroy the child within the womb after the child has quickened. *State v. Patterson*, 105 Kan. 9, 181 Pac. 609 (1919); *Foster v. State*, 182 Wis. 298, 196 N.W. 233 (1923); *State v. Cooper*, 22 N. J. L. 52, 51 Am. Dec. 248 (1849); *Sullivan v. State*, 121 Ga. 183, 48 S.E. 949 (1904). The common law courts consider these recognitions of a child's *en ventre sa mere* personality as a mere legal fiction which should not be extended into the law of torts. *Allaire v. St. Luke's Hospital*, supra. Denial of the right of a child to recover for personal injuries sustained prior to birth is difficult to reconcile with the views of criminal and property law. This difficulty is most apparent in those cases where the act complained of may constitute both a crime and a tort. Under the existing majority rule the crime may be punished, but the infant remains without redress for the tort.

In the instant case the petition averred that the plaintiff was an existing viable child at the time of her injury. Viable may be defined as: "Capable of life . . . applied to a newly born infant, and especially to one prematurely born, which is not only born alive, but in such a state of organic development as to make possible the continuance of its life." *Black's Law Dictionary* 1814 (3rd. ed. 1944).

The court declared that this action could be maintained under the common law and the Ohio constitution unless it were held as a matter of law that the injury in question was not done to the person of the plaintiff. The question is: was the infant a person at the time of the alleged injury? At the time of her mother's death the infant was concededly so far matured that it had reached the period of viability. This was proven by the child's survival. The court refused to deny recovery on the basis of the majority rule. In repudiating this rule the court announced that it could not, as a matter of law, hold that a viable child *en ventre sa mere* is a part of its mother until birth only on the basis of a legal fiction, not founded on fact and untrue within common knowledge. In so doing the court emphasised that the facts in the *Williams* case, supra, are validly distinguishable from those in the *Dietrich* case, supra. Supporting this view is the dissenting opinion of Justice Boggs in a case where recovery was denied an infant for injuries received while viable. Referring to the *Dietrich* case, supra, he stated:

"This case can have little application here, for the reason that in the case at bar it appears . . . that the child had reached that state of foetal life when it was capable of continued existence independent of the mother; that its person was injured within itself, and it was afterwards born alive, and with sufficient strength and maturity to maintain independent existence, and still lives. It does not follow from the *Dietrich* case that the plaintiff in this cause should not be recognized as capable of having a *locus standi* in court to recover damages for
injuries to his person, or that the supreme court of Massachusetts would have
(1900).

In accord with the decision in the instant case are two decisions based on
general statutory provisions which were interpreted to allow a child to main-
tain an action for injuries received prior to birth. In the case of *Montreal Tram-
ways v. LeVeille*, (1933) 4 D.L.R. 337 (Can. Sup. Ct.), the Supreme Court of
Canada approved the decision of the circuit court allowing recovery to the
plaintiff who was born two months premature after his mother was thrown from
the steps of the defendant's vehicle. The petition alleged that the child was
born with club feet as a result. The court cited Article 1053, Civil Law Code
of the Providence of Quebec and upon it based recovery: "Every person capa-
ble of discerning right from wrong is responsible for the damage caused by his
fault to another, whether by positive act, imprudence, neglect or want of skill." In
allowing recovery it is apparent that the Canadian Court intended to extend
the fiction which recognizes an infant *in esse* for some purposes when for the
infant's benefit and to carry this doctrine into the law of torts.

for hearing denied*, 33 Cal. App. 2d 629, 93 P. 2d 562 (1939) recovery was al-
lowed for injuries sustained prior to birth incident to delivery of the plaintiff
under § 29, California Civil Code: "A child conceived, but not yet born, is
to be deemed an existing person so far as may be necessary for its interest in the
event of its subsequent birth." The court decided that the statute included the
right to recover for personal injuries received prior to birth, not on the grounds
of extending the legal fiction of the criminal and property law, but based on the
established and recognized fact by science that a child conceived but not yet
born is an existing person.

In the instant case the court did not by direction or implication extend the
fiction of the criminal and properly law. The opinion of the court clearly indi-
cates its intention to recognize well known medical facts and to base its de-
cision squarely on the recognition of a viable infant's personality before birth.

In considering this decision, and the case of *Scott v. McPheeters*, supra, it
must be remembered that medical science has advanced to a very great extent
during the sixty-five years since the decision in the *Dietrich* case, supra. The
medical profession has during this period, and long before, recognized the exis-
tence of a person before its separation from its mother. Greisheimer, *Physiology
and Anatomy*, 738 (5th Ed. 1945). In the cases subsequent to the *Dietrich* case,
supra, one of the arguments nearly always presented against allowing recovery
has been the difficulty of proof of the injuries inflicted, and the fear of fictious
(1926). This difficulty of proof is still present, but it has been greatly lessened
by the advance of medicine. Whether or not the injuries complained of were
due to the acts alleged must remain a question to be decided with the aid of
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expert testimony. This procedure, however, has not prevented courts from determining medical facts in other causes, nor should it be used as a ground to prevent recovery in this class of cases.

