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THE BACKGROUND OF THE AMERICAN BILL OF RIGHTS

Leon R. Yankwich*

I. THE INTEREST IN THE BILL OF RIGHTS

The stress of economic changes in the decade preceding World War II, the impact of the war itself, and postwar readjustments have served to focus attention on our Bill of Rights. It is in the spirit of our democratic process that social controls be related to the fundamental guarantees of the Bill of Rights. For, ultimately, all our social change must be in the spirit of freedom which the rights and restrictions of the Bill of Rights secure.

On the one hand there are those who now, as in all periods of great change, look to the Bill of Rights as an impregnable armor against political and economic development. They would make it a shield for some cherished political or economic policy in the interests of the few against the larger public interest. In reality they would use it to block progress and use the Bill of Rights as a "cover-up" for this desire.

There are others who would put restrictions on its application. They would extend it only to persons with the same political, economic, and religious opinions, use it for control over dissenting and minority groups. They would dim the light of truth, turn away the pitiless glare of free criticism, thought, and analysis.

These attacks have not succeeded, however, nor have the efforts to use the Bill of Rights as a means of preventing social progress. A zealous and vigorous reaffirmation of these very principles has been asserted

*LL.B. (1909) Willamette University; J.D. (1926), LL.D. (1929) Loyola University; Member of the Bars of California and Oregon; Formerly, Lecturer on Pleading and Practice, Saint Vincent School of Law, Loyola University; Formerly, Judge, Superior Court of Los Angeles County; Currently, Judge, United States District Court, Southern District of California; Author: Notes on Common Law Pleading (1925) (1930), Handbook of California Pleading and Procedure (1926), Essays in the Law of Libel (1929), The Constitution and the Future (1936), Marriage and Divorce (1937), The New Federal Rules of Civil Procedure (1938), The New Federal Rules of Criminal Procedure (1946), and of innumerable articles in various legal periodicals.
again and again by the Supreme Court. Indeed, the Bill of Rights, rather than being confined and restricted over the years has been liberalized and broadened. The basic rights, originally thought to be secured only against encroachment by the Federal government, have been made shields against state encroachment. This has been achieved by giving a latitudinarian meaning to the word "liberty" in the Fourteenth Amendment. These rights are the inherent rights of free men—the very essence of liberty, so deeply rooted and entrenched in our free tradition.

In writing of the Bill of Rights here the approach is historical. This article is to stress the background, both American and English, of the fundamental guarantees and restrictions of the Bill of Rights.2

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2These are enumerated in the famous case of Palko v. Connecticut, 302 U. S. 319 (1937), and include: (1) freedom of speech; (2) freedom of the press; (3) the free exercise of religion; (4) the rights of peaceable assembly; and (5) the right of one accused of crime to the benefit of counsel.

Two recent writers on the Constitution consider this case the starting point for a new era in civil liberties. See, Alfred H. Kelly and Winfred A. Harrison, The American Constitution, Its Origin and Development, 828 (1948). They sum up its effect:

"Constitutionalism—the doctrine of limited government—is evidently an ideal possessed of immense vitality in our country. In the United States, if in few other places in the world, the conception that the individual possesses certain rights as against the state is still a fundamental part of the processes of government. Those rights are no longer conceived, as they were in the seventeenth and eighteenth centuries, as categorical absolutes derived from the immutable law of nature; rather, modern constitutional doctrine envisions private right as susceptible to growth and change in a process of continuous adjustment to the social order. Yet the individual's rights are no less vital to his freedom and happiness because their particular form is not frozen permanently into some static absolute legal system. Ultimately, our constitutional system still rests upon the values given expression by Jefferson in the Declaration of Independence—that government exists to protect and promote individual welfare and happiness. In brief, the state exists for the individual."

3The interest of Judge Yankwich in the Bill of Rights has been life long. In the case of Ex parte Miller, 162 Cal. 687, 124 Pac. 427 (1912), he defended the constitutionality of the California Eight Hour Law for Women, insisting, against those who would use the Bill of Rights to restrict social legislation and thereby allow women to work themselves to exhaustion, that liberty of contract did not mean absolute liberty of unlimited exploitation of the vital powers and resources of the state.

In 1921 he argued for a broad right of criticism of men in public office, maintaining that the advantages of free criticism outweighed the abuses of the privilege by the unscrupulous. Snively v. Record Publishing Co., 185 Cal. 565, 198 Pac. 1 (1921).

II. BILLS OF RIGHT IN ENGLISH AND COLONIAL HISTORY

The principles underlying our Constitution and Bill of Rights are not new. They have their origin in English life and history and in the experience of the American colonists themselves as English subjects. The colonists brought with them and sought to introduce and adapt to their own needs the fundamental norms of the English law and Constitution.

An old historian of our law, Chancellor Kent, wrote:

"The inhabitants of the colonies of Plymouth and Massachusetts, in the infancy of their establishments, declared by law that the free enjoyment of the liberties which humanity, civility, and Christianity called for, was due to every man in his place and proportion, and ever had been, and ever would be, the tranquility and stability of the commonwealth. They insisted that they brought with them into this country the privileges of English freemen; and they defined and declared those privileges with a caution, sagacity, and precision, that have not been surpassed by their descendants. Those rights were afterwards, in the year 1692, on the receipt of their new charter, reasserted and declared. It was their fundamental doctrine, that no tax, aid, or imposition whatever, could rightfully be assessed or levied upon them without the act and consent of their own legislature; and that justice ought to be equally, impartially, freely, and promptly administered. The right of trial by jury, and the necessity of due proof preceding conviction, were claimed as undeniable rights; and it was further expressly ordained, that no person should suffer without express law, either in life, limb, liberty, good name, or estate; nor without being first brought to answer by due course and process of law."3

It is a truism that there is no formal English Constitution. But England has had a series of charters and Bills which laid the framework of its government. The most fundamental of these are Magna Carta of June 15, 1215, The Habeas Corpus Act of 1679, the Petition of Right of 1682, the Bill of Rights of 1689 and the Act of Settlement of 1700.4

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3 Kent, Commentaries 611 (10th ed., 1860).
4 Of these, Magna Carta, the Habeas Corpus Act and the Bill of Rights of 1689 are the most important. For most of their provisions have been carried over into our constitutional system. Some modern writers have called Magna Carta a "class" document. In a sense, it was such. But Magna Carta concerned itself with the rights of all then-existing classes. And as the basis of freedom broadened, new classes rising to power claimed the benefits of the Charter. Its most important clauses, and the ones which affected our own Bill of Rights, were those constituting limitations upon arbitrary power—the 38th, 39th and 40th. They read:

"38. No bailiff, for the future, shall put any man to his law, upon his own simple affirmation, without credible witnesses produced for that purpose.

"39. No freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land."
What the English call "The Glorious Revolution of 1688", which followed the Puritan Rebellion under Cromwell (1649-1658) and the Restoration Period (1660-1685), was the culmination of a long struggle, which resulted in establishing the supremacy of the English Parliament. Three of the most important of the Charters (The Habeas Corpus Act, The Petition of Right, and the Bill of Rights) are directly traceable to it.

From the very beginning of American colonial history, in the charters of the various settlements, the settlers were guaranteed the same privileges of Englishmen. Provisions to this effect were contained in the

"40. To none will we sell, to none will we deny, to none will we delay right or justice."

Their effect is summed up by Holdsworth:

"These clauses do embody a protest against arbitrary punishment; they do assert the right to a free trial, to a pure and unbought measure of justice. They are an attempt, in the language of the thirteenth century, to realize these ideals—just as the demand for the laws of Edward the Confessor was an attempt, in the language of the twelfth century, to realize the same ideals. It is not until these ideals have been expressed in Magna Carta that we cease to hear the demand for the laws of Edward the Confessor. It is not until the parliamentary contests of the Middle Ages and the technical skill of the common lawyers have provided more perfect securities for freedom and justice that we cease to hear the demand for the confirmation of the Charter. This is the real sense in which trial by jury and the writ of Habeas Corpus may claim descent from these clauses of the Charter." 2 HOLDSWORTH, HISTORY OF ENGLISH LAW 169 (1922).

Elsewhere the same author has written:

"Its contents were comprehensive because an alliance of all classes was needed to secure it. Its historical importance consists in the fact that it opened a new chapter in English history, which ended by establishing a system of constitutional government, of which the Charter was regarded as the pledge and the symbol. All through the medieval period it was constantly confirmed; during the constitutional conflicts of the seventeenth century, it was constantly appealed to; and in later ages, its observance came to be regarded, both by lawyers and by politicians, as a synonym for constitutional government. It is only in these last days that its interest has come to be mainly, if not wholly, historical." HOLDSWORTH, SOURCES AND LITERATURE OF ENGLISH LAW 11-12 (1925).

The Habeas Corpus Act was passed in 1679 in the reign of Charles II. As under its modern counterpart, anyone unjustly imprisoned could obtain a writ of habeas corpus and compel the Government to show legal cause for the detention.

The Bill of Rights of 1689 is, next to the Magna Carta, the most important charter in the development of constitutional law in England. This declaration followed the acceptance of the crown jointly by William of Orange and Mary in 1688. Its most important provisions were these: (1) The King shall have no power to suspend the operation of any law; (2) No revenue shall be levied without the consent of Parliament; (3) Immunity was granted for speeches delivered in Parliament; (4) Assurance was given that the Parliament would meet frequently; (5) Protestants shall have the right to have arms for their defense; (6) The King shall be Protestant; (7) The right to petition the King was recognized. For a critical view of the "Glorious Revolution", see ESME WINGFIELD-STRATFORD, THE HISTORY OF BRITISH CIVILIZATION 574-640 (1928).
charters given to Virginia settlers in 1606 and 1609 and in the Massachusetts Charter of 1629. Other colonies followed. In 1765 delegates from nine colonies meeting in New York proclaimed a general declaration of rights, and in 1774 the First Continental Congress asserted in their fullness the rights which later were embodied in the Bill of Rights of the Constitution.

That Congress declared:

"That the inhabitants of the English colonies in North America, by the immutable laws of nature, the principles of the English Constitution, and the several charters or compacts, have the following Rights: 1. That they are entitled to life, liberty, and property, and that they have never ceded to any sovereign power whatever, a right to dispose of either without their consent. 2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects within the realm of England. 3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights. . . . 4. That the foundation of English liberty, and of all free government, is the right of the people to participate in the legislative council: and . . . they are entitled to a free and exclusive power of legislation in their several . . . legislatures, where their right of representation can alone be preserved in all matters of taxation and internal policy. 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law. 6. That they are entitled to the benefit of such of the English statutes as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances. 7. That these . . . are likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws. . . ."

In proposing, on June 8, 1789, the adoption of the first ten amendments—the original Bill of Rights—Madison said:

"I believe the great mass of the people who opposed it [the Constitution], disliked it because it did not contain effectual provisions against the encroach-

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5The dates of the respective charters containing assertions of their rights were: Maine—1639, Connecticut—1662, Rhode Island—1663, Carolina—1663, Maryland—1632, New Jersey—1665, and Georgia—1732. The Plymouth Colony asserted this claim in its first legislative act in 1635. It was reaffirmed in 1658 and 1671 and finally in its new charter in 1692. Similar legislative declarations of rights were made by the assemblies of Connecticut in 1639, New York in 1691, Massachusetts in 1641, Virginia in 1624 and 1676, Pennsylvania in 1682, Maryland in 1639 and 1659, Rhode Island in 1663, and the proprietaries of Carolina in 1667, and New Jersey in 1664 and 1683. The legislature of Maryland in 1638 claimed the benefit of the rights guaranteed by Magna Carta.

6Declaration and Resolves of the First Continental Congress, October 14, 1774, 1 Journals of the Continental Congress 63-69 (Ford ed., 1904).
ments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power."

By these words Madison focussed attention on the fact that the failure to include a Bill of Rights in the Constitution, as originally submitted, was one of the chief weapons used by the opponents of the Constitution. It led, no doubt, even so sincere a friend of the Revolution as Patrick Henry to denounce that document, at the Virginia Ratification Convention on June 9, 1788, "as the most fatal plan that could possibly be conceived to enslave a free people."

Madison's statement, in speaking of the fear which the absence of a Bill of Rights had created, enunciated the political philosophy behind it. The absence of guarantees against governmental encroachment on individual rights spelled to the colonists a return to the day of absolutism and to that unlimited sovereignty which their forebears, back to Magna Carta, had fought.

And so, many of the defenders of the Constitution sought, before its adoption, to overcome the people's fears by insisting, as did Hamilton, that there was no need to enumerate restrictions on sovereign power. In Hamilton's view, certain fundamental rights which freemen in England had enjoyed for centuries were a part of our colonial governmental fabric without any re-declaration. Re-declaration, he thought, might result in confusion. He wrote:

"I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"

Jefferson, at all times, favored a bill of rights. On December 20, 1787, he wrote to Madison:

"Let me add, that a bill of rights is what the people are entitled to against every government on earth, general or particular; and what no just government should refuse or rest on inference."

2 Speech of June 9, 1788, reprinted in 3 W. W. HENRY, PATRICK HENRY 503 (1891).
3 THE FEDERALIST, No. 84 (Hamilton), II, 156 (Bourne ed., 1901).
So it is quite evident that the difference between the great protagonists did not concern the existence of these rights. All assumed that they were inherent in the citizenry of the United States as freemen. The disagreement was over the need for their positive assertion.

III. THE BACKGROUND OF THE AMENDMENTS

Before proceeding to how recent history has vindicated the position of Madison and Jefferson, it is well to discuss, in some detail, the background of the ten amendments and the precedents, legal and historic, on which each is based.

They are not all of equal importance. Some have a long history, the re-telling of which is imperative because of their meaning to our present political life. Others have lost most of their actuality.

1. The First Amendment reads:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

(a) Religious Freedom

Freedom of religion is a fundamental policy of our Government. It arose from the struggle against absolutism in religion and the experience, both in England and in the colonies, that where the church was not separated from secular government, the state was used as a means of religious repression. The colonies themselves, especially the Puritan colonies, were theocracies. Many of the early laws severely punished offenses against religion, offenses such as blasphemy, non-attendance at church, and religious dissent.11 And even the so-called religious colonial toleration statutes were of very limited scope. Thus, the Maine statute of 1650 declared that:

"all gode people . . . shall have full liberty to gather themselves into a church estate provided they do it in a Christian way."

Perhaps the Code of Laws of Rhode Island, dated 1647, contained the broadest declaration of tolerance in religious matters as we understand it today.

A student of the sources of the Constitution of the United States has written:

Virginia, in her Declaration of Rights of 1776, asserted the right of religious liberty, but it retained the established church until 1785. And New York, in 1777, in its first constitution, disestablished the church and made a declaration much broader than the Virginia declaration of 1776.

It is not disparaging to the colonists that they came to understand tolerance by short and, at times, painful steps. After all, they reflected the ferment in the spirit of man which was going on in the home country and all over Europe, where Protestantism and the Renaissance were freeing the minds of men from absolutism. England cannot, despite the pioneering of some of its great men, lay claim to much tolerance during the seventeenth century. The Toleration Act bore date of 1688. The privileges it granted dissenters indicated more a promise of future tolerance than its then fulfillment. It was not until 1828 that the Test Acts, barring certain religious dissenters—especially Catholics—from public office were finally repealed. On the whole, therefore, the first amendment, at the time of its adoption, asserted the type of religious non-interference which no other great legislative body had asserted up to that time. It put into practical effect, for the new nation, the tudinarian principle which Jefferson stated in the Virginia Act of 1786 for Establishing Religious Freedom, when he wrote:


"... Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy Author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was his Almighty power to do."14

(b) Freedom of Expression

If the framers of the amendment, in their assertion of absolute freedom of religion and total secularization of the state were ahead of the mother country, and of every other country for that matter, they were equally so in their assertion of freedom of expression. In England, at the time of the American Revolution, freedom of the press meant little more than freedom from restraint previous to publication. Great voices had risen against the doctrine. Milton had directed his famous "Areopagitica" against the licensing of printing by the Long Parliament, and had argued for the "liberty to know, to utter and to argue freely according to conscience above all liberties". He had thundered:

"And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?"15

But freedom "for the thought that we hate",—to use Mr. Justice Holmes' noted expression, did not exist in England at that time, or for a long time after.16 The Long Parliament, notwithstanding Milton's great protest, did pass a bill licensing printing, which remained in force until 1694. Under the law of seditious libel, many Englishmen were prosecuted and convicted for criticizing the government. After the Court of the Star Chamber, in 1609, promulgated the doctrine that in criminal libel truth was not a defense,17 prosecution continued for more than a century, and as many as fifteen men were prosecuted as late as the early 1800's for criticism of government activities. The doctrine was not without its critics, though. A great English lawyer and subsequently Lord Chancellor, Thomas Erskine, while defending Thomas

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11Jefferson believed this act stood with the Declaration of Independence among his services to mankind. CHNAERD, THOMAS JEFFERSON 100 (1929).
Paine in 1792 insisted that the right of free expression in England included the right to advocate the abolition of the Monarchy and the establishment of a Republic, as Paine had done in "The Rights of Man". But the principles which Erskine advocated found no sanction in statutory law or in the decisions of the courts. In fact, so resentful were the people of England of the narrow interpretation which the judges had placed upon the law of libel that, on memorable occasions in the prosecutions for libel, they returned verdicts of not guilty, when guilt, according to accepted law, was undisputed.

This happened during the trial of William Owen in 1752 when he was prosecuted for publishing a pamphlet criticizing Parliament. Although publication was proved and the defendant was not allowed to show the truth of the pamphlet, the jury found the defendant not guilty. More, this jury of English tradesmen outwitted a learned judge and prosecutor. When they returned the verdict of not guilty, the judge, at the request of the prosecutor, asked the foreman: "Gentlemen of the book by selling it is not sufficient to convince you that the said the Jury, do you think the evidence laid before you of Owen's publishing Owen did sell the book?" This was a "trick" question. Had they answered "Yes", they would have rendered a special verdict which contradicted their general verdict of not guilty. The court could then have set aside the verdict of not guilty. Had they answered "No", they would have been guilty of perjury, for publication and sale had been proven.

But this jury of English tradesmen, whose foreman was Richard Barwell, merchant of Bread Street, gained immortality by answering the question, "Not Guilty, Not Guilty; that is our verdict, my lord, and we abide by it."19

In the colonies, the battle for freedom of expression antedated this occurrence. It came to a climax in New York at the trial of John Peter Zenger in 1735. Briefly, the facts were these:

Governor William Cosby had summarily removed Lewis Morris, long Chief Justice of the Colony, from office, and thereafter Morris became a candidate for Assemblyman. In support of his cause he founded the New York Weekly Journal, with Zenger hired as publisher. Zenger published a series of articles highly critical of the Governor and his

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19 Trial of Thomas Paine, 22 How. St. Tr. 358 (1792).
Council, and after a year he was arrested and jailed. When his case finally came to trial after a delay of nine months, he was represented by Andrew Hamilton of Philadelphia, one of the ablest lawyers in the colonies. Ignoring the accepted rule in criminal libel cases that truth was not a defense, Hamilton offered to prove the truth of Zenger’s statements.

The Chief Justice, James DeLancey, who presided at the trial, held that the truth of a libel could not be given in evidence, saying: “The law is clear that you cannot justify a libel.” Hamilton’s attempt to demonstrate to the court the viciousness of the Star Chamber decisions upon which the principle was based, brought a warning from the Judge that he might be punished for contempt for his insistence in arguing against the opinion of the court. Defeated in his effort, Hamilton decided to stake his case upon a direct appeal to the jury, and to do so by defying DeLancey. So, while apparently submitting to DeLancey’s final ruling, Hamilton, without waiting for his turn to address the jury, turned to them and told them that they were the judges of the truth of the libel, and had the right to assume that he could have proved the truth “of what we have published”. These were his first words:

“I thank Your Honor. Then, gentlemen of the jury, it is to you that we must now appeal, for witnesses to the truth of the facts which we have offered, and are denied the liberty to prove.”17

These words and those which followed were, from a legal standpoint a contemptuous appeal to the jury, over the head of the judge, bidding them to defy the harshness of the law as laid down by the judge. His final words to the jury were an impassioned plea for the right to speak the truth in governmental matters with impunity. He concluded:

“Men who injure and oppress the people under their administration, provoke them to cry out and complain; and then make that very complaint the foundation for new oppressions and prosecutions. . . . But to conclude: the question before the Court, and you, gentlemen of the jury, is not of small nor private concern; it is not the cause of a poor printer, nor of New York alone, which you are now trying: No! It may, in its consequence, affect every freeman that lives under a British government on the main of America. It is the best cause; it is the cause of liberty; and I make no doubt but your upright conduct this day, will not only entitle you to the love and esteem of your fellow-citizens; but every man, who prefers freedom to a life of slavery, will bless and honour you, as men who have baffled the attempt of tyranny; and, by an impartial and uncorrupt verdict, have laid a noble foundation for securing to ourselves, our posterity, and our neighbours, that to which nature and the laws of our

17 How. St. Tr. 675 at 699 (1735).
country have given us a right—the liberty—both of exposing and opposing arbitrary power (in these parts of the world, at least) by speaking and writing truth.”

As he concluded with these ringing words, the Attorney General protested that Hamilton had “gone very much out of the way.” The Chief Justice took occasion to instruct the jury that Hamilton’s statements were not the law. But the jury acquitted Zenger. And, thereupon, his own report of the case says: “There were three huzzas in the Hall, which was crowded with people.” The following day Zenger was discharged from his imprisonment. The people of the city of New York considered the acquittal a great victory in the cause of liberty. The Common Council of the City, on September 29, 1755, presented Hamilton with the freedom of the City, in a grant which recited the remarkable service done to the inhabitants of the colony “by his learned and generous defence of the rights of mankind, and the liberty of the press.”

So, the German colonial immigrant, in his fight for freedom of expression, and his willingness to defy arbitrary power, laid the foundation for a free press in America.

(c) **Freedom of Assembly**

A limited right to petition came to be recognized before the Puritan Rebellion and the Commonwealth in England. In the Bill of Rights of 1689 it was stated:

“It is the right of the subject to petition the King and all commitments and prosecutions for such petitioning are illegal.”

In 1774, the American Continental Congress, in its Declaration of Rights, asserted that “they [the colonists] have a right peaceably to assemble, consider of their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.”

This is one of the basic rights, a necessary attribute of citizenship in a republic. In fact, some writers have held its declaration in the Bill of Rights “unnecessary” because the right is inherent “in the very nature of its structure and institutions.” It is not a right created or

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21Ibid., 721-722.
22Ibid., 724.
23Declaration and Resolves of the First Continental Congress, October 14, 1774, 1 Journals of the Continental Congress 70 (Ford ed., 1904).
granted by the Federal Government but one which was already in existence at the time of the adoption of the Constitution. It is a right which the government found and the protection of which it was bound to assure. While it is seldom invoked in the United States, it is significant that the authoritarian states such as Fascist Italy barred this as a means of political and social control. In such states petition and assembly were held inherently subversive of the established government. The right is most closely akin to that of freedom of speech and is inseparable from the democratic process.

2. The next two amendments, now primarily historical in interest, are the second and third which read:

"2. A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

"3. No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

The right to bear arms in the common defense is perhaps the most overlooked and least considered right in the first ten amendments. Yet to the colonists who had just broken away from the mother country, it was still real and vital. John Adams had held that the local militia was one of the four cornerstones of New England, one of the features on which its society was built. This view ran deep in their own lives. In populating the wilderness, the right to bear arms and to maintain their own militia was absolutely necessary. The standing army, in England and the colonies alike, was a major source of strife with the English authorities.

The Bill of Rights of 1689 contained the provision: "The subjects which are Protestants may have arms for their defense, suitable to their conditions, and as allowed by law." The right to bear arms was a means of assuring self-government against the tyranny of the King.

So also was the provision against the quartering of soldiers in time of peace. The English Petition of Right and the Bill of Rights of 1689 contained complaints against the quartering of soldiers in private homes. In 1765, the English Parliament passed a quartering and billeting act requiring the colonies in which troops were stationed to provide them with quarters and certain supplies. The Declaration of Independence complained that George III had given his assent to "pretended" legis-

25Letter to the Abbe de Mably, 1782. In: 5 Works of John Adams 495 (1851). The others were the towns, congregations, and schools. The four were "the four causes of the growth and defence of New England." 3 Works 400.
lation "for quartering large bodies of armed troops among us." So here, too, historical experience lay at the bottom of the injunction to prevent its recurrence in the future.

Beyond the experiences of their own and immediate ancestors ran the feudal principle, that the only man who was free, who could be free, was the man who fought. This had become an almost universal principle in the Dark Ages, and as expressed since then, he who will not fight for his freedom does not deserve to be free.

This intellectual remnant of the Dark Ages underlay the entire organization of the feudal system, many survivals of which were brought to America from England. To their ancestors and to themselves, the right to bear arms in the common defense was an inalterable mark of a free man. It remains so today.

3. The Fourth, Fifth, and Sixth Amendments may well be considered together. For they all relate to personal security and consist, chiefly, of guarantees when the individual comes into conflict with the law. They read:

"4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"5. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

"6. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The right to be protected against unreasonable searches and seizures goes back to Magna Carta. In it the King promised: "No freeman shall be seized, or imprisoned, or dispossessed, or outlawed . . . ; nor will

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26 The "pretended legislation" was a reference to the "foreign" and "unacknowledged" jurisdiction of Parliament over the colonies.
we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers or by the laws of the land."27

We find recognition of the principle that a man's house is his castle in the later Roman law. The Pandects state it as a maxim of jurisprudence: Nemo de domo suo extrahi debet. (No one shall be carried away from his home.)

In England before the Revolution and in the colonies, there had been abuses arising from the issuance of general warrants. Many persons were arrested on warrants which did not name them, without accusations charging them with specific offenses. There was also abuse of writs of assistance issued to Revenue officers in the colonies, which empowered them, in their discretion, to search suspected places for smuggled goods. In 1761, James Otis of Massachusetts led the fight against them. Otis called them "the worst instrument of arbitrary power", placing "the liberty of every man in the hands of every petty officer."28 In 1765 Lord Camden gave his memorable judgment in Entick v. Carrington,29 in which he held against the defendant for trespassing the plaintiff's dwelling house and searching and examining his papers, in an effort to discover a seditious libel.

Camden declared the search "subversive of all the comforts of society." To the argument of necessity, his answer was:

"Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. . . . It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty."30

Under the common law as established in the colonies, persons could be prosecuted by information or indictment. The Fifth Amendment guarantees prosecution by indictment, in peace time, for capital or otherwise infamous crimes. Misdemeanors have always been, and can still be, prosecuted by information.31 The grand jury has always been

27 Magna Carta, §39 (1215).
28 As cited in: Tudor, Life of James Otis 63, 66 (1823).
29 19 How. St. Tr. 1030 (1765). Italics added.
30 Ibid., 1073. Italics added.
considered in England a protection against tyranny and a safeguard of justice.

In a book published in England in 1681 and entitled "The Security of Englishmen's Lives; or the Trust, Power and Duty of the Grand Jurys of England", the grand jury is defended as the indispensable instrument of personal security. One passage reads:

"It was absolutely necessary for the support of the Government, and the safety of every man's life and interest, that some should be trusted to inquire after all such as by Treasons, Felonies or lesser crimes, disturbed the peace, that they might be prosecuted, and brought to condign punishment; and it was no less needful for every man's quiet and safety, that the trust of such inquisitions should be put into the hands of persons of understanding and integrity, indifferent, and impartial, that might suffer no man to be falsely accused, or defamed, nor the lives of any to be put in jeopardy, by the malicious conspiracies of great or small, or the Perjuries of any profligate wretches: For these necessary, honest ends was the institution of Grand Juries."

The ancient oath is as follows:

"You shall diligently enquire, and true presentment make of all such articles, matters and things as shall be given you in charge. And of all other matters and things as shall come to your own knowledge, touching this present service. The Kings Council, your fellows, and your own, you shall keep secret: You shall present no person for Hatred or Malice; neither shall you leave any one unpresented for Favour, or Affection, for Love, or Gain, or any hopes thereof; but in all things you shall present the Truth, the whole Truth, and nothing but the Truth, to the best of your knowledge; so help you God."32

Back of the guarantee against self-incrimination lay the cruelty of the inquisitions, which, on the continent of Europe and in England, characterized the administration of criminal law prior to the Revolution. This guarantee is of equal importance today in view of some of the objectionable police methods which still characterize the handling of persons accused of violations of law.

The due process guarantee is a warrant against arbitrary power. It secures one's liberty and possessions. It reinforces the other rights enumerated in the other amendments, protects them against encroachment by the Federal Government, except according to orderly proceedings prescribed by law. In this respect, the provision is traceable to Magna Carta. The Fourteenth Amendment subsequently applied this principle to the state governments, making more clear the principle that all our governments and officials are subordinate to law, that our government is one of law and not of men.

32 Published in London in 1681, 12-13, 21. Written by the Baron of Evesham, John S. Somers, but originally published anonymously.
Equally important is the provision that property be not taken for public use without just compensation. It is of the essence of sovereignty that it have power to take private property for public use. The Constitution grants this power to the Federal Government, but insures to the individual the right to receive just compensation. In modern practice this has come to mean the money equivalent of the property taken. With the enlargement of governmental powers, with the constant shrinking of the public domain, the Federal Government would be helpless without the power of eminent domain. Hence the importance of this guarantee.

The security of free justice also goes back to Magna Carta. The provision for prosecution for a specific offense, of which the individual shall be informed, is in the spirit of the great fundamental of the common law of England expressed in the maxim *Nulla crimen, nulla poena sine lege* (No crime, no punishment, without law). No one can be prosecuted, under our system, except for a distinct violation of a law, which clearly defines the offense. When we read about the continental European systems prior to 1789 under which persons were detained under the infamous *lettres de cachet*, we can readily understand why persons imbued with the spirit of the common law should have reasserted this right.

Obviously, to make the right effective, it was necessary to insure that the accused be confronted by witnesses, that he have the right to use the compulsory power of sovereignty to secure the attendance of his own witnesses, and that he have counsel to assist him in his defense. All these rights were very well established at the time of the Revolution.

4. The Seventh Amendment reads:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

This guarantees a jury trial in civil cases, as the Constitution and the Sixth Amendment guarantee it in criminal cases. There has been much speculation about the origin of the English jury system. At first it was an inquiry by the men in the neighborhood, who arrived at their verdict on the basis of facts known to them, and to which they gave oath. By the middle of the 15th century, it had become crystallized into the form

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in which we have it today, where jurors arrive at verdicts on the basis of sworn testimony of others, which they hear for the first time in court.\textsuperscript{35} Prior to the Constitution's adoption, the Declaration of Rights of the Continental Congress of 1774 claimed that trial by jury was an indisputable right. The Declaration of Independence later complained that the colonists had been deprived "in many instances of trial by jury". Thus it was already part of the accepted law of the colonies.

The existence of the right to trial by jury in civil cases when the matter in controversy exceeds twenty dollars emphasizes the importance which the colonists attached to the jury system. For, while that sum may have bought much more in colonial times than it does now, it was, nonetheless, small. It shows the unwillingness of the first Congress to entrust controversies of any importance, except as a matter of choice, to the sole judgment of a judge.

5. The next three amendments, the Eighth, Ninth, and Tenth, read:

"8. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

"9. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

"10. 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."

The experience of the colonists made them value personal security above all. And so to the guarantee against double jeopardy in the Fifth Amendment there was added the prohibition against excessive bail and cruel and inhuman punishments. Both aimed to guard against abuses and oppressions in criminal proceedings which, at times, had been a blot upon the administration of justice in England and the colonies.\textsuperscript{36}

The assertion of the inherency in the people of the rights not enumerated and in the states and people those powers not delegated to the United States, expresses two ideas which dominated the colonies during their constitutional struggle and which were responsible for some of the opposition to the adoption of the Constitution. One was the fear of a strong central government, which the framers sought to substitute for

\textsuperscript{35}Seagle, The Quest for Law 75-76, 174-176 (1941).

\textsuperscript{36}The administration of justice in England had been frequently bloody. The black record of Jeffreys (1648-1689) and Scropps (1623-1683) is common knowledge. The Scropps case is reported in 7 Hargraves State Trials 476-491 (1680). An account of Jeffreys is: Schofield, Jeffreys of "The Bloody Assizes" (1937).
the loosely ineffective confederation which the Articles of Confederation of 1777 had established.

The other was the thought which Hamilton expressed in arguing for the inutility of a Bill of Rights,—that these rights were inherent in citizenship.37

IV. The Bill of Rights in the Light of Today

As we sum up the antecedents of the Bill of Rights, we find in them the desire to limit sovereign power, and, at the same time, to insure to the individual citizen certain rights and privileges which he can assert against the sovereign, be he a constitutional monarch, a legislative body, or a constitutional majority. And implicit in the arguments is the idea, fundamental to all Anglo-American political theory, that the government be one of laws rather than one of men. This flows directly from the due process clause of the Fifth Amendment and is still at the heart of our system of free government.

Modern students of political science consider the doctrine of limited sovereignty the basis of free government. Hans Kelsen, the Austrian authority on the state, has so characterized it:

"Government by a majority, so characteristic of democracy, differs from every other government because, by its very nature, it not only recognizes opposition—the minority—but also protects it politically, by guarantees of fundamental rights and liberties, and through proportional representation."38

The right to dissent and to oppose the state are of the very essence of the democratic process. It flows from the limitation of sovereignty and the recognition of rights in the individual.

The converse of these principles, however, governs in large areas of the world today. And one of the basic cleavages between the states of the west and what has been well-called the "oriental" state is over the rights of the individual.39 On the one hand, the states of the west are directly in the cultural tradition of Western Europe, i.e., states which allow their individuals the maximum liberties, limit the sovereignty of the state to specific grants of power, and protect the liberties of the dissi-

38Translated from the French. Kelsen, La Democratie, Sa Nature—Sa Valeur 113 (1952). The same writer points to the fact that bourgeois groups, seeking to preserve capitalism, oppose democracy because they fear that it threatens their existence, while proletarian groups oppose it because it stands in their way of acquiring power. Ibid., 107. And see McIver, The Modern State 467-479 (1926).
students and minority groups in their right to oppose the majority. Opposing these are the states of the east in which the sovereignty of the state is unlimited, opposition is prohibited, and the individual has no rights which he may assert against the state. This state deems itself a distinct, amoral entity, dissociated from the individuals who compose it, who do not ever dare assert rights against it.40

This is the totalitarian state which has become dominant on other continents since 1917. Regardless of the name under which it has paraded, Fascist, Nazi, or Communist, it has consistently aimed, in either theory or practice, or both, at the destruction of the individual and his subordination to the state, the exact opposite of our own history, culture and traditions.

Mussolini expressed the ideology of the Fascist state in the formula: Tutta nello Stato, nulla contro lo Stato, nulla l'influsso dello Stato, (All within the State, nothing against the State, nothing outside the State.) This is the basis of the Fascist “corporate state.” In his article on Fascism, written in 1932 for the fourteenth volume of the “Encyclopedi Italiana”, he stated with great frankness his attack on the democratic doctrine:

“Fascism fights the whole complex of democratic ideologies and repudiates them both in their theoretical plans and in their practical applications. Fascism denies that a mass can direct human society. It denies that this mass can govern through periodic consultation. It asserts the existence of irremediable, rich and beneficial inequalities between men, which cannot be leveled by mechanical and extrinsic facts such as universal suffrage.”41

40Ibid., 179-189.
41Quoted in IL LAVORO FASCISTA, Anno V, Number 186, August 5, 1932, p. 1. A Fascist writer has summed up the true character of the Fascist state in these words, translated from the Italian:

“The state is a separate juristic person, distinct from its citizens. It has its own existence, its own aims, its own means of achieving them. . . . The source of the individual’s public rights is the will of the state, and both their existence and their broadening are conditioned to the aims which this will pursues,—namely the aims or the interests of the state. . . . Politically, this juristic theory of the state, like the organic theory, is opposed to the entire individualistic ideology of the French Revolution. It derived the state, as the guarantor of rights, from the individual. Our concept makes the individual, as possessor of rights, stem from the state.” (ALFREDO ROCCO, POLITICA E DIRITTO NELLE VECCHIE E NELLE NUOVE CONCEZIONI DELLO STATO, NUOVA ANTOLOGIA, Fasciolo 1433, Dec. 1, 1931, 356, 365-66.)