Mr. Justice Boggs in his dissenting opinion in the Allaire case, supra, at 374, stated: "The law should . . . be, that whenever a child in utero is so far advanced in pre-natal age as that, should parturition by natural or artificial means occur at such age, such child could and would live separable from the mother . . . and is afterwards born, and becomes a living human being, such child has a right of action for any injuries . . . negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother." There can be no doubt that this is the law as expressed by the Ohio court, and that it represents the most just approach to the problem.

PAUL R. MADDEN
BOOK REVIEWS


The experience of the twenty-two years which have passed since its first publication has confirmed the wisdom of the original outline and development of Judge Goodrich’s book on Conflict of Laws, and I have enjoyed witnessing that confirmation. As a student, I was exposed to the First Edition (1927). As a teacher, I have required hundreds of students to prepare digests of the Second Edition (1938) as part of their term requirements in my course on “Conflict of Laws.” And, Deo volente, I shall continue to use the crystal clear passages of the Third Edition (1949) as helpful aids in expounding the principles of “Conflict of Laws” until the Fourth Edition makes its appearance some years hence.

From the foregoing it should be obvious that I approve of the book. In view of my strong approval, it might be better if my review should stop right here. Further words of praise would be the sheerest sort of tautology. Certainly, condemnation of individual passages with which I might not agree would add nothing to my stature as a critic or detract the slightest bit from the general quality of the work.

If fault it has, it is on the side of brevity and superficiality; but it was never intended to be a complete treatise, and I accept it for what it purports to be, a clear and concise presentation of “conflicts” principles for the use of undergraduate students.

To one who knew even where commas were accidentally omitted (or inserted) in the Second Edition, the following quotation from the preface to the Third Edition is one of the most impressive things about the new book:

“As years go by, however, there seems to me less compulsion about conflict of law rules except as the Constitution provides the compulsion.”

I shall leave the interpretation of that quotation to those readers who are already familiar with Judge Goodrich’s views on conflict of laws as part of the common law on comity, on characterization, classification or qualification, and on renvoi. I shall wonder how many and how widely varying interpretations they shall place upon it. Many devils of different persuasions will find it a quotable bit of scripture. And most of them will miss the vital point, namely, that the marriage of eclectic elasticity and constitutional compulsion is producing a hybrid that is not handsome.
Fortunately, the Third Edition enlarges upon the discussion of *Erie Railroad v. Tompkins.* Unfortunately, it has to tell the students about the stupid decisions which some courts have made in their efforts to prick out the shadowy line that separates *substance* from *procedure.* Goodrich, however, is faithful to his task. It is the courts who have failed us in this regard.

Most of the chapters of the book show only the normal development that one might expect in a living *corpus juris.* The chapters on taxation and divorce reflect the revolutionary changes in the law which have carried us in the space of a few years from single to multiple taxation and from apparent monogamy to progressive polygamy.

In his preface Judge Goodrich also says:

“To the extent one abandons the categorical imperative he slips away from the dogmas of Joseph H. Beale, that great teacher who taught us all so much, even when we disagreed with him.”

In this sentence Goodrich seems to be a “*laudator temporis acti*” who regrets the passing of Kant’s imperative and transcendental schemata. I do not share his nostalgia. We can do without categorical imperatives. We should never have had them in the first place. We do, however, need stable and stabilizing principles. They should not be condemned as dogmas. We have not had enough of them for a long time.

AL. PHILIP KANE*

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What easily could have been an informative but nonetheless uninteresting comparative study of English administrative law becomes far more in the capable hands of Bernard Schwartz. Rather than launch the reader immediately upon a sea of comparison (between the British System and our own), there is an opening chapter, entitled “Executive Power and the Disappearance of Law” which is perhaps the book’s highlight. Here the reader is treated to a scholarly review, in outline form, of the divergent schools of thought dealing with the concept of the place of law in

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1 304 U. S. 64 (1938).
2 P. v.
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organized society, with special emphasis on the chosen topic.¹ The author
sets out his philosophy of law and administration, which permeates the
total study, saving it from mediocrity and making it a thoughtful
analysis of the achievements and deficiencies of the administrative
process on two sides of the Atlantic.

Mr. Schwartz recognizes with Mr. Chief Justice Stone that law and
administration "are not to be regarded as wholly independent and un-
related instrumentalities of justice. . . ."² Stressing the concept of
control of governmental agencies by the judiciary, he regards that control
as adequate if judicial review can be had to ensure: (1) that the admin-
istrative action stays within the powers conferred by the legislature;
(2) that the "fundamentals of fair play"³ are adhered to; and (3) that the
administrative determination is based upon rational evidence of
probative value.