“Fascism wants to remake not the forms of human life, but its contents,—man, character, faith. And to this end, it wants discipline and authority that enters into the spirits of men, and there governs unopposed.” (Fascismo, Dottrina: Iede Fondamentali, 14 ENCYCLOPEDIA ITALIANA 848.)

“Because in the fascist conception of the state, the individual is identified with the state, its theorists claimed that ‘private initiative’ does not exist, and that the assumption of its existence would imply a contradiction of terms. (Ugo SPIRITO, CAPITALISMO E CORPORATISMO 17, 1933).”
Lenin stated in 1917 that under the dictatorship of the proletariat, "there cannot be liberty or democracy." The first Soviet Constitution contained no bill of rights. On the contrary, it provided:

"Inspired by the interest of the workers, the Russian Socialist Soviet Re-

"We are the first to assert, in opposition to democratic liberal individualism, that individualism exists only in so far as it is within the state, and that as civilization assumes more complex forms, the liberty of the individual is restrained." (Mussolini, Report to Fascism, September 14, 1929, as quoted in Le Fascisme 70 (1933). And see Mussolini, Le Fascisme 1-6.) Perhaps the best exposition of Italian Fascism in its formative period is contained in the officially-authorized edition of Mussolini's speeches delivered between 1922 and 1924, published under the title La Nuova Politica Dell' Italia (1926). And see Thomas Mann, The Coming Victory of Democracy (1938).

The entire passage is worth quoting:

"No, progressive development—that is, towards Communism—marches through the dictatorship of the proletariat; and cannot do otherwise, for there is no one else who can break the resistance of the exploiting capitalists, and no other way of doing it.

"And the dictatorship of the proletariat—that is, the organization of the advance-guard of the oppressed as the ruling class, for the purpose of crushing the oppressors—cannot produce merely an expansion of democracy. . . . The dictatorship of the proletariat will produce a series of restrictions of liberty in the case of the oppressors, exploiters and capitalists. We must crush them in order to free humanity from wage-slavery; their resistance must be broken by force. It is clear that where there is suppression there must also be violence, and there cannot be liberty or democracy.

"Engels expressed this splendidly in his letter to Bebel when he said, as the reader will remember, that 'the proletariat needs the State, not in the interests of liberty, but for the purpose of crushing its opponents; and, when one will be able to speak of freedom, the State will have ceased to exist.'

"Democracy for the vast majority of the nation, and the suppression by force—that is, the exclusion from democracy—of the exploiters and oppressors of the nation: this is the modification of democracy which we shall see during the transition from Capitalism to Communism.

"Only in Communist Society, when the resistance of the capitalists has finally been broken, when the capitalists have disappeared, when there are no longer any classes (that is, when there is no difference between the members of society in respect to their social means of production), only then 'does the State disappear and one can speak of freedom.' Only then will be possible and will be realized a really full democracy, a democracy without any exceptions. And only then will democracy itself begin to wither away in virtue of the simple fact that, freed from capitalist slavery, from the innumerable horrors, savagery, absurdities and inanities of capitalist exploitation, people will gradually become accustomed to the observation of the elementary rules of social life, known for centuries, repeated for thousands of years in all ages. They will become accustomed to their observance without force, without constraint, without subjection, without the special apparatus for compulsion which is called the State." Lenin, The State and Revolution 91-92 (1917).

To some visiting socialists, Lenin once said:

"We never speak about liberty. We practice the dictatorship of the proletariat in the name of a minority, because the peasant class have not yet become proletarian and are not with us." Fodor, The Revolution Is On 146 (1940). Italics added.

Elsewhere, Lenin wrote:

"Dictatorship is a state of acute war. And we are precisely in such a state. . . . Until the final issue is decided, the state of terrible war will continue. And we say: A la guerre, comme a la guerre; we do not promise any freedom nor any democracy." 18 Lenin, Collected Works 336 (1923). Quoted in Shub, Lenin, A Biography 390 (1948)."
public deprives individuals and private groups of rights which they might use to the detriment of the socialist revolution.\textsuperscript{43}

The effect of this policy was reported by Andre Gide who had once sympathized with Russian communism. He wrote, in 1936:

"What is asked now is acceptance and conformity. The least protest, the slightest criticism is punishable and suppressed at once. And I doubt that there is any other country today, not even the Germany of Hitler, where the spirit is less free, more bowed, more fearful and terrorized, more enslaved."\textsuperscript{44}

And although the Soviet Constitution of 1936 recognized certain individual rights,\textsuperscript{45} no noticeable change in Russian political or social life


For the Soviet view of those elements which we have come to consider as of the essence of any bill of rights, see: Hazard, \textit{The Soviet Union and a World Bill of Rights}, 47 Col. L. Rev. 1095, 1097, 1102, 1105. The background of Soviet legal philosophy is summed up brilliantly in Schlesinger, \textit{Soviet Legal Theory} (1945). A judicious attempt to assay the divergent political and economic philosophies of East and West and the hope which they hold for mankind is \textit{Northrop's The Meeting of East and West} (1946).

"Translated from the French, Gide, \textit{Retour de l'URSS} 67 (1936). It is axiomatic that Russia has no tradition of freedom. So, in assaying any of its social or political manifestations, whether pre-Revolutionary or post-Revolutionary, this fact must be taken into consideration. Maynard writes:

"We shall miss some of the lessons of Russian history unless we realize that the outlook on law, and on the liberty of the subject is fundamentally different from that which, in theory at least, prevails in the Anglo-Saxon world." \textit{Maynard, Russia in Flux} 155 (1948).

Like others he sees much promise in the constitution of 1936. But he admits that "it is not democratic". Indeed, he adds, the conditions do not "make democracy possible. What is aimed at is a discipline which shall re-make man in a new image, and the cooperation of the patient in the process of remaking." \textit{Ibid.}, 514.

\textsuperscript{45}Chapter X of the U. S. S. R. Constitution of 1936 cites "The Fundamental Rights and Duties of Citizens". These include:

118. The right to work, to guaranteed employment and payment.
119. The right to rest and leisure.
120. The right to maintenance in old age, in sickness, or loss of capacity to work.
121. The right to education.
122. Women are accorded equal rights with men.
123. The equality of rights of citizens "irrespective of nationality or race, in all spheres of economic, state, cultural, social and political life" is an indefensible law.
124. Freedom of religious worship and anti-religious propaganda.
125. "In conformity with the interests of the toilers, and in order to strengthen the socialist system, the citizens of the U. S. S. R. are guaranteed by law: (a) freedom of speech, (b) freedom of the press, (c) freedom of assembly and of holding mass meetings, (d) freedom of street processions and demonstrations. ...."
126. The right to unite in public organizations.
127. Inviolability of the person.
appear traceable to this part of the new Constitution.\textsuperscript{46}

A state which brooks no opposition will enslave its people, whether it does so under the pretense of an economic, racial, social, or cultural ideal. All authoritarians seek the annihilation of the individual and the enthronement of the state as supreme. They seek to attain this by postulating the omnipotent state, the direct opposite of the Western European traditions and ideals of liberty, ideals embodied in our own Bill of Rights. Under the authoritarian state the individual is only the means or instrument of society's ends; whatever rights and values the individual has he has derived from the omnipotent state.\textsuperscript{47} The

\begin{footnotesize}
\begin{enumerate}
\item[128.] Inviolability of homes and secrecy of correspondence.
\item[129.] The rights of asylum to persecuted foreign citizens.
\item[130-133.] Duties of citizens—to abide by the Constitution, to safeguard and fortify public, socialistic property; universal military service; and defense of the fatherland. Paraphrased from the citation in N. L. Hall and H. W. Stote, The Background of European Governments 586-588 (1940 ed.). These rights are "guaranteed" by the state "in the interests of the toilers". This is as it has always been in Russia, whether a matter of substance or only of form—"government from above".
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American Bill of Rights recognizes the absolute rights of individuals before the state; indeed, the first ten amendments are merely confirmatory of existing rights. They do not bestow them.48

As two former leaders of Germany bluntly stated:

"In the Nazi State there will be no voting. The Nazi State knows but one authority, namely, that from above downward, and but one responsibility, from the bottom upward. We are the dread enemies of the Democratic majority principles. Not since the time of Frederick the Great was authority so concentrated. Call it dictatorship if you please—really it is merely the principle of leadership."

Goering had stated this in 1933.49 Later, in 1934, Goebels wrote:

"National Socialism cannot be judged right in this and wrong in that respect. As we, the National Socialists, are convinced that we are right, we cannot tolerate any other in our neighborhood who claims also to be right.

the Constitution of the United States is an example. These amendments mostly have the character of prohibitions and commands addressed to the organs of the legislative, executive, and judicial powers. They give the individual a right in the technical sense of the word only if he has a possibility of going to law against the unconstitutional act of the organ, especially if he can put into motion a procedure leading to the annulment of the unconstitutional act. This possibility can be given him only by positive law, and consequently the rights themselves can only be such as are founded in positive law.

"This, however, was not the view of the Fathers of the American Constitution. They believed in certain natural inborn rights, which exist independent of the positive legal order and which this order has only to protect—rights of individuals which the State has to respect under any circumstances, since these rights correspond to the nature of man and their protection to the nature of any true community. This theory—the theory of natural law—was current in the eighteenth century. It is clearly expressed in the Ninth Amendment: 'The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.' By this, the authors of the Constitution meant to say that there are certain rights which may neither be expressed in the constitution nor in the positive legal order founded thereupon. Nevertheless, the effect of this stipulation, from the point of view of positive law, is to authorize the State organs who have to execute the constitution, especially the courts, to stipulate other rights than those established by the text of the constitution. A right so stipulated is also granted by the constitution, not directly, but indirectly, since it is stipulated by a law-creating act of an organ authorized by the constitution. Such a right is thus no more 'natural' than any other right countenanced by the positive legal order. All natural law is turned into positive law as soon as it is recognized and applied by the organs of the State on the basis of constitutional authorization. Only as positive law is it relevant in juristic considerations." Ibid., 266-267.

See also: VERMEIL, DOCTRINAIRES DE LA REVOLUTION ALLEMANDE (1939); TRENITIN, LES TRANSFORMATIONS RECENTES DU DROIT PUBLIC ITALIEN (1929); HANS KOHN, FORCE OR REASON (1938), REVOLUTIONS AND DICTATORSHIPS 211-229 (1939), NOT BY ARMS ALONE 3-30 (1940); C. E. M. Joad, LIBERTY TODAY 139-216 (1934); THOMAS MANN, THE COMING VICTORY OF DEMOCRACY (1968).

48See supra, notes 1 and 9.

49As quoted in the Los Angeles Times, July 9, 1933, p. 5, col. 1.
"We deny the right to criticize the Government to those who have no share in the responsibility and the burden of work."  

These formulations are not new. The Fascist, Nazi, and Communist states merely denied to the people the safeguards between the individual citizen and those exercising executive power which Madison had in mind when he moved the adoption of the Bill of Rights. These safeguards, which as Madison said, the citizens "have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power", had a history dating back to Magna Carta in the English speaking world. It is true that Magna Carta, in its interdictions, applied to freemen only and that the number of freemen, at the time, was not very large. But there is no denial that what may have been originally intended as a document conferring privileges upon privileged groups became, through that leveling process so common in history, the source of rights to all. 

So, when we see those rights extended to the whole population of England, and hear them proclaimed by the colonists as a part of their heritage, we realize the truth of the statement of a New York colonial governor: "There are none of you but are big with the privilege of Magna Carta." And Holdsworth, the English legal historian, has stated very emphatically that "All classes united to obtain the Charter." Its effect was to establish the doctrine of limited sovereignty, and its concomitant doctrine,—that of the supremacy of law. 

Pollack and Maitland, earlier English historians of English law than Holdsworth, say of Magna Carta: "For in brief it means this, that the King is and shall be below the law." Coke also expressed this idea in his famous statement made in Parliament: "Magna Carta is such a Fellow that he will have no sovereign." 

This is the doctrine that has underlaid the growth, development and recognition of our civil liberties. As stated by John Adams in the pream-
acy of law has a very significant meaning in our political philosophy and in the philosophy of those who carried it over into the Bill of Rights. It means, first, that all persons are equal before the law and that no one is above it. Equality before the law came into being with Mosaic law and has come to us through Magna Carta and the Bill of Rights to become one of our most precious heritages.

As embodied in our political and legal system the doctrine means that no one can be deprived of life, liberty, or property without due process of law. That is, the issue must be determined by a court, tribunal, or administrative body, acting under a law applicable alike to all, under like circumstances. And it is the courts which can stay the hand of the arbitrary power when exercised by any of the three branches of our government.

Our security lies in this doctrine of the supremacy of the law, over and above all men. It sobers the daily relations of men with each other

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56 When Moses established courts, he charged the judge:

"Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him. Ye shall not respect persons in judgment, but ye shall hear the small as well as the great; ye shall not be afraid of the face of man." Deuteronomy, I, 16-17. The establishment of a judicial system by Moses is related in Exodus, XVIII: 14-20.

We also find the thought in the Holiness Code—Leviticus, XIX: 15-18: "Ye shall show no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honor the person of the mighty: but in righteousness shalt thou judge thy neighbor."

57 The doctrine of judicial supremacy under which American courts exercise the right to nullify legislative acts has been the subject of much controversy. There are state precedents showing the use of the power prior to the adoption of the Constitution. See: Andrew C. McLaughlin, Constitutional History of the United States 299-319 (1935), especially note 34 at page 312-313. The most comprehensive critique of the system is Charles G. Haines, The American Doctrine of Judicial Supremacy (1932). Recently one of our ablest historians, Henry Steele Commager challenged the doctrine. Speaking before the University which Jefferson founded, the University of Virginia, he boldly asserted the ability of the majority to practice decency and tolerance towards individuals and minorities, without judicial interference:

"In a year when we turn back to Thomas Jefferson for inspiration and instruction in so many matters—and rarely in vain—we might do well to take more seriously his faith in majority rule and his fear of any institution which repudiates the philosophy of majority will or deprives it of the advantages of free play. We have less cause to fear the consequences of majority rule than had Jefferson, a century and a half ago. Only a democrat with limitless faith in the enduring strength of democracy could say—and it was proudly said:

"If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

"We have no reason to be less confident of the ability of majorities to tolerate dissent or of the safety with which error may be tolerated where reason is left free to combat it." H. S. Commager, Majority Rule and Minority Right 82-83 (1943).
and with his social organizations, restrains any one group or class or interest from overcoming and dominating the others. The Bill of Rights asserts the rights of individuals, not groups or minorities. Thereby equality of all under the law is secured. The individual has certain rights of which the majority cannot deprive him. When the individual surrenders his rights to the state or to any political faction, his freedom will disappear.

But whatever changes may come in our political and economic life, free men will find the Bill of Rights, in the future, the shield against oppression which it has proved in the past. 87

Freedom of worship, freedom of expression, freedom of assembly and petition, protection against arbitrariness in the enforcement of the law and in criminal prosecutions, the guarantee of free and open trials before a jury upon definite charges presented in open court;—these fundamentals of our constitutional system embodied in the Bill of Rights are so important to freedom that even if, at some future time, voice be denied us in the choice of those who govern us, they would still make possible life with human dignity.

None is possible without them. We must, therefore, rededicate our-

87 In a society which is constantly expanding its control in the economic field, the true spirit of freedom may require interdictions against those who would interfere with its exercise. Thus, the right of workmen to associate is illusory, if employers, in the exercise of economic power, interfere with its exercise, or discriminate against those who would bargain collectively by declining to deal with them or to employ them. The Bill of Rights speaks in terms of individuals. But in the development of our economic and political system, it may become as important to protect the exercise of rights by groups as by individuals. Our advances in these fields require that whatever is done be in the spirit of freedom which the Bill of Rights expresses. (See, David Riesman, Civil Liberties in a Period of Transition, 3 Public Policy 33-96 (1942); and see FRANKEI, OUR CIVIL LIBERTIES (1944). A wise teacher and philosopher has written:

"The same forces which have brought about the forms of democratic government, general suffrage, executives and legislators chosen by majority vote, have also brought about conditions which halt the social and humane ideals that demand the utilization of government as the genuine instrumentality of an inclusive and fraternally associated public. 'The new age of human relationships' has no political agencies worthy of it." (John Dewey, The Public and Its Problems 109 (1927).)

Even the most conservative commentators on the Constitution admit the trend toward a more activist government. Thus, McLaughlin in his Constitutional History of the United States wrote:

"Who are a free people? Those who live under a government so constitutionally checked as to make life, liberty and property secure. That would have been the explicit answer of the Revolutionary days. In some ways the most marked development of the idea of popular government from that time to this has been the development of the belief that governments, strongly directed by popular opinion, should be competent and active—a change from the belief that governments should not do things to the belief that they should do things." 117.
selves to their preservation, and their retranslation into the spirit and needs of today.

For ultimately, the best guarantee of freedom is our will to be free.58

58."No formal devices for government can in themselves provide a people with a democratic way of life, for the essence of such life is the exercise of instructed and effective social concern." T. N. Whitehead, Leadership in a Free Society 258-259 (1936). And see E. B. Ashton, The Fascist, His State and His Mind 297 (1937); F. Nitti, La Democratie 503 (1933); D. Mornet, Les Origines Intellectuelles de la Revolution Francaise 177 (1933).

In the text I have envisaged not only Communism, but Fascism and Nazism as living realities. The reason is obvious: Despite the defeat in war of the two nations which carried these ideas into practice, the philosophies themselves must stay defeated in the minds of men everywhere.

And because there is dichotomy between what we ourselves profess and what we practice, as the Report of the President's Committee on Civil Rights shows so clearly, it is well to treat realistically all current philosophies which go counter to our norms of freedom. See U. S. President's Committee on Civil Rights, To Secure These Rights (1947).
RECIPROCITY AS A MAXIM OF INTERNATIONAL LAW

Ernst Schneeberger*

I. THE MEANING OF RECIPROCITY

WITH the economic development in the last hundred years the national frontiers became too confining for commerce, industry, banking and insurance. People, goods and capital waited to spread over new land; but each state was surrounded by an insurmountable wall: the sovereignty of the neighbor.¹ No one had the right to be admitted by a foreign country to settle there, to carry in goods, to acquire land, to engage in trade or to develop a plant. There was no guarantee that the alien in the case of necessity would enjoy protection by the courts and the administrative authorities or that he would not be subject to ruinous imposts. Furthermore, it was uncertain whether the foreign country would receive diplomatic or consular representatives for the protection of their compatriots.

However, insight into the soundness of the mutual opening up of frontiers won out over the narrow concept of obstructionism. Through treaties of friendship, settlement, and commerce, the barriers which blocked citizens and goods at the frontiers were removed. The governments of the commercially progressive nations took the initiative in promoting trade relations between their citizens by every means possible.²

The simple and obvious rule was that one state would grant rights to the other states and their citizens on condition that the first state and its nationals receive equal rights. In other words, each state refrained from exercising its sovereignty in a nationalistic manner to the extent that the other states were willing.

This positive reciprocity is the scaffolding on which relations between peoples developed. With respect to the exchange and protection of industrial property also, reciprocity has become of great importance. The situation of inventors and owners of trade marks would be precarious indeed

*Dr. jur., 1938, University of Berne, Switzerland, 1940-44 on the staff of the Legal Adviser to the Swiss Foreign Office in charge of problems arising from economic warfare; assigned to the Swiss-American-British War Trade Mixed Commission. Member of Swiss Military Tribunal. Now First Secretary of Legation of Switzerland, Washington D. C.—The views expressed in this study are those of the author, and do not necessarily reflect the official Swiss opinion.

¹See, A MODERN LAW OF NATIONS, 157 (1948).
²For one example, see the Preamble to the Convention of Friendship, Commerce and Extradition between the Swiss Confederation and the United States of America, Nov. 25, 1850.

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if the results of their creative work could be robbed by a foreigner and if a well-known trade mark would be misused for the purpose of illegal competition. The International Convention for the Protection of Industrial Property, promulgated in Paris, March 20, 1883, bears testimony that positive reciprocity is a simple but none the less effective and sound principle for the achievement of progress among peoples.\(^3\) The Convention brought about international protection in a field where anarchy might have reigned. It is to be stressed that the principle of positive reciprocity underlying the Convention is self-governing. No sanctions are provided for breaches.\(^4\) Nevertheless the Convention is respected, not the least in that the other states abide by its rules. Similar considerations apply to the cooperation of the World Post Federation.

Positive reciprocity as an international bridge can be traced up to the present day. The development of air traffic over the globe depended on the states mutually allowing airlines to fly over their territories.

Reciprocity has a governing position both in peacetime and wartime. Solely on the constructive basis of reciprocity it was possible to mitigate even the severities of war.\(^5\)

II. **Negative Reciprocity as a Legal Consequence of a Wrong**

Whoever violates a rule of international law commits an illegality, a fact which needs no elaboration.

Still controversial, however, is the manner in which the state whose rights have been violated may react; in particular whether, in the sense of negative reciprocity, it may give "tit for tat".\(^6\)

It goes without saying that above all the state transgressed must endeavor, according to Article 33 of the U. N. Charter, to settle a dispute by pacific means. But even authorities who participated in the creation of the Charter concede the existence of shortcomings, especially in powers retained by the member states.\(^7\) The main one retained is the veto power,

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\(^{55}\) Eidg. Gesetzessammlung 1237 (1939).


\(^{7}\) Hague Convention Respecting the Laws and Customs of War on Land, Oct. 17, 1910 (hereinafter Rules of Land Warfare); Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929; Convention Respecting the Treatment of Prisoners of War, July 27, 1929; Protocol Prohibiting the Use in War of Asphyxiating, Poisonous, or other Gasses, and of Bacteriological Methods of Warfare, June 17, 1925.

\(^{8}\) Jessup, *op. cit.* 165.

\(^{9}\) Jessup, *ibid.*, 202.
by which not only the taking of measures against a violator state but even the investigation of a case may be blocked. Because of that the right of self-protection re-emerges.9

One side objects that “a wrong may not be answered with a wrong”.9 The victim state should seek peaceful means; it should negotiate or address itself to a court. In war, however, the factor of time precludes such procedure as a rule.10 The situation becomes precarious when negotiation or judicial settlement is possible and the violator nevertheless sabotages a compromise or does not abide by the judgment. Then war would be the ultima ratio. It may be that the victim state is too weak to wage war or that this venture would not be worth the necessary risk in a given case. Then the victim loses touch with the violator if it cannot take provisional counter-measures from the outset. The victim state may appeal to world opinion, denouncing the actions of the violator and pressing him to fulfill the obligations. It is possible, though, that these efforts will fail or even have the negative result that the violator, because of one inconvenient obligation, will terminate an entire contract which in its other provisions worked in the interest of both parties. In practice then, this procedure considerably impedes the reactions of a violated state.

The doctrine that a wrong may not be answered with a “wrong” would in practice lead to unsatisfactory consequences. The malefactor would be overly spared and the victim forsaken. This would undermine confidence in the international law. Too frequently it is overlooked that international law is a primitive law order.11 Therefore its rules must be simple and realistic. There is often no room for complicated, tedious procedures. President Wilson stated that “international law has perhaps sometimes been a little too much thought out in the closets”.12 King George V of England, acting as an “amiable compositeur” in a dispute between the United States and Chile, said that the duty he had undertaken was one of pronouncing an award which should do substantial justice between the parties without attaching too great an importance to the technical points which might be raised on either side.13 The American-German Mixed

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83 Lauterpacht, The Function of Law in the International Community, 179 (1933).
84 Guggenheim, Lehrbuch des Voelkerrechts, 3 (Basel, 1948).
85 Hackworth, Digest of International Law 684 (1943).
86 Hackworth, ibid., 87.
Claims Commission held itself to be free from any particular code or rules of law but to be guided by justice, equity and good faith.14 Professor Max Huber warned that the law of war should not be a nice facade of impracticable rules but a solid construction which will withstand the rigors of war.15

A. The Law of War

The substantive international law, in the first instance, the law of war, contains indications that negative reciprocity is permissible as an answer to a wrong.

1. Agreements between belligerents must, once settled, be scrupulously observed by both parties.16 As obvious as this statement are the consequences of a unilateral breach; any serious violation of an armistice gives the other party the right of recommencing hostilities immediately.17 Thus there is negative reciprocity.

2. Certain rules of international law are not more than expressions of hope.18 Between such and legally binding rules there must be a distinct differentiation. Mere recommendations given by international law are exclusively governed by the mechanism of positive or negative reciprocity; there are no other consequences. Also the state which first acted in contradiction to the recommendation does not commit a violation. For example, according to a Hague Convention,19 it is desirable that when a merchant ship belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port it will be allowed to depart freely and to proceed, after being furnished with a pass, direct to its port of destination or any port indicated. And it is left to the discretion of the belligerents whether they want to detain or release newspaper correspondents following an enemy army.20

Of course the consequences of a breach of a binding rule of international law are not confined to the right to resort to negative reciprocity. The violating state may become liable for the payment of damages, or,

14Hackworth, ibid., 12.
15Huber, Kriegsrechtliche Vertraege und Kriegrason, 1 Zeitschrift fuer Voelkerrecht 365 (1913).
17Ibid., Art. 40.
in extremely grave cases, individuals could be held responsible.\textsuperscript{21} Because of the problematic nature of international law enforcement the consequences of a breach must often be confined to some sort of punishment involving the honor (\textit{Ehrenstrafe}); to wit: the loss of the reputation of the state in the eyes of the world with a corresponding recording in history.

3. \textbf{Officers} taken prisoners of war may not be put to work.\textsuperscript{22} This agreement as such is questionable. Labor is not unworthy, particularly if it is exacted according to rank and aptitude. Written international law appears to authorize that the state whose officers taken prisoner are made to work may put to work prisoner officers of the enemy.\textsuperscript{23} In fact, work may be more humane treatment than idleness which certainly increases the danger of so-called "barbed wire psychosis".

4. The \textit{tasks of prisoners of war} shall have no connection with the operations of the war.\textsuperscript{24} Another Convention says "no immediate connection".\textsuperscript{25} Where, then, is the line to be drawn? An expressed rule that the use of prisoners for the construction of fortifications and trenches is forbidden could not be agreed upon.\textsuperscript{26} Therefore it is an open question whether a belligerent commits a wrong if he exacts from prisoners the production of weapons and ammunition. It is clear, however, that the other belligerent, if the enemy has taken the initiative, can exact the same work; it may do this without exposing itself to reproof for a violation. The malefactor should not alone enjoy the advantage of the enemy’s hesitation to bomb war factories because of the fear that its troops working there would suffer.

5. The following example sheds light on the superficial slogan that a wrong cannot be answered with a "wrong". In the course of World War II the occupied territories had to endure \textit{mass deportations} of workers to Germany, an action which has been branded as tyranny without precedent. It has been argued that it is also a violation, if German prisoners of war are held back in liberated territories and if they are put to work there. This, however, is met with the argument that the Germans are not used


\textsuperscript{22}Rules of Land Warfare, \textit{op. cit.}, Art. 6.

\textsuperscript{23}Ibid.

\textsuperscript{24}Ibid.

\textsuperscript{25}Convention Respecting the Treatment of Prisoners of War, July 27, 1929, Art. 31.

\textsuperscript{26}Staatsvertrage ueben Landkrieg und Neutralitaet, herausgegeben gemaess Bundesrates Beschluss des Schweiz vom 31 Oktober 1910, 124-125 (1939).
against their country and that in helping to rebuild the devastated areas
they are not only fulfilling a moral and legal obligation but are con-
tributing to the recovery of Germany's political prestige.  

6. In the Hague Convention on Land Warfare the parties agreed on
the inviolability of private property. This was certainly a step forward.
What, however, are the legal consequences if a belligerent breaks this
rule? Such an action removes the basis (i.e., the condition of reciprocity)
on which the inviolability was based, and, regrettably but unavoidably,
the mechanism of negative reciprocity must apply. This solution would
in any event not be inconsistent. It would mean that, with respect to the
treatment of private property in land warfare, a more primitive rule would
obtain again; to wit: the law of maritime warfare—the property may be
confiscated. It could hardly be understood why, regarding the treat-
ment of property in land warfare and in sea warfare, the same principles
should not obtain. As a matter of fact, the American Government has
made an effort—but without success—to declare also inviolable enemy
private property on the high seas. Remote as would be the possibility of
commanding that a belligerent respect property on the seas unilaterally,
as little would be justified in land warfare.

7. Most of the conventions concerning warfare contain the so-called
"Allbeteiligungsklausel". According to this clause, belligerents are bound
only if all of them are parties to the convention. They are in particular
free from the obligation of adhering to the provisions, if a third state
which is not a party to the convention enters the war. It is thenceforth
left to the discretion of each party whether it will follow rules to miti-
gate the severities of war. If a belligerent does not follow these rules,
it has to reckon with negative reciprocity from the other side. How much
more justified is negative reciprocity if it is the answer to a transgression?
The contractual elimination of certain methods of warfare and the giving
of distinct assurances are (better: were!) apt to create within a state
an atmosphere of safety so that it refrains from taking precautionary
measures. All the more pernicious then is a violation by a party to the
convention. The violator deserves rather less consideration than a nation

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27 Fried, Transfer of Civilian Manpower from Occupied Territory, 40 Am. J. Int'l L. 303 (1946).
29 Schuerch, Neutrale Bemerkungen zur Konferenz von Potsdam, Neue Schweizer Rund-
schau, 209 (1945).
30 Sommerich, A Brief against Confiscation, 11 Law & Contemp. Prob. 153 (note 16),
159 (1945).
which from the beginning reserved to itself a free hand, thus causing the other states to prepare themselves accordingly.

8. To put the problem of reciprocity on a more fundamental basis: the ultimate aim is not the elimination of certain military or economic means with which war is waged but the elimination of war itself. In the Kellogg-Briand pact the parties solemnly condemned recourse to war as a solution of international controversies and renounced it as an instrument of national policy in their relations with one another. Despite that, no one could accuse a state of a breach of international law if it defended itself against an aggression. The general statement that war may be answered with war means, in the last analysis, that a belligerent, in the sense of negative reciprocity, may resort to all means of waging war which have been utilized by the enemy, legally or illegally.

9. It has been asserted that negative reciprocity as an answer to a violation deals a vital blow to confidence which is of paramount importance in relations between states. The reproof for bringing about a deterioration would be addressed to the victim and not to the violator! In contradiction of this, former Secretary of State Cordell Hull denounced it as effrontery and cynicism if a state demands, while itself scoffs at and disregards every principle of law and order, that other states adhere rigidly to all such principles. Until now confidence in international law has been weakened just because violations remained without effective sanctions. Denial of the right to resort to reciprocity in answer to a wrong would constitute a grotesque encouragement to enter treaties with the mental reservation to disregard obligations to self and to bind merely the other party.

B. International Law in Peace

In international law in peacetime the mechanism of reciprocity has to a large extent become familiar. In times of economic crisis or political tension reproof for a violation is hardly voiced if a state—even contrary to contractual obligations—avails itself of its sovereignty to keep out

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31 Preamble to the Hague Convention Respecting the Laws and Customs of War on Land, op. cit.
32 Hackworth, op. cit. 678 (Budapest Resolution on the Kellogg-Briand Pact); U. N. Charter Art. 51.
33 Die deutschen Vermoegenswerte in der Schweiz, Neue Zuecher Zeitung, No. 1364, Sept. 9, 1945; Sommerich, op. cit. 155.
34 Hackworth, op. cit. 689.
foreign elements. Visas, permits to settle or work, and similar devices contradict, in the strict sense, treaties of friendship and settlement. The free flow of goods and financial transactions are cut to quotas or stopped completely. Such procedure, by virtue of the clausula rebus sic stantibus can claim or at least allege legality. Of course, the other side must be granted the right of negative reciprocity, i.e., the right to wield its sovereignty.

The United States Supreme Court has expressed its view regarding the problematic nature of treaties between states. According to the Court, the enforcement of treaty provisions depends "on the interest and the honor of the governments which are parties". If therefore—from the beginning, or more often because of a subsequent change of circumstances—a treaty is unbalanced as to interests, it is to be expected that difficulties will arise or that the treaty will not be kept at all. The question is then whether honor demands that a state fulfill an inequitable treaty. The answer may be that by using the notion of honor an argument may also be made for the benefit of the adversely affected state; to wit: the favored state should not insist on the execution of a limping treaty but should loyally be prepared to adapt its provisions.

The efforts made for the creation of an International Trade Charter speak against the attempt to enforce contractual agreements which have become unbalanced and for the establishment of material reciprocity. Trade barriers are to be torn down, of course, reciprocally. If, however, a country is swamped with the exports of another country to an extent that the demand for its own goods is seriously jeopardized, that state is free to take the necessary measures for the restoration of an equilibrium.

With regard to the inviolability of private property in peacetime, no elaboration is necessary. There is a growing sentiment that respect for private property must also be governed by the principle of reciprocity. Foreign exchange, nationalization and other measures authorize the party

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See the excellent treatise: Huang, The Doctrine of Rebus sic Stantibus in International Law (1933).

Kunz, The Meaning and the Range of the Norm Pacta Sunt Servanda, 39 Am. J. Int'l L. 189: "it is clearly a norm of positive international law that the innocent party has, at its option and discretion, the right to abrogate the treaty on account of previous breach by the other party." Jessup, op. cit. 152.

Head Money Cases (Edye v. Robertson, Cunard Steamship Co. v. Robertson), 112 U. S. 580 (1884).

affected to resort to self-defense, for instance to introduce compulsory clearing.40 Because of the uncertain protection an international agency may offer, negative reciprocity is at least justified as a provisional safety measure. This is in harmony with the Hague Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts.41 According to this Convention, even “resort to war is permissible if the efforts for arbitration or an arbitral judgment is sabotaged by the debtor”.

Of course the right of negative reciprocity does not mean that the victim is obliged to avail itself of this right.42 Because of political and economic considerations it may appear expedient to postpone counter-measures, particularly if there is hope that the violator may be won over for the restoration of positive reciprocity. For example, in 1933 the Swiss Government made representations with the American Government because Swiss corporations had been subjected to higher imposts than American firms.43 The protest was rejected with the argument that while the Treaty of 1850 guaranteed treatment on the same footing for “citizens”, the inclusion of corporations would have required a special clause, such as the one contained in the American-German Treaty of 1923. In accepting the American viewpoint Switzerland might have resorted to negative reciprocity. Instead of taking a step toward a lower basis, however, effort has been made periodically to win the United States over for a step toward a mutual higher level of understanding. In the Treaty of 1850 corporations were not mentioned obviously because they did not play an important part in economic life. The much younger American-German Treaty of 1923 justifies that the Treaty of 1850 should be interpreted in a liberal sense or explicitly amended to include corporations.44 This would be in line with the purpose of the Treaty, i.e., the promotion of the mutual trade relations. Incidentally, agreement would be indicated that the Treaty does not cover only private law corporations but also the two Governments in so far as they act as fiscs. During the second World War American authorities requisitioned toluol belonging to the

40 Amtliches Stenographisches Bulletin, Staenderat 144-145 (Swiss Senate 1946); Ibid., Nationalrat 380, 387 (Swiss Parliament 1946); Rubin, op. cit. 166 ff.
41 Promulgated Oct. 18, 1907.
42 Hackworth, op. cit. 346; To a certain extent, Articles 2 to 5, in connection with Article 10, the Hague Convention Relating to the Rights and Obligations of Neutral Powers and Persons in the Event of a Land War are an exception to the rule. No one has to suffer a violation of neutrality; on the other hand, no one should permit a violation of neutrality.
43 Hackworth, op. cit. 431.
44 In this regard, see the recent American-Italian Treaty, February 2, 1948.
Swiss Confederation. In court proceedings regarding an increase in the compensation the United States Department of Justice contested that the Swiss Confederation had a standing in the court on the ground that it was not a natural person. The court, however, did not follow this formalistic reasoning.45

III. LIMITS OF NEGATIVE RECIPROCITY

We have advocated negative reciprocity as a principle of the primitive international law order. If we inquire of ourselves whether a belligerent may mistreat prisoners of war because the enemy first violated the law, our legal conscience definitely answers no. The answer will be the same to the question whether a belligerent may utilize the symbol of the Red Cross as a ruse because the enemy first misused that sign for hostilities. Other examples could be given, but it may suffice to say that evidently there are "higher precepts" which unconditionally claim binding force; in particular when they are disregarded by another. One could call it compulsory international law. Who, though, makes it binding on the states whose precepts belong in this category? Eventually each government decides the question for itself, and also therefore the question whether negative reciprocity is permissible.