Bearing in mind the fundamental distinctions between the United
States and Britain in constitutional structure, which accounts for the
major differences between the two systems of administrative law, striking
similarities constantly reoccur as various phases of the problem are
discussed. As the author puts it, quoting from Sir Cecil Carr: "... to
both countries the end is liberty."⁴

The chapter dealing with "Delegated Legislation" is especially inter-
esting. Of course, the doctrine of Schechter Poultry Corp. v. United
States,⁵ has no counterpart in British law, since Parliament is supreme,
but apart from the constitutional aspect, the maxim "delegata potestas
non potest delegari" is applicable. In fact, the Committee on Minister's
Powers (the British equivalent to the Attorney General's Committee on
Administrative Procedure) strongly advocated principles closely akin to
the Schechter doctrine. However, the conclusion is inescapable that the
use of delegated legislation in Britain goes far beyond anything that
would be constitutionally valid here.⁶

The wealth of Mr. Schwarz's knowledge and understanding of admin-
istrative law, as it has developed on both continents, is displayed at its

¹ The brief portion dealing with the natural law school is especially challenging.
⁴ P. vii.
⁵ 295 U. S. 495 (1935).
⁶ An example is the appropriately named "Henry VIII Clause", included in some statutes,
which confers power upon the Executive to modify the provisions of an enabling act so far
as may be necessary to make the act fully effective.
best in the sections of his book devoted to the problem of judicial review. His critical analysis of the function of the judiciary in reviewing the determinations of governmental agencies is legal writing at its best. The leading Supreme Court cases are discussed and compared with the English authorities. Under this heading, the handling of the problem of review upon questions of fact deserves special mention. The “substantial evidence” rule, enunciated in Consolidated Edison Co. v. NLRB,7 is contrasted with its British counterpart, the “non-evidence” rule, discussed in In re Bowman,8 in illuminating detail.

Other chapters analyze such problems as administrative justice, legislative checks, judicial control, and finally executive power in emergency. One marvels at the author’s ability to say so much so well in such compact form. If adverse criticism be necessary, the book is read all too quickly. And that, after all, is a tribute to its author.

What Law and the Executive in Britain gives to its readers is a basic familiarity with the principal doctrines governing executive action in Great Britain; a more enlightened understanding of the fundamentals of administrative law in this country and a tremendous admiration for the ability, both as a lawyer and a writer, of Bernard Schwartz. The work should be required reading for the critical student of the administrative process, and should prove a valuable aid to the administrative practitioner as well.

THOMAS H. WALL*


This book, by one of America’s most highly respected economists, is designed as a comprehensive volume on modern monetary theory to be used as a supplement to the current standard textbooks on money and banking in American colleges and universities. In the opinion of this reviewer, its demands on the theoretical training of the reader are so great that it will be found usable as a textbook only at the graduate level. It is of course not meant for the general reader and much of it will be perfectly unintelligible to him. After thoroughly mastering Keynes—and how many undergraduates (or graduates for that matter) have succeeded

7 309 U. S. 197 (1938).
8 [1932] 2 K.B. 621.
* Attorney, Federal Communications Commission.
in doing that—chapters 3 through 9 will repay the efforts of the serious student.

These chapters demonstrate, by verbal argument, diagram, and analytical notation, the general relations among the different theories of money, from the first crude quantity theorists, through the Marshallians and the earlier income theorists, down to the Keynesians and up to the post-Keynesians. Chapter 7, “Cost Functions, Employment, and Prices”, was previously published in the *American Economic Review* for September 1947, and tackles the difficult postwar problem of having full employment without also having price and profit inflation. Professor Hansen concludes that, happily for American capitalism, reasonably full employment can be had without steep rises in prices. The necessary condition is that full employment be continuously maintained so that capital formation will be sufficient to provide plenty of plant and equipment. If this be done, and he thinks a positive government program necessary to ensure it, then everyone can be put to work without raising costs, prices, and profits and without starting an inflationary spiral.

Chapter 8 on “Wages and Prices” seeks to define the proper goal of wage policy in our troubled times. The efficiency-wage, the ratio between money wage rates and the productivity of labor, is recognized as crucial to the behaviour of the price level. Money wages and productivity can rise, or fall, together without affecting the level of prices. Rises in money wages in excess of increases in productivity must raise prices. If, as may seem to be the case in postwar America, wages and prices have risen so high as to discourage employment, what is to be done? Must we go through the wringer of falling incomes and prices, be punished for the crime of wartime inflation, before we can have again a balanced wage-cost-price structure which will be favorable to full employment? Professor Hansen carefully examines the arguments in this controversial field and concludes that the punishment is unnecessary. The higher price and wage level may be accepted as a *fait accompli*, and conditions favorable to investment and employment created by deliberate monetary policy. Certainly this is the solution which is going to be tried, anyhow. Few people still believe that a drastic wage, income, and price deflation would ever be tolerated by the public. Stable efficiency-wages must be the goal of wage policy. The great danger is not deflation, but the persistent upward pressure caused by successful wage demands in excess of increases in productivity.

These are perhaps the most interesting and presently relevant points
made by Dr. Hansen. There are besides excellent historical descriptions of the ratio of money to income, of the mysterious process by which money is created and destroyed in the banking system, of the history of the price level in the United States, and of the aims and methods of compensatory fiscal policy. Professor Hansen has contributed something a good deal more than a textbook to the literature of money and banking.

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BOOKS RECEIVED