Yet it may be that the limits of negative reciprocity can be narrowed. We would lean on "the usages established among civilized peoples, the laws of humanity, and the dictates of the public conscience". Relying on these abstract ideas, in a particular case, we shall, however, not get a precise answer what the legal solution is but only what may appear to be merely acceptable. This conclusion reflects the real picture of the presumed positive international law. It shares with the law of reason uncertainty of content, for the finding of which the search never ends. Naturally the victim state at the time of the violation, in an atmosphere of highly subjective evaluation, is hardly able to determine the limits of negative reciprocity. We therefore suggest a formula which would separ-

46Rules of Land Warfare, op. cit., Art. 4; Convention Respecting the Treatment of Prisoners of War, op. cit., Articles 2 and 3.
48Art. 25 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, op. cit., provides that its provisions are to be obeyed "in any event."
49Burckhardt, Die Unvollkommenheit des Voelkerrechts, 19 (Bern, 1923).
rate the violation and the judgment. The formula could be worded: Would it be compatible with our legal conscience for the states in a given case to agree from the beginning on negative reciprocity, explicitly or by implication? If the answer is yes, then the violation of the rule may be answered by means of negative reciprocity. We would reach this result in the following instances: Utilization of the labor of officers who are prisoners of war; utilization of troops taken prisoner for tasks in connection with the operation of war; obtaining information from the inhabitants of occupied territory about their army and its means of defense; nonpayment of work done by prisoners of war; confiscation of enemy private property as a means of compensation; setting up of trade barriers; visas and permits to work for aliens.

If the answer to our formula is in the negative, then an outlawed action does not become legal because a violation of the rule has preceded. For instance, consulting our legal conscience, it could not be agreed from the beginning that prisoners of war may be mistreated or that hospital ships may be sunk or that the sign of the Red Cross may be used as a ruse. Each such action constitutes a breach of international law, independent of whether the other party was guilty previously of the same violation. The sanction must be sought in the direction of individual responsibility—a dictate of public policy which was explored at Nuremberg.

According to the formula a rule might be the expression of a "higher precept"; nevertheless, the right of resorting to negative reciprocity must be granted exceptionally. For example, it would be incompatible with our legal conscience to allow from the beginning the bombing or gassing of defenseless cities. The mechanism of reciprocity must however apply, if the very existence of the victim state is menaced. One speaks of necessities of war. Such a situation may come about by means of mass destruction like bombs and gas.50 As a matter of fact, several powers have rati fied the protocol concerning the prohibition to use asphyxiating gases with the reservation that it will cease to be binding in relation to the violator. On the other hand, if prisoners of war are put in chains, this does not decisively influence the conduct of the war; thus negative reciprocity is not permissible. The same is true with regard to the right of prisoners of war to enjoy complete liberty in the exercise of religion.51 The property of institutions dedicated to religion, charity and education also deserves

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50See: Stimson, The Decision to use the Atomic Bomb, Harpers Magazine (Feb. 1947); Jessup, op. cit. 215.
unconditional respect.52 There is doubt whether the property of municipalities should be put into this last category.53

As everywhere in the field of law, so too with regard to the suggested formula there may be borderline cases54 which leave doubt whether we have to deal with a "higher precept" to be kept absolutely or whether the violation by another cancels the obligation. We shall not dwell thereon, but it should be emphasized that the determination of a borderline case cannot be reserved to the violator. He had better remember the warning "Do unto others . . ." before by his bad example he sets the starting point for negative reciprocity. Because it is destructive it is therefore unsatisfactory. Progress, however, can only be accomplished on the basis of positive reciprocity.55

Using the notion of "higher precepts" indicates the recognition of the natural law concept that above the traditional sources of international law—the contractual and customary law—there are general principles which are binding on the states whether they want or not.56 The precept, for instance, that prisoners of war must be treated humanely and that they cannot be made the object of reprisal must also apply to enemy civilians, although there is no convention to this effect. The other opinion, according to which a state is bound only so long and in so far as it consents to be bound,57 would allow the states the possibility of removing all controversies from the pale of international law.

52Ibid., Art. 56.
53Jessup, op. cit. 217.
54E.g., the rule that prisoners of war should not be less provided for than a belligerent's own troops in regard to food, housing and clothing. However, it is recognized that the belligerent might be bound to discriminate even against his own soldiers, in the field and in the barracks. Rules of Land Warfare, op. cit., Art. 7; Convention Respecting the Treatment of Prisoners of War, op. cit., Art. 11.
55"... constructive international cooperation is the product of give and take." Sovereignty and Interdependence in the New World, 19 DEP'T STATE BULL. 184 (1948).
IV. Negative Reciprocity Instead of Reprisal

The concept that a wrong may not be answered with a "wrong" might have been easily rejected by referring to the law of reprisal. We must, however, also make reservations with regard to the law of reprisal.

According to the prevailing theory, reprisal is allowed in time of peace and in time of war. A reprisal is a permissible action which would be illegal if it were not directed against a state (or its citizens) which first committed a violation of international law.

The reprisal as an answer to a wrong goes much farther than negative reciprocity, which we advocate in principle. Negative reciprocity tends to create a balance between two socially harmful acts. No limits, however, are put on the reprisal. It may consist in the violation of any norm of international law. A broken window may be avenged by the burning down of an entire house. Or, as happened in the last war, because of a wrong of which one prisoner of war was the victim a hundred enemy prisoners were shot. Such outrages do not end here. For no rule of international law can be proved according to which a reprisal must be tolerated. It may be that there was no foundation for reprisal. Counter-reprisals may follow and perhaps eventually cause the annihilation of an entire area with its inhabitants as answer to the burned house. We do not wish to trace further the senseless viciousness and brutality of the law of reprisal. It is no law at all but the surrender of everything reasonable, legal and ethical.

V. Summary

1. Contrary to the narrow opinion that a wrong may not be answered by the same "wrong", and contrary to the liberal law of reprisal, negative reciprocity is permissible in principle. It confronts a wrong with an evil equal in kind and extent—at least extent. Other sanctions, such as the obligation to pay damages, are reserved.

2. A wrong may not be answered by a violation of a rule which we have recognized as a "higher precept", no matter whether this precept is declared in a convention. The legal consequences, with military necessities as possible exceptions, must be sought in the personal responsibility of the malefactor.

58 Kelsen, op. cit. 91 ff.
59 The implications of the problem of the harmful effects of a reprisal on a third nation are difficult and complex. See 7 Hackworth, op. cit. 144.
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FEDERAL LEGISLATION

H. R. 1639, A BILL TO PROVIDE THE VENUE IN ACTIONS AGAINST RAIL CARRIERS

The work of the Eightieth Congress was performed with full knowledge on the part of the membership that its accomplishments or shortcomings would be the subject of political debate in the summer and autumn of 1948. The dominant political atmosphere is reflected in the flotsam and jetsam that bobbed in the wake of the departing legislators as much as in the statutes that received their approval. Much of this rejected, buried or unfinished legislation can be conveniently forgotten after the results of our quadrennial political binge are announced. Other items, because of their fundamental economic or social importance or because of the power of those interested in their enactment, are most certain to be revived.

One of those matters which was left for later decision, when the responsibility for making legislative policy is seriously resumed, was a little noted proposal to revise and limit the venue provisions of the Federal Employers' Liability Act. This legislation, while it has its roots in the progressive movement of an earlier generation, has been the source of a large volume of litigation in recent years and has provided the occasion for some of the more controversial opinions handed down by the Supreme Court in this decade. In a proposal to restrict the venue provisions of that act, the recent student of conflict of laws will immediately recognize a further effort by the legislative branch to reverse the trend of judicial interpretation of prior statutory enactments. The Miles\(^1\) and Kepner\(^2\) cases were frequently cited and heavily relied upon during the discussions of the several bills here under consideration. Like the Devil quoting scripture, the authority of those cases was indiscriminately drawn upon by the advocates and opponents of the legislation alike.

Consideration of this proposal also provided another spectacle of public policy being determined solely on the basis of the conflicting claims of contending economic interests. In this battle of the titans, the organized railroad transportation industry and the organized legal profession joined in supporting the proposal and were opposed by organized railway labor. At no time was there any testimony presented by

\(^1\)Miles v. Illinois Central R. R., 315 U. S. 698 (1942).
any witness who could be said to represent any large segment of the public. As originally presented, this proposal may have been properly considered on that bilateral basis, since the public interest in this particular phase of the FELA is at best indirect; later developments in the legislative history of the measure wiped out this excuse for semi-private deliberation for, as the bill emerged from the House of Representatives, it seriously affected the public interest. There is reason to believe that this change in the character of the bill may explain why it was never reported by the Senate committee, even though it had passed the House by a substantial margin. The apparent lack of opposition outside the railway labor groups likewise indicates a high probability for revival and passage of the bill if restricted to its original scope.

LEGISLATIVE HISTORY OF FELA

The statute here being amended originated as a part of the tremendous growth of workmen's compensation legislation, especially in the states, in the early part of this century. Through enactment of the first employers' liability act in 1906, Congress decreed abandonment of the fellow servant, assumption of risk and strict contributory negligence doctrines in cases of personal injury or death suffered by employees of interstate rail carriers. Unlike the contemporary industrial accident compensation statutes, however, the federal act stopped there, provided no administrative machinery and no system of making awards except through judicial process. Mr. Justice Jackson, concurring in the Miles case decision, aptly described the present act as leaving "interstate commerce under the burden of a medieval system of compensating the injured railroad worker or his survivors. He is not given a remedy, but only a lawsuit". In that respect, at least, there has been no change in the basic law since its first enactment.5

5A roll call of witnesses who appeared before the House committee shows that testimony in support of the bill was received from the author of the bill who also represented his local bar association, two attorneys employed full time by railroads, two former state judges and the president of a state bar association. In opposition appeared five witnesses who were all officers or paid counsel of the Railroad Brotherhoods plus one attorney who had engaged extensively in the trial of railroad negligence cases. The Senate committee heard a larger number of witnesses but, with the exception of a representative of the Justice Department who advised that the bill did not affect government litigation, the same interests were represented.

4The act was amended in 1939 to further restrict assumption of risk as a defense. 53 Stat. 1404 (1939), 45 U. S. C. § 54 (1946). No changes have been made in its administration nor in the venue provisions since 1910, however.
Even this anemic effort was short-lived, however. In its first scrutiny by the Supreme Court, the act as then drafted was held to invade purely intrastate affairs and to be otherwise beyond the scope of federal authority. This defect was cured in 1908 by the enactment of the statute which, in the main, continues in force. The 1908 act, like its predecessor, contained no specific provision establishing the jurisdiction and venue of courts in which the remedy might be enforced. Within another two years, this fact resulted in litigation and decisions which did not meet with Congressional approval. In *Cound v. Atchison, Topeka and Sante Fe Ry.*, it was held that the general venue statute made it mandatory that actions under the FELA be brought in the district where the defendant was an inhabitant since they were founded on a federal right despite the possible incidental fact of diversity of citizenship. This view was later sustained by the Supreme Court in *Macon Grocery Co. v. Atlantic Coast Line R. R.* Another fact of the problem was opened at this early date when the Supreme Court of Connecticut held that the act did not confer upon state courts any authority or duty to enforce its provisions.

In 1910 both of these interpretations were reversed by enactment of an amendment to Section 6 of the Act. As thus amended, the second paragraph of the section provided, until a recent revision, as follows:

"Sec. 6 * * * * *
"Under this Act an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

THE PROPOSED AMENDMENT

H. R. 1639 was introduced by Representative Jennings of Tennessee. The bill would so change the existing law that an action under FELA

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8*The Employers' Liability Cases, 207 U. S. 463 (1908).
14*Public Law 773, 80th Congress, 2d Sess., sec. 18 (June 25, 1948). This act codifying and enacting Title 28 of the United States Code, incorporates the prohibition on removal of FELA cases from state courts into the code section on removals generally.
could be "brought only in a district court of the United States or in a State Court of competent jurisdiction, in the district or county (parish), respectively in which the accident occurred, or in which the employee . . . resided at the time when the accident occurred" with the sole exception that "if the defendant cannot be served with process issuing out of the courts aforementioned, then, and only then, the action may be brought in a district court of the United States, or in a State court of competent jurisdiction, at any place where the defendant may be doing business". No change was made in the provision relating to removals from state courts.

The bill was revised drastically prior to being reported by the House Committee on the Judiciary. As reported and as considered by the Senate Committee, the bill deleted all of the second paragraph of Section 6 except the last sentence (that relating to removals) and then proceeded to amend Section 51 of the Judicial Code, as it then existed, by adding at the end thereof a new paragraph providing that any "civil suit for wrongful death or personal injuries against any interstate common carrier by railroad" could be brought only in such places as had been enumerated in the original bill.\textsuperscript{13} In this fashion was the isolated amendment of the FELA broadened so as to cover the traveling public generally and to put rail carriers in a special category of preferred defendants.\textsuperscript{14}

\textsuperscript{13}Text of bill as reported may be found in H. R. REP. No. 613, 80th Cong., 1st Sess. 1 (1947).

\textsuperscript{14}The full effect of this amendment was quite clearly shown by an exchange between a member of the Senate subcommittee and Mr. John Freels, a railroad attorney and representative of the law committee of the Association of American Railroads. An excerpt from that colloquy is as follows:

"Senator Langer. I am interested in asking just a few questions, if I may, Mr. Chairman, in connection with what the Senator has asked.

Suppose I buy, for example, a railroad ticket to California for my wife and she gets hurt in Arizona. The railroad picks her up and naturally takes her to a first-class hospital in California. If this measure goes through, where will the case be tried?

Mr. Freels. Under this it could be tried either in the county of your residence, if you could get service there, or where it happened, and if you couldn't get service in either place, you could go anywhere.

Senator Langer. Would she not bring the action in Arizona, where the accident took place?

Mr. Freels. Under this provision you would have to do that, sir.

Senator Langer. In other words, if my wife lived in Washington, D. C, and she is hurt in Arizona, and you took her to a hospital where all the doctors were in California, she would have to try that action in some little town in Arizona where she is a stranger?

Mr. Freels. Or any town in Arizona, sir, where the Federal Court is, because Arizona is just a one Federal court district."
The proposed amendment was supported by witnesses who advanced two principal grounds for its necessity. Its Congressional sponsor advised the Committee that he was motivated in introducing it by a desire to stop a notorious traffic in lawsuits which approaches racket proportions and to eliminate an injustice to carriers which was never envisioned by Congress. These were the main points covered by the supporting witnesses. In opposition, the spokesman for railway labor maintained that passage of the bill would destroy a very substantial part of the effectiveness of the Act since it would in a very large percentage of cases, put medical witnesses beyond the reach of injured employees. It was further alleged that the beneficiaries of the Act would also be penalized by being required to bring their actions in small communities where experienced counsel could not be retained and where inadequate awards of damages would result from "small town" concepts of money value.

These opposing views were supported by voluminous testimony on both sides, including recital of illustrative cases that supported the particular argument. These cannot be summarized here except as they may pertain to the issues selected for special comment. Nearly all of the witnesses had one thing in common, however, in that they were lawyers of experience and learning. That being the case, they all drew upon the lessons of legal history to support their contentions. Some analysis of the judicial history of FELA, as related to this bill, is therefore pertinent.

Senator Langer. If a farmer in Nebraska were to ship a carload of hogs to Chicago, Ill., over the Union Pacific connecting with the Chicago Northwestern Railroad, and a wreck occurred in Iowa in which he lost his arms and legs, if this proposed legislation became effective and the railroad did not run through a county where he resided, he would be compelled to sue in some county in Iowa, would he not?

Mr. Freels. No, sir. He could sue in any Federal court. He could sue in the Federal court. He is not limited to State court jurisdiction, sir.

Senator Langer. I understand, but it would have to be a court in Iowa.

Mr. Freels. In Iowa or the point of his residence.

Senator Langer. For the damage to the hogs he could sue any place.

Mr. Freels. That is right, sir.

Senator Langer. But for damage for losing his arms or a leg, he would have to go to a place maybe a thousand miles away from home.

Mr. Freels. There is no racket in transporting cases as to livestock, sir.”

*Hearings before Subcommittee No. 4 of the Committee on The Judiciary, House of Representatives, on H.R. 1639, 80th Cong., 1st Sess. 12 (1947).*

*Ibid. 61.*
JUDICIAL CONSTRUCTION OF FELA

In their testimony urging a narrowing of the venue election open to employees entitled to benefits of FELA, the proponents of H. R. 1639 and its Senate counterpart took the position that amendment had been made necessary by the Supreme Court's interpretation of the Act in the *Miles* and *Kepner* cases. These witnesses apparently desired to convey a belief that, prior to the decision of these cases, the enforcement of rights under the Act were under sufficient judicial control to assure freedom from abuse whereas, since those decisions, such control had been abolished leaving defendant railroad employers defenseless against unscrupulous plaintiff-employees and their counsel. To determine whether this allegation is true or not requires some review of the earlier cases.

The power of Congress to enact the substantive provisions of this Act and to specify that it should be enforceable in state as well as federal tribunals was very early decided. In *Mondou v. New York, New Haven and Hartford R. R.*,17 the Supreme Court disposed of a group of cases which had accumulated in state and lower federal courts in the two years following enactment of FELA with conflicting results. The issues raised in those proceedings were determined as follows: (1) the Act was properly within the province of Congress to enact under the commerce clause, (2) insofar as industrial accidents on interstate railroads were concerned, the common law of both state and federal jurisdictions had been superseded, (3) no one has a vested right to the continued existence of common law remedies or defenses when the legislature elects to abolish them under a constitutionally authorized grant of power, and (4) a state may not refuse to provide a forum for adjudication of cases under the Act on the sole ground that the policy of the Act is contrary to the public policy of the state.18 More than twenty years later, the

17Second Employers' Liability Cases, 223 U. S. 1 (1912).

18The *Mondou* case also presented a question regarding the validity of placing federal judicial powers in the state courts. That issue was not considered extensively, however, and appears not to have been very seriously argued in any of the subsequent litigation involving FELA. It has received extensive treatment outside the courts, notably in Barnett, "The Delegation of Federal Jurisdiction to the States", 3 Selected Essays on Constitutional Law 1202 (1938) and the general question was clearly decided in connection with wartime price control legislation. *Testa et. al. v. Katt*, 330 U. S. 386 (1947). The question is one of jurisdiction, rather than venue, and is therefore outside the scope of this discussion. It appears, however, that there exists an area for research on the relationship of such delegation practices to the specific provisions of Article III, Sec. 2 of the Constitution, particularly as that article has been construed in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 328 (U. S. 1816) which seems to say that, as to litigation falling within the federal
Court found it necessary to repeat and strengthen this later rule, when it held that state courts may not refuse jurisdiction over subject matter within their sphere of competence merely because the right being enforced is created by federal statute, rather than state policy. 19

Fundamentally, however, the Second Employers' Liability Cases fixed the general rules which have governed jurisdiction and venue under the Act in all proceedings since they were decided. Subsequent cases (including, it is submitted, the more celebrated Miles and Kepner affairs) have been mere refinements of the original rule announced as follows:

"... There is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure." 20 (Italics supplied)

Within a few years after this guide was established, the Court had occasion to amplify the proper scope of "competent jurisdiction" (as used in FELA) or "ordinary jurisdiction" (as used in the Mondou case). In Douglas v. N. Y., N. H. and H. R. R., 21 a citizen and resident of Connecticut who had been injured in an accident in that state brought suit in New York under FELA. There was in force in New York, however, a statute which had closed the state's courts to transient litigation except when brought by residents of New York and had been so construed as to prevent assertion of Douglas' claim, even though the defendant railroad was doing business in New York. The statute was attacked as being in conflict with FELA as applied in the Mondou case and therefore void. This argument was rejected by the Court, Mr. Justice Holmes observing that the Federal Act did not purport to require that state courts accept jurisdiction of suits arising under it, but only empowered them to do so. The Court further held:

"But there is nothing in the Act of Congress to force a duty upon such Courts as against an otherwise valid excuse." 22

judicial sphere, a right to a federal forum exists and may not be denied. Whatever may be the result of such investigation, anyone who seeks to open the matter for argument faces the prospect of being foreclosed to present it after so long a period of practice to the contrary. Gallaway v. U. S., 319 U. S. 372, 389 (1943).

20223 U. S. 1, 56-57 (1912).
21279 U. S. 377 (1929).
22Id. 388.
Since the courts of New York were not open to transient suits generally, a "valid excuse" existed for refusing to enforce FELA actions brought by non-residents. 23

While it is generally recognized as one of the landmark cases on the subject, the Douglas case appears not to have been the first pronouncement of the above rule in connection with FELA. Thirteen years before, in a case which is more famous for another constitutional principle, 24 it had been argued that the state courts could never refuse a hearing to FELA cases since the Mondou case established the principle that rights derived from federal statute must be enforced by state tribunals. This was decided, the Court asserting that the Mondou case only held that when enforcement of a right was within the scope of state court authority it could not refuse a comparable FELA case solely on the ground that it was federally created.

In the period that elapsed between the above cases, the Court had decided three others that are pertinent to the present issue. Michigan Central R. R. v. Mix 25 involved an accident in Michigan after which the plaintiff had moved to Missouri. The defendant operated no lines in the latter state, maintaining only a freight agent there. It was held that this activity would not support venue of a suit on the foreign accident and the suit dismissed. A contrary result was reached in Hoffman v. Missouri ex rel. Foraker 26 wherein plaintiff, a citizen and resident of Kansas, brought an action in Missouri for wrongful death arising from an accident in Kansas. The defendant railroad was a Missouri corporation, but contested the trial court's right to hear the case because all witnesses and evidence were located in Kansas. Mr. Justice Brandeis spoke for a unanimous Court in holding that these factors of relative convenience and burden did not control when a suit under FELA involved a domestic corporation doing business in the county where the action is brought. Although this holding seems wholly proper, even under the normal and traditional concepts of jurisdiction and venue for transitory actions unaffected by FELA, the Court took occasion to

23 A second ground for attacking the validity of the New York statute, that it transgressed the "privileges and immunities" clause, was rejected since the statute based its discrimination on residence, rather than citizenship. Id.

24 Minneapolis & St. L. R. R. v. Bombolis, 241 U. S. 211 (1916). The main contention of the defendant employer, that the Seventh Amendment was applicable to proceedings in state courts, was also rejected.

25 278 U. S. 492 (1929).

26 274 U. S. 21 (1927).
place it in correct perspective with relation to the commerce power by observing:

“It [defendant railroad] must submit, if there is jurisdiction, to the require-
ments of orderly, effective administration of justice, although thereby interstate commerce is incidentally burdened”.27

It had been argued in the Foraker case that, despite the special venue provisions of the act, the matter should be governed by the consider-
ations which determined in Davis v. Farmers' Corp. Equity Co.28 That case did not arise under FELA or any similar Federal statute. It was an action brought in Minnesota to recover for loss of goods shipped on an interstate carrier. Neither plaintiff nor defendant were Minnesota corporations; the transaction had no relation to that jurisdiction but was brought under a statute making all foreign interstate carriers liable to process and suit as a condition of doing business in the state. The railroad maintained a traffic soliciting agent there. The state court's jurisdiction was contested by the wartime Director General of Railroads on the ground that such invitations to transient litigation, when there was such slight legitimate basis for jurisdiction, was a burden on commerce. This view prevailed and the state statute was declared void at least to the extent that it had been construed to apply to situa-
tions represented by that case.

The supporters of H. R. 1639 have made much of the Davis case and, with only slight regard for the difference between the power of Congress to regulate interstate commerce and the prohibition on the states from burdening it, have pressed for adoption of its rationale in fixing legislative policy. Two very significant factors are conveniently glossed over in urging this action. First, the Davis case by no means places a ban on all out-of-state litigation where railroads are concerned—even as to foreign-operative facts. The same justice who wrote the opinion in that case pinpointed its real purport when he refused to apply it in the Foraker case. In the latter opinion it was emphasized that jurisdiction could not be conferred under the facts of the Davis case because none of the bases for its exercise were there present. Whether or not the usually recognized grounds for jurisdiction or venue at another place were shown, the proposal contained in H. R. 1639 would limit the plaintiff to the places enumerated. To that extent, there-

27Id. at 23. This passage looks forward to the more bold and strongly contested dictum contributed by Mr. Justice Reed in the Miles case that “The Missouri court here in-
volved must permit this litigation”.

28262 U. S. 312 (1923).
fore, the *Davis* case does not offer convincing authority. Second, in all the statistical data compiled for Congressional consumption, there is no clear showing that the proclaimed abuses of FELA have, in practical fact, been of the type that transgressed the basic idea of the *Davis* case. It is one thing to report (from a survey consisting of reports from railroad law departments) that 776 suits were imported into Illinois in the years 1941-1946.\(^{20}\) It is quite another when the same reports fail to distinguish between those cases which have no legitimate basis for venue and those which, apart from FELA, might have been heard there under the general venue statute or under common law concepts of venue.

Thus, after some thirty years of litigation, it had been fairly well settled that (1) a state court may not refuse to provide a forum solely on the ground that a federal, rather than state right is involved, (2) jurisdiction may be refused by a state court if the courts of the state are not open to foreign litigation generally, (3) there must be some real basis for assumption of jurisdiction, that is, the defendant must be doing business in a real sense, and not merely maintaining a traffic agent, in the state where the action is brought.

The *Miles* and *Kepner* cases followed. Despite the wide attention which they received because of the pointed language used by some of the justices, it does not appear that they contribute significantly to the settled law on the subject. Fundamentally, they hold merely that previously announced rules may not be defeated through the indirect method of injunctions issued by state courts prohibiting plaintiff residents of those states from bringing their suits in foreign state or federal courts. This would seem to follow naturally from what had previously been said.\(^{30}\)

The House Committee, in its report recommending favorable consideration of H. R. 1639, supported its views with the following summary of the general law governing venue:

"In correcting the evils above referred to, the legislation does not deny to claimants the opportunity to have their cases tried in an appropriate forum. One of


\(^{30}\)The *Miles* case did, however, reverse previous views of state courts. As early as 1918, a plaintiff had been enjoined by the courts of her state of residence from bringing an action in Minnesota. *Reed's Adm'x v. Illinois Central R. R.*, 182 Ky. 455, 206 S. W. 794 (1918). Subsequent decisions involving similar petitions for injunctive relief appear not to have questioned the power of state courts to grant it, but have been solely concerned with the equities involved. *See, e.g.*, *Chicago, M., St. P. & P. Ry. v. McGinley*, 175 Wis. 565, 185 N. W. 218 (1922), discussed below, note 36.
Aside from the fact that this view ignores past experience which indicated that a wider choice of venue was necessary to achieve the ultimate aims of the Act, the conclusion of the Committee seems inexcusably naive in alleging that there is a relationship of "peerage" between eligible jurors in a West Virginia county seat and a railroad corporation organized under the laws of Delaware and operating lines and mines in eight or ten industrial states. Beyond that, however, the conclusion expressed seems wrong according to the settled rules laid down by the Supreme Court. An action for personal injuries or wrongful death is transitory, and the Court has held invalid a statute of an organized territory purporting to prohibit the bringing of an action outside that territory on an accident occurring therein. This view puts a stamp of constitutional sanctity on the right to bring a transitory action wherever the defendant may be found. It is undoubtedly true that Congress, in creating a new statutory right or in substituting a statutory remedy for a preexisting common law protection, can limit the choice of jurisdiction and venue. But in so doing, it may not rely on supposed historical precedent to the effect suggested by the above excerpt.

It is charitable to regard the Committee's summary as resulting from the testimony it received, rather than any intentional effort to bolster a purely public policy decision with the color of judicial report. That view would be more appropriate if the report in question had emanated from the Senate committee, for, during its hearings, one prominent witness cited Blackstone and Dean Pound on the history of common law venue in England as authority for the view that transitory actions were very greatly restricted by the statute of 6 Richard II and, inferentially, that the limitations imposed by that fourteenth century act continue to characterize our jurisprudence. His display of legal learning ignores such leading statements of modern law as that of Mr. Justice Cardozo in *Loucks v. Standard Oil Co. of New York* and the federal cases cited therein which are diametrically opposed to his contention.

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31 Cited *supra*, note 13, 8.
32 This principle is almost too well established to warrant argument. The best discussion by the Supreme Court may be found in *Dennick v Central R. R.*, 103 U. S. 11 (1881).
34 *Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, on S. 1567 and H. R. 1639*, 80th Cong., 2d Sess., 103 (1948).
35 224 N. Y. 99, 120 N. E. 198 (1918).
Undoubtedly, the most convincing argument in support of H. R. 1639 is that which pertains directly to the ethical conduct of certain practitioners of the legal profession. The bill’s supporters were able to paint a very lurid picture of organized “ambulance chasing” conducted on a big business basis and so operated that the offenders were able to use state boundaries as effective shields to prevent punishment of their wrong-doing. Moreover, these same spokesmen presented, though perhaps not intentionally, a shocking indictment of their own profession in general by their frank admission that reputable members of the profession must share in the responsibility for the situation which exists because of their failure to report and to institute disciplinary action against their unprincipled brethren.

The problems presented in this connection are not novel, nor are they restricted to FELA litigation. The legal periodicals have for decades contained exhaustive discussions of solicitation and its companion evils. Likewise the courts have taken notice of the matter in cases which did not involve questions of disbarment. Unfortunately, however, progress in eradicating abuses is slow and it is indeed disheartening to discover the shortcomings of an honored profession becoming the most potent argument in favor of legislation restricting a substantial right previously accorded to a large body of our citizens.

Testimony before the committee showed that the great volume of FELA litigation tends to gravitate toward some half dozen metropolitan centers, all of which rank as major rail terminals. Chief among them were: Chicago, St. Louis, New York, the Twin Cities of Minneapolis and St. Paul, Los Angeles, and Oakland. According to reliable and informed witnesses, the most flagrant abuses exist in Chicago where a celebrated disbarment proceeding has served to show how the business of soliciting cases has been organized on a nation-wide scale with professional runners employed on a permanent basis. Much attention was focused on St. Paul, however, and it is of interest to note that this unsavory reputation has been given circulation by the highest court of Minnesota, by the Supreme Court of a neighboring state, and by

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30Chicago, M., St. P. & P. Ry. v. McGinley, supra, note 30. This case and its true significance were the subject of considerable dispute during the course of hearings on H. R. 1639. It was cited and quoted by a witness favorable to the bill as evidence of “an open scandal recognized as such by courts and members of the bar” (Hearings, supra, note 33, 34). The leading spokesman for the opposition was quick to point out that the court in that case had minimized the burden created by interstate transportation of lawsuits and had dismissed a petition for injunction against a suit in Minnesota (Id. 236).
the Supreme Court of the United States. The former tribunal has observed that a "mysteriously large number of foreign personal injury cases" find their way into the state's courts. In a marginal note to the Davis case, the United States Supreme Court called attention to a message from the State's governor to the Legislature on February 2, 1923, reporting that a survey of district court dockets in 67 of the 87 counties showed that there were pending 1,028 personal injury suits involving non-resident plaintiffs and foreign railroad corporations, and the staggering total of $26,000,000. This tabulation included only those railroads not operating lines in the state and does not differentiate between actions brought under FELA and those based on other facts. In any event, the Davis case would have cured the situation with respect to the latter, while the interpretation placed by the Court on the term "doing business" in the Mix case effectively shut off FELA cases where the defendant carrier was not operating lines.

In 1930, the Minnesota court was faced with the clear issue as to whether it would permit continuance of practices which had caused so much concern. In Boright v. Chicago, R. I. and P. R. R. a Kansas resident had brought suit in Minnesota against a defendant which operated lines in both states, but based upon an accident in Kansas. Prior to that time, as is evidenced by the Winders decision, the Minnesota court had said that it could not bar these suits because to do so would contravene the privileges and immunities clause. In the interim, however, the Douglas case had been decided by the Supreme Court, effectively destroying this ground for refusal to purge the dockets. If, in the absence of a clear legislative directive as to the reception of transient litigation, the court had declared the local law as prohibiting such foreign cases generally, then FELA could not force a state to provide a "court of competent jurisdiction" to hear its cases. Over the strong dissent of one of its most respected members, however, the court refused to take this step. Instead, and after considering the effect of the Douglas case, it held that dismissal of the action at bar was still beyond its power because "such actions as this could be maintained under our repeated holdings—under our law from the earliest times", and went on to express the view that it was the duty of state courts to help carry the burden of this litigation.

38 Supra, note 28, 316 (footnote 2, by the court).
39180 Minn. 52, 230 N. W. 457 (1930). The case is severely criticized in a full discussion, Note, 15 MINN. L. R. 83 (1930).
No constructive result will be achieved by indulging in hindsight criticism of a choice exercised by a respected court nearly two decades ago not to reverse its traditional denial of the \textit{forum non conveniens} doctrine. In its defense it may be observed that the legislature of the state, with far greater opportunity, has taken no steps to stifle the odium that has been heaped on the state by reason of its "business" in lawsuits. Nor is there evidence that any substantial bar activity has resulted in punishment of those practitioners responsible for the adverse reputation.

Unfortunately for the lay public at large and for railroad workers in particular, this history of one state's experience is not wholly restricted to that jurisdiction. The efforts of \textit{Iowa}\textsuperscript{10} and \textit{Tennessee}\textsuperscript{41} to meet the problem of ambulance chasing have been successfully challenged. The courts of Illinois have been burdened with lengthy and sordid judicial proceedings which do not warrant optimism for success in that direction.\textsuperscript{42} Those who desire to force railroad workers to seek redress for industrial injuries in isolated communities, where competent counsel is not available and expert medical testimony is beyond the reach of process, are able to marshal staggering statistics indicating the extent to which tramp litigation exists. The regrettable fact is that these lump figures do not differentiate between those brought under FELA and transitory actions generally. Nor are they broken down to show whether there are special facts which would make the "transportation" not only innocent, but natural and proper.

\textbf{CONCLUSION}

Despite the above reservations concerning the extent to which FELA is responsible for the general abuses cited by H. R. 1639's supporters, enough has been shown to warrant serious concern and action by the Congress. The difficult task, however, is to find means of breaking the grip held by unconscionable persons on this humanitarian legislation without also penalizing its beneficiaries. It has likewise been shown that H. R. 1639 would have the latter result in various ways and in a sufficient percentage of cases to warrant its rejection as the satisfactory solution.

The history of FELA in the courts and of modern social legislation

\textsuperscript{10}\textit{Chicago, M. & St. P. & P. Ry. v. Schendel}, 292 F. 326 (C. C. A. 8th, 1923), held void a state statute aimed at non-resident solicitors.

\textsuperscript{41}\textit{Tennessee Coal Co. v. George}, 233 U. S. 354 (1914).

\textsuperscript{42}E.g., that discussed in \textit{Hearings}, supra, note 33, 40 ff.
compels a conclusion that three avenues are open, two of which are alternatives and the other concurrent to either of them.

*Give a right and not a lawsuit.* Mr. Justice Jackson's judicial wisecrack in the *Miles* case contains a substantial nugget of truth. In failing to go beyond a 1908 concept of social responsibility for the costs of industrial accidents, the Congress itself must accept some of the criticism currently borne by the courts, the legal profession and injured plaintiffs. Compensation for loss of livelihood should certainly be raised above the level of an interstate crap game. While there is room for activity by the unprincipled operator before an administrative agency as before courts, the experience of state workmen's compensation tribunals has not indicated this problem to be a significant one. The relative advantages of lawsuit vs. administrative adjudication must be settled by the policy-making agencies of the nation. Until they do, however, the great preponderance of the latter in state practice would seem persuasive. In any event, by substituting a single authority for the multitude of courts now open to these cases, the question of venue would disappear entirely.

*Enlarge judicial discretion to do justice.* *Forum non conveniens* is the very essence of this problem. In policing the administration of justice, authority, opportunity to observe and public esteem are the chief weapons of reform and these are uniquely combined in the make-up of our judicial system. Whether or not a Wisconsin case being prosecuted in Minnesota involves "ambulance chasing", the essential question is whether the scales of justice are so weighted that substantial justice will result without placing an onerous burden upon the defendant. The mandatory prescription of venue without regard to judicial discretion has developed flaws and there is ample ground for believing that any effort to revise the present formula will result in new complications a decade or two hence when distances have again been telescoped by modern instruments of transportation and communication. Any success in this direction would apparently have to be achieved over the combined opposition of both the railroad industry and its organized labor force if the position of those two interests during the last Congress is to be taken as indicative.48 Short of administrative super-

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48Seven of the eight members of the House Committee who declined to subscribe to the majority recommendation joined in a minority report in which a substitute proposal was presented. This substitute would have made the general venue statute applicable to FELA actions and the report specifies that the "'forum non conveniens' doctrine would be applicable as a check against wanton bringing of lawsuits in improper jurisdictions." (H.
vision, however, judicial supervision appears to offer the most flexible device for assuring that the public interest, as well as that of the parties, is effectively preserved.

Professional self-discipline. Whatever the ultimate decision on the above issues may be, consideration of H. R. 1639 has indicated conclusively that the legal profession is faced with a serious internal and social responsibility. The proponents of the bill have put great stress on Canons 27, 34 and 35 of the Canons of Professional Ethics adopted by the American Bar Association. In so doing, they are to be commended, but it is to be regretted that they have not emphasized the great Canon, 32, and its co-equal, 29. The great need is for a vigilant bar which will be alert to purge itself of those whose conduct is contrary to its high purpose and responsibility. An attorney or a court failing to condemn unethical practices condones them. Reluctance to initiate grievance proceedings is not a privilege to be indulged in, particularly when the rights of large segments of the public are jeopardized thereby. If the bars, courts, and legislatures of the individual states find that they are incapable of controlling these abuses and if "ambulance chasing" represents a burden on commerce to the extent alleged, then the federal power is broad enough to remove the burden by making interstate solicitation of litigation an indictable offense and grounds for revocation of the right to practice in the courts of the United States.

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R. Rep. 613, supra, note 13, Part 2, 5). During the Senate hearings, the author of the minority report, Representative Devitt of Minnesota, testified that neither the railroads nor the brotherhoods favored it, but that it failed of adoption by only a few votes in the House (Hearings, supra, note 33, 258). The record indicates that the vote on this substitute was 61 to 106 (93 Cong. Rec. 9193 (1947)).
ADMINISTRATIVE LAW

A BILL TO REMOVE THE FACT-FINDING POWER OF THE FEDERAL TRADE COMMISSION

The administrative process is the political result of the industrial revolution. Its basis is the need for a specialized exercise of governmental power by agencies of the government, each skilled in the techniques and conversant with the problems of the particular industries and phases of economic activity subjected to its jurisdiction.

The Federal Trade Commission has been a notable example of the administrative process. It was conceived as an administrative agency composed of men especially qualified to examine and determine questions of competition and monopoly. While it also has jurisdiction over matters of false advertising, the matters toward which H. R. 3871, 80th Congress, is primarily directed are those of unfair trade practices and monopoly. It makes investigations and conducts quasi-judicial hearings on the basis of which adjudicative orders are issued, which are enforceable in the courts. The Act provides that "The findings of the Commission as to the facts, if supported by testimony, shall be conclusive" on judicial review. It is aided in the discharge of its duties by a staff of experts, accountants, economists, and other specialists, as well as examiners and attorneys.

The crux of H. R. 3871 may be simply stated. The bill would deprive the Federal Trade Commission of its quasi-judicial power. Instead of conducting its own adjudicative hearing in an unfair trade practice case, the bill would require the Federal Trade Commission to file a complaint in the appropriate district court of the United States. The court would then try the issues of law and fact, and issue an appropriate order.

The bill would amend Section 5(b)(1) to read as follows:

"(1) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding in respect thereof would be to the interest of the public, it shall, by any of its attorneys designated by it for such purpose, file in the district court of the United States for the district, or in the United States court of any Territory, in which such person, partnership, or corporation resides or maintains his or its principal place of business, a complaint stating its...

\[38\text{ Stat. 717} (1914), 15 \text{ U. S. C. \S} 41.\]

\[38\text{ Stat. 719} (1914), 15 \text{ U. S. C. \S} 45(c).\]
charges in that respect and praying that the court enter an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice.  

It is further provided that the Federal Rules of Civil Procedure shall apply, and that for good cause shown the court may allow any person, partnership or corporation to intervene in the proceeding. Upon conclusion of its hearing the court may issue an appropriate order in the nature of a permanent injunction, which order shall be subject to review in accordance with sections 128 and 240 of the Judicial Code, as amended.  

It is readily apparent that the effect of this is to substitute adjudication by an unspecialized judiciary for adjudication by an administrative body of subject-matter specialists. In so doing the bill challenges the fundamental premise of administrative law—that various phases of our national life requiring government regulation have become so complex and specialized as to call . . . "for experience and training which a court might not possess, but which could be found in a commission especially selected for the purpose, and authorized to employ technical experts as well as lawyers for its guidance." Mr. Gerard C. Henderson, writing in 1924, summarized this rationale with respect to the Federal Trade Commission: "The reason for conferring upon the Commission this typically judicial function must have been that Congress expected that the problems which would be encountered would be of a technical and specialized character. . . . It was doubtless the belief of Congress that the Commission could perform more satisfactorily than a court the task of making findings of fact in the special field over which it was given jurisdiction." Such a fundamental change in the administrative process as is proposed by H. R. 3871 would be equally applicable to other administrative agencies. The proposal is therefore basic and far-reaching in its implications.

The primary reason for proposing such a fundamental change would seem to be a conviction that the proposed procedure would be fundamentally fairer. The majority report of the House Committee on Interstate and Foreign Commerce on the bill states that the proposed procedure "would replace the present procedure under which the Commis-

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Ibid.
Henderson, Judicial Control over Administrative Determinations 92, Yale University Press, 1924.
Ibid.
sion itself is judge and jury, as well as complainant and prosecutor, in cases involving unfair methods of competition and unfair and deceptive acts and practices in commerce. Other reasons advanced, including delay and excessive travel in the present Commission procedure, would seem to be secondary, and by their nature would not require so radical a change in the administrative process. Nine members of the House Committee on Interstate and Foreign Commerce dissented from the majority report approving the bill.

It has long since been firmly established by decisions of the Supreme Court that administrative procedure, such as that now followed by the Federal Trade Commission, requiring notice and hearing and a determination on the record, satisfies the requirements of the due process clause of the Constitution. Mr. Chief Justice Stone in the case of Chamber of Commerce v. Federal Trade Commission, summar-case of Chamber of Commerce v. Federal Trade Commission, summarized these requirements: "... there are certain elements of fair play required by the Constitution which are necessary in any character of hearing affecting personal or property rights. In respect to hearings before administrative bodies (as well as judicial tribunals) those elements include (1) a reasonable time and place for hearing where interested parties may attend with reasonable effort; ... (2) reasonable notice to interested parties; ... and (3) a reasonable opportunity for presentation of such evidence and argument as are appropriate to the proceeding."

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3 F. 2d 675 (N. D. N. Y. 1926); For discussions of due process in administrative proceedings and the elements thereof see F. C. C. v. Pottsville Broadcasting Co., 309 U. S. 134, 60 S. Ct. 437, 84 L. Ed. 656 (1940); N. L. R. B. v. Donnelly Garment Co., 330 U. S. 219, 67 S. Ct. 756, 91 L. Ed. 854 (1947); Market Street Ry. Co. v. Railroad Commission of California, 324 U. S. 548, 65 S. Ct. 770, 89 L. Ed. 1171 (1945); Federal Communications Commission v. National Broadcasting Co., Inc. (KOA), 319 U. S. 239, 63 S. Ct. 1935, 87 L. Ed. 1374 (1942); S. E. C. v. Chenery Corp., 318 U. S. 80, 63 S. Ct. 454, 87 L. Ed. 626 (1943); N. L. R. B. v. Express Publishing Co., 312 U. S. 426, 61 S. Ct. 693, 85 L. Ed. 930 (1941); Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1937); Norwegian Products Co. v. U. S., 288 U. S. 294, 53 S. Ct. 350, 77 L. Ed. 796 (1933). See also concurring opinion of Mr. Justice Brandeis in St. Joseph Stockyards Co. v. U. S., 298 U. S. 38, 73, 56 S. Ct. 720, 80 L. Ed. 1033 (1935), in which Mr. Justice Brandeis said: "The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be
The procedure of the Federal Trade Commission complies with all constitutional requirements for administrative due process of law. The legislative proposal contained in the bill would therefore exceed the constitutional requirements of fair play under the due process clause. The majority report on the bill supports this in part by the contention that the scope of judicial review is inadequate to protect the rights of the parties and that a finding of fact de novo by the courts would be preferable to the conclusive fact-finding of the Commission on the basis of substantial evidence. The committee report states in this connection:

"The Circuit court must uphold the Commission if its order is based on findings supported by substantial evidence. The Commission is not required to establish that its findings are supported by the greater weight of the evidence. Therefore, unless the defendant is able to break the testimony of every witness on behalf of the Commission at the hearing, any appeal from the Commission's decision may well be unavailing.

Leading businessmen and attorneys practicing before the Commission have testified before the committee that the present procedure is unfair to defendants, since they are judged by their accuser. Numerous decisions have been cited in which the circuit courts have said that had they the power to weigh the evidence, they would not have sustained the Commission.

The Committee feels that public confidence in the Commission would be improved and the usefulness of that body enhanced if it ceased to be the adjudicating body in cases which it pre-judges and prosecute."10

The assumption would seem to be that a court of law is more competent to decide questions now within the Commission's jurisdiction than is the expert agency itself. This, of course, presents the question of whether the subject matter of unfair trade practices and monopoly is such as to require expert handling. Students of the problem have felt that the subject matter required expert administrative handling, and that experience with the Sherman Act had disclosed the weakness of a strictly legal approach to the problem. Mr. James M. Landis, formerly Dean of the Harvard Law School, and former Chairman of the Securities and Exchange Commission, and of the Civil Aeronautics Board, in an address before the Swarthmore Club of Philadelphia, February 27, 1937 noted the extension of the commission technique of government to such problems as unfair competition and stated: "One driving impulse in the creation of these new instruments of govern-

ment was the need for specialization in the art of administration. The complexity of the situations dealt with demanded men who could give their entire time and energy to the particular problem. And for that time and energy to be effective, means for carrying out policies that they devised had to be given them. It was not enough to have them merely in the position of powerless planners.  

Another expert speaking from experience with the Federal Trade Commission has said:

"In cases which do not involve misrepresentation, and especially in the cases which involve methods of competition held to be unfair because of their tendency improperly to hamper or restrain competitors, or to lessen competition, questions of economic or business judgment are constantly involved. It is true that they are the kind of questions which the courts have for a generation been considering under the Sherman Law, but dissatisfaction with the courts was . . . one of the principal motives which actuated Congress in setting up an administrative tribunal.

"In the Clayton Act, the language more clearly suggests a non-legal criterion. The phrase 'where the effect may be . . . to substantially lessen competition or tend to create a monopoly in any line of commerce,' qualifies, in one form or another, all the prohibitions over which the Commission has jurisdiction, and it implies an exercise of economic or business judgment rather than a finding of law. This is true whether the phrase be taken to refer to the probable effect of the price discrimination, tieing contract, or other practice, under the particular circumstances of the case at issue, or whether it refers to a general economic tendency inherent in the practice under any circumstances. Upon either interpretation, the question involved seems particularly appropriate to the exercise of administrative judgment. Experience with the Sherman Law has shown the futility of the attempt to find a strictly legal solution of the problem of monopoly and restraint of trade."112

The Attorney General's Committee on Administrative Procedure took the view that expertness is a less important factor in the case of the Federal Trade Commission than in the cases of some other administrative agencies such as the Federal Communications Commission and others regulating industries having a highly developed technology. The Attorney General's Committee stressed the importance of continuing governmental responsibility. The report of the committee states:

". . . Congress has also employed the administrative process to perform specialized and continuing regulation not of particular industries but of activities cutting across many industries. For example, Congress, believing it necessary to

supervise and check competitive practices which tended toward monopoly and restraint of trade, in 1914 created the Federal Trade Commission to prevent unfair methods of competition. In 1935 the National Labor Relations Board was established to prevent unfair labor practices. Both objectives were declared by Congress to embody a national policy. In the case of these two agencies, the factor of technical expediency plays a less important part than in the others; but the advantages of continuous attention and a clearly allocated responsibility are substantially the same. If the initiative for enforcement were to be left to the injured persons immediately concerned, they might often be too weak or timid or discouraged to bring the necessary proceedings, in which case, so Congress thought, the public interest would suffer, since the public interest called for the elimination of the particular practices."

The Attorney General’s Committee on Administrative Procedure stressed the need for uniformity in application of law which is satisfied by a single agency but is impossible with a multiplicity of courts.

"The 94 Federal district and territorial courts are structurally incapable of the same uniformity in the application of law as a single centralized agency. . . . The need of bringing to bear upon difficult social and economic questions the attention of those who have time and facilities to become and remain continually informed about them was recognized very early. . . ." 14

Assuming that the subject matter does require regulation by experts, there still remains the question of separation of functions, a fundamental problem in the administrative process. The criticism of the committee that the Commission is "judge and jury, . . . complainant and prosecutor"15 is not without merit. Certainly the potentialities of unfairness are inherent in this situation. The difficulty in its solution lies in the problem of getting integrated regulation of a complex economic situation while retaining separation of responsibility for investigation and prosecution on the one hand and adjudication on the other. The Administrative Procedure Act has made a long stride toward the solution of this problem as has the Federal Trade Commission itself by its own rules. Section 5(c) of the Administrative Procedure Act provides with respect to presiding officers at hearings that: "Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the

14 Id. at 14, 15, 16.
performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings.\(^{16}\) The Rules of Practice, Federal Trade Commission, Rule XXV provides in part: "No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the commission, and no party respondent or his agent or counsel in any case shall, in that or a factually related case, participate or advise in the decision of the commission, except as a witness or as counsel in public proceedings." Section 11 of the Administrative Procedure Act attempts to provide a safeguard from possible coercion of trial examiners by superior administrative officials.\(^{17}\) It places examiners in a position of relative security as to tenure and provides for their removal only for good cause established and determined by the Civil Service Commission.

**Conclusion**

While the administrative process is still evolving and a scrutiny by the legislature is a wholesome stimulus to its proper development, H. R. 3871 proposes "radical surgery" on the very heart of the administrative process itself. It is submitted that the complexities of modern business activity in connection with monopoly and unfair trade practices warrant the continued exercise of expert analysis by the Federal Trade Commission, not only in investigation and prosecution, but also in the field of fact-finding and adjudication. The Commission's procedure does not violate due process of law and time should be allowed to determine whether Sections 5 and 11 of the Administrative Procedure Act provide adequate safeguards in the exercise of fairness and objectivity in quasi-judicial determinations.

**HORACE BUCHANAN BAZAN**


FACTORS CONSIDERED BY THE CIVIL AERONAUTICS
BOARD IN MERGER, CONSOLIDATION, OR ACQUISITION OF CONTROL OF AIRLINE CASES

SECTION 408 of the Civil Aeronautics Act\(^1\) makes consolidations, mergers, and acquisitions of control involving certain types of aeronautical companies illegal unless approved by the Civil Aeronautics Board. Covered by this section are mergers or consolidations of air carriers with other air carriers, with companies engaged in any other phase of aeronautics, or with common carriers. Prohibited without Board approval is the acquisition of control of an air carrier by the following types of companies: 1. another air carrier, 2. a person controlling an air carrier, 3. a common carrier, or 4. a person engaged in any phase of aeronautics; and it also prohibits a purchase, lease, or contract to operate a substantial part of the properties of any air carrier by one of these types of companies without Board approval. The Board must also approve the acquisition by an air carrier, or person controlling an air carrier, of control of a company engaged in any phase of aeronautics otherwise than as an air carrier.\(^2\) The Board is authorized to approve any such transaction "upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe."

No discussion will be undertaken in this paper of the extremely controversial issue of surface carrier participation in air transportation.\(^3\)

To approve a proposed transaction, the Board must find it to be consistent with the "public interest." Section 2 of the Act\(^4\) contains a statement of national policy and sets forth certain factors to be considered in determining whether or not a proposed transaction is in the public interest. Thus any Board decision under Section 408 approving a proposed merger, consolidation, or acquisition of control must be arrived at in the light of the requirements of Section 2. The declaration of national policy as enunciated in Section 2 has been recognized


\(^{2}\)See Neal, Some Phases of Air Transport Regulation, 31 Georgetown L. J. 355.

\(^{3}\)For a complete discussion of this problem, see Hickey, Surface Carrier Participation in Air Transportation Under the Civil Aeronautics Act, 36 Georgetown L. J. 125 (Jan., 1948); Tomlinson, Surface Carrier Participation in Air Transportation, 34 Georgetown L. J. 64 (1945).

\(^{4}\)52 Stat. 980 (1938) as amended 54 Stat. 1235 (1940), 49 U. S. C. 402 (1940). For a complete discussion of the legislative history and coverage of the Act, see Rhyne, Civil Aeronautics Act Annotated (1st ed 1939)

by the Board as the ultimate standard in determining if a proposed transaction is in the public interest.

"‘Public interest’ as used in the Act," the Board has repeatedly declared, is not a mere general reference to public welfare, but has a direct relation to definite statutory objectives. These objectives include those set forth in Section 2 of the Act which directs the Board, in the exercise and performance of its powers and duties under the Act, to consider, among other things, as being in the public interest (subsections a-f of Section 2)."

The recent and important case of American Airlines, Inc., Acquisition of Control of Mid-Continent Airlines, Inc. contains an excellent discussion of the various factors to be considered by the Board in arriving at the public interest. Said the Board, "The ultimate question to be decided is whether the proposed acquisition of control is not consistent with the public interest. Adjudication of this issue is a balancing process. No single factor is controlling; rather we must weigh all the considerations disclosed by the evidence relating to the high purposes enumerated in Section 2 of the Act, in order to calculate, as nearly as may be determined, the probable net effect of the proposed transaction

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6E.g., United Air Lines Transport Corp.—Acquisition of Western Air Express Corp., 1 C. A. A. 739; Braniff Airways, Inc. et al., Acquisition of Aerovias Braniff, S. A., 6 CAB 947.

7Sec. 2. In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

7 7 CAB 365.

*Italics added.
upon the public interest.” The Board decided that the combination would not be well coordinated (“The evidence points unwaveringly to the conclusion that the systems are relatively uncomplementary and that their amalgamation would not contribute to the creation of an ordered over-all air transportation pattern, designed to serve efficiently the public convenience and necessity”), and that the large diversion of traffic from other air carriers would impair competition. Some economies and reduced fares would result. Having weighed these various factors, the Board concluded that “although some actual, tangible public benefits are attainable through the proposed acquisition, these benefits appear to be of relatively slight weight and fall short of offsetting the substantial injuries which the same transaction threatens to the public interest.” American is the largest of the domestic air carriers but the Board declared that it would make no attempt to calculate an optimum size for a carrier in such a dynamic field, stating that “the problem is one of degree and the avoidance of extremes.”

An analysis of the Board’s decisions indicates that, in determining the paramount public interest in each fact situation presented to it, the Board has consistently weighed the following factors:

1. Competition and monopoly
2. Balanced system
3. Price
4. Economies, efficiency, public benefits and convenience.

**Competition and Monopoly**

Section 408 (b) contains a proviso directing the Board not to approve a transaction covered by the section “which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party” to the transaction. Section 2 (d) declares in the public interest “competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense.”

The competitive situation will be closely examined by the Board to determine whether the proposed transaction will result in a monopoly which will restrain competition. The cases conclusively demonstrate that the Board has a firm belief in the function of substantial competition to develop an air transportation system in the public interest. That controlled competition was contemplated by the Act was recog-

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*Burt & Highsaw, Jr., Competition Under the Civil Aeronautics Act, 6 La. L. Rev. 148.*
nized by the Board in the Acquisition of Western Airlines By United Airlines case,¹⁰ the Board saying that "the Civil Aeronautics Act as construed by the Board provides for regulated competition which seeks to avoid the stifling influences of monopoly on the one hand and the economic anarchism of unrestrained competition on the other." Emphasized by the examiner was the point that great inconvenience to passengers would be eliminated by this acquisition but the Board concluded that although some improvements in service and some economies in operating costs would result if the transaction were approved, these factors were outweighed by the undesirability of allowing United to dominate the western region to such an extent as the merger would allow. At that stage in the development of a properly balanced system of air transportation the elimination of the only north-south route west of the Rocky Mountains which was independent of the transcontinental air carriers was undesirable in the opinion of the Board.¹¹

The acquisition of Mirow Air Service by Wein Alaska Airlines, Inc.¹² was approved where the price was reasonable, and greater efficiency, economy, and improved service to the public would result. In the opinion of the Board, no monopoly would be created although the proposed acquisition would make the acquirer the largest operator in the area served.

The proposed purchase of Lavery Airlines by Pan American Airways¹³ was disapproved since, although the operation by the latter of the Fairbanks-Anchor age service would result in more luxurious service at a reduced rate for through passengers, it would foreclose from participating in traffic between those points Star Air Lines, one of the pioneering Alaskan air carriers, whose services were deemed to be highly essential to the economic life of the Territory.

Since the acquiring carrier's already overwhelming competitive advantage in Alaska would be further increased to such an extent as to make the acquisition inconsistent with the public interest by precluding the development of a proper competitive balance in that territory, the proposed acquisition of Cordova Air Services, Inc. by Alaska Airlines, Inc.,¹⁴ was disapproved by the Board.

¹⁰CAA 739.
¹¹At that time the CAB was known as the Civil Aeronautics Authority. It became known as the CAB under the Reorganization Plan No. 4 of 1940.
¹²Wein Alaska Airlines, Inc.—Acquisition of Mirow Air Service, 3 CAB 207.
**Balanced System**

The concept of a "reasonably balanced system of air transportation" was initially laid down by the Board in the United Air Lines—Western Acquisition case, the first acquisition case to come before the Board.

In the National-Carribean—Atlantic Control case the routes of National and Carribean were separated by 1000 miles of ocean and served different territories with different needs so there would be no fusion of physical properties in a contiguous area but merely the placing of two routes independently operated under one management. "The acquisition of Carribean by National offers no development of an integrated and coordinated air transportation system," stated the Board and concluded that this lack of integration would make the attainment of an economically sound operation difficult if not impossible. No question was raised as to whether a monopoly would be created. The systems were neither competitive nor complementary.

Acquisition of American Export Airlines by American Airlines was approved, it being shown that this acquisition would accomplish an integration of the operations of both systems, which would result in substantial economies and would generally promote international air transportation. The carriers did not compete with each other and no monopoly was created.

As has been noted earlier the fact that the American and Mid-Continent systems were "relatively uncomplementary and that their amalgamation would not contribute to the creation of an ordered over-all air transportation pattern" was one of the adverse factors which loomed large in the Board's disapproval of the acquisition of control of Mid-Continent by American Airlines.

Several small complementary carriers were integrated into one system affording safer, better, and more comfortable service in the recent case of Northern Consolidated Airlines, Inc. et al., consolidation. No monopoly was created and economies were effectuated by the elimination of duplication of services.

**Price**

To date the Board's attitude in reviewing the purchase price has been liberal. The Board's position in the recent Western-United transaction indicates an unwillingness on its part to take any action which

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66 CAB 671.
68 S CAB 110.
69 Western-United, Acquisition of Air Carrier Property, Docket 2839 (Aug. 25, 1947).
would result in discouraging initiative on the part of the individual carriers. However, there can be no doubt that the Board will deny approval in any transaction where the price is clearly excessive.\textsuperscript{19} In the first Marquette case, the Board disapproved of the transaction because of the excessive price and declared, "It would be clearly adverse to the public interest to allow a certificate of convenience and necessity to be treated as if it were a speculative security, to be sold by the holder to the highest bidder, or as if it were possessed of a value of its own, distinct from the legitimate expenses of initially securing a certificate, and from the values developed by the conduct of operations under the certificate. Transfer of a certificate at inflated or speculative prices would not foster sound economic conditions in air transportation." The doctrine of the first Marquette case was short lived. Citing decisions of the I. C. C. holding that operating rights have an independent value, the Board in the second Marquette case\textsuperscript{20} declared that "it would be unrealistic for the Board to consider a purchase transaction as though such a value (the value of the route) did not exist and was not taken into account."

The substantial sum paid for the certificate of convenience and necessity itself in the Western-United and Marquette cases has been severely criticized by the law review writers.\textsuperscript{21} Difficult of definition is the exact nature of a certificate of convenience and necessity although the Civil Aeronautics Act states that "no certificate shall confer any proprietary, property, or exclusive right. . . ."\textsuperscript{22} The position is taken by these critics that although these certificates represent earning potentialities for which a vendee line is willing to pay, this favored position is the result of a public grant and to allow the vendor to profit from its sale is inconsistent with the nature and purpose of the grant.\textsuperscript{23} It is further contended that an assignment of value to a certificate of convenience and necessity will only result in a public burden as it will eventually come out of the public's pocket.

\textit{Economies, Efficiency, Public Benefits, and Convenience}

The burden is upon the acquiring line to show that the public will be

\begin{footnotesize}
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\item \textsuperscript{19} Acquisition of Marquette by TWA, 2 CAB 1; National-Carribean-Atlantic Control case, 6 CAB 671.
\item \textsuperscript{20} Acquisition of Marquette by TWA, Supplemental Opinion, 2 CAB 409.
\item \textsuperscript{21} Notes, 15 U. of Chi. L. Rev. 343-51; 61 Harv. L. Rev. 523-31; 48 Col. L. Rev. 88-104.
\item \textsuperscript{22} 52 Stat. 990 (1938) as amended, 54 Stat. 1235 (1940) 49 U. S. C. § 481(j) (1940).
\item \textsuperscript{23} And see Board Chairman Landis' dissent in Western-United, Acquisition of Air Carrier Property, Docket No. 2839 (Aug. 25, 1947).
\end{itemize}
\end{footnotesize}
benefited by the proposed unification, through better service or more economical operations. Although several\textsuperscript{24} unifications have been allowed where the applicant could demonstrate that better, safer, more convenient service would result, the Board has made it clear that while elimination of inconvenience to the public is an important factor to be considered it is by no means the only factor to be considered. And where a monopoly would result, the proposal will be denied regardless of how much efficiency, economy, and convenience will be effectuated. Likewise, if the transaction will not contribute to a well coordinated air transportation system, the chances of a Board approval are so slight as to approach the vanishing point.

Conclusions

Since its inception in 1938 the CAB has passed on over a score of applications under Section 408 of the Act. A fairly clear pattern emerges from a study of these cases. From our survey the following conclusions are drawn:

1. The cases are unanimous in declaring that any Board decision under Section 408 passing on a proposed merger, consolidation, or acquisition of control must be arrived at in the light of the requirements of Section 2. The declaration of national policy set forth in Section 2 which contains certain factors to be considered, among other things, is the ultimate standard in determining if a proposed transaction is in the public interest.

2. Adjudication of the issue of whether or not a proposed transaction is in the public interest is a balancing process in which all of the various factors are weighed.\textsuperscript{25}

3. Any transaction which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the transaction will be disapproved by the Board.\textsuperscript{26}

\textsuperscript{24}Pan American Airways, Inc., \textit{et al.}—Merger, 2 CAB 503; Wein Alaska Airlines, Inc.—Acquisition of Mirow Air Service, 3 CAB 207; Marine Airways, Alaska Air Transport, Inc.—Consolidation, 3 CAB 315; Acquisition of Mayflower Airlines, Inc. by Northeast Airlines, Inc., 4 CAB 680; Acquisition of Ferguson Airways, by Wein Alaska Airlines, Inc., 7 CAB 769; Northern Consolidated Airlines, \textit{et al.}, Consolidation, 8 CAB 110.

\textsuperscript{25}American Airlines, Inc.—Acquisition of Control of Mid-Continent Airlines, Inc., 7 CAB 365.

\textsuperscript{26}Sections 408(b) and 2(d) of the Act; United Air Lines Transport Corp.—Acquisition of Western Air Express Corp., 1 CAA 739; Alaska Air Lines, Inc., \textit{et al.}, Service to Anchorage, Alaska, 3 CAB 522; Acquisition of Cordova Air Service, Inc. by Alaska Airlines, Inc., 4 CAB 708; American Airlines, Inc., Acquisition of Control of Mid-Continent Airlines, Inc., 7 CAB 365.
No attempt has been made by the Board to predict an optimum size for any carrier in this dynamic field. "The problem is one of degree and the avoidance of extremes."^27

4. The doctrine of a balanced air transportation system, first laid down in the United-Western case, has been consistently adhered to by the Board. Quick rejection has been the fate of those proposed transactions which would add nothing to an integrated, well-coordinated system.^28 The Board has constantly reiterated that the over-all transportation policy of the Act must be effectuated.^29

5. In reviewing the purchase price, the Board's attitude has been liberal.^30 But where the price is clearly excessive, the transaction will undoubtedly be disapproved.

6. Persuasive but not controlling will be the effect of a showing by an applicant that the proposed transaction will result in greater efficiency, economy, and better service to the public.^31

JOHN GEORGE WOODS

THE INDEFEASIBLE RIGHT OF LICENSEES UNDER THE COMMUNICATIONS ACT^1 TO BE HEARD BEFORE COMPETING INTERESTS ARE LICENSED

ALTHOUGH in England legislative bodies have delegated licensing powers to administrative agencies at least since the sixteenth century,^2 the license has not been used as a regulatory device in American federal administration until comparatively recently.^3 Whether for this reason, or because the power to coerce the individual has been tradition-

[^28] National-Carribean-Atlantic Control case, 6 CAB 671; American Airlines, Inc., Acquisition of Control of Mid-Continent Airlines, Inc., 7 CAB 365.
[^31] Cases cited note 24 supra.

ally a judicial prerogative and licensing has not, the license has not been viewed by the courts as so serious an invasion of private rights as has the administrative order. The courts cannot be unaware, however, that the licensing power, resting upon the proposition that all activities of a certain kind in a certain field of enterprise are enjoined until one or more may be authorized, necessarily places upon the individual the burden of affirmatively proving that what he proposes to do should be permitted. In a sense, therefore, licensing by its very nature is repugnant to the philosophy behind the principle that the individual is innocent until the State proves him guilty; and the collateral effects of so placing the burden of proof, implicit in the licensing process, is severe enough perhaps to warrant extra attention by the courts to the strict enforcement of traditional notions of fair play. The difficulty is, however, that the pursuit of such judicial ideals may needlessly thwart the agency charged with the licensing program. An interesting demonstration of this conflict is embodied in a recent decision by the Court of Appeals for the District of Columbia in which the court, after deciding that a hearing must be granted to the licensee of a radio station on the issue whether objectionable interference would be caused in his contour by the grant of an application then before the Federal Communications Commission, declared that the hearing must be granted by the agency even though the petitioner might have failed to allege facts in his petition sufficient in law to establish his rights.

The law is fundamental in the field of licensing that the State bestows a privilege or gratuity in granting a license, and it follows that the privilege may be withdrawn summarily. This principle is applied without qualification wherever the enterprise licensed is looked upon as of little or no benefit to the community. Pool rooms and liquor shops, for example, are seldom accorded any protection against summary revocation of their licenses. The same rule is applied wherever the enterprise

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4Freund, op. cit. supra note 1.


7"The character of the business determines the right and protection to which the holder of the license is entitled. . . . Where the business is inherently harmful, and permissible only under license of the State, for instance, the licensee accepts his license subject to the right of the State to outlaw the business and to revoke his license. . . ." Riley & Co. v. Wright, 151 Ga. 609, 107 S. E. 857, 859 (1921).

may constitute an actual threat to the public health and is improperly practiced.9

The courts depart from this principle where it is found that substantial investment by the licensee would be impaired by revocation of the license. Here, it is held, the license may be revoked only after notice and hearing lest the 5th Amendment to the Constitution be violated. A "property right," is said to be involved even though the right may be limited in time and quality by the terms of the license and subject to suspension, modification or revocation in the public interest.10 Reinforcing this principle in the federal courts is the Administrative Procedure Act which provides that notice and hearing must be given prior to the revocation of any license granted by a federal administrative agency "except in cases of willfulness or those in which public health, interest, or safety requires otherwise."11

The rules grow more complicated when the licensing determinations of an agency run not directly against the outstanding licensee but affect him only collaterally. While no cases have been found that specifically decide12 that a non-party licensee affected adversely has a constitutional right to intervene in the proceedings before an agency, the enabling statute being silent as to his rights to a hearing, the courts have found statutory rights to such hearings where the statute can be construed to require the agency to consider the competitive consequences of its grant,13 or where the statute stipulates that the agency must weigh the possible harm that may be caused,14 or where the grant of a license is made contingent upon the agency's finding that the "public interest, convenience, or necessity" would be served thereby.15 Where the statute is concerned primarily with the licensing of persons in professional occupations, no attempt has been made to construe the statutes to permit intervention by outstanding licensees. Finally, it should be noted, that although very few of the enabling statutes require the agencies to

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10Wilson v. F. C. C., supra, note 5.
12Unless Wilson v. F. C. C., supra, note 5, may be said to do so.
permit intervention by a non-party adversely affected, or could be so construed to provide, it has been the general practice of the agencies themselves to permit it when, in their individual discretion, fair play requires it. Were it not for this general practice, the question of a possible constitutional right to intervention by non-parties indirectly but adversely affected might have arisen.

The lengths to which such statutory construction can be extended is illustrated by those statutes which authorize the grant of a license only after a determination by the agency "that the public interest, convenience or necessity would be served". In such cases the statute is interpreted to require that the agency must consider the extent to which the ability of existing licensees to serve the public will be affected by the grant of an additional license or licenses. Although this reasoning limits considerations of licensed interests of the outstanding licensee to those which are synonymous with the public interest, the effect is the same: the licensee is heard with regard to the adverse effects his facility will suffer.

One of the most important cases on the point, Federal Communications Commission v. National Broadcasting Company, Inc. (KOA) involved a petition by station KOA at Denver, Colorado, to intervene in the hearings before the Commission on the question whether the public interest would be served by granting the application of station WHDH at Boston for an increase in power and station time. The Commission denied KOA's petition to intervene and granted WHDH's application after having found that the grant of WHDH's application would in fact cause interference on KOA's channel. It defended its position on grounds that KOA's license was not modified within the meaning of Section 312(b) of the Communications Act because the terms of KOA's license were not literally changed. The Supreme Court overruled the Commission, holding that the grant of an application which would permit interference with the channel assigned to KOA constituted a modification of KOA's license and that before such modification could be directed, KOA had a right under Section 312(b) of the Act to be heard on the question whether the modification was in the public interest.

17309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693 (1943).
18Section 312(b) of the Act, 47 U. S. C. A. Sec. 312(b), 10 F. C. A. title 47, Sec. 312(b)
Mr. Justice Frankfurter in a vigorous dissent declared that the provisions of the Act properly construed do not entitle an existing licensee whose license "merely involves 'modification'" to any more than notice in writing and a reasonable opportunity to show cause why the order should not issue. His further discussion of the requirements of the petition for intervention before the Federal Communications Commission are particularly pertinent here.

Under Section 105.19 of the Commission's Rules and Regulations of 1935, as Mr. Justice Frankfurter pointed out, any person could intervene in a Commission proceeding if his petition disclosed "a substantial interest in the subject matter." This rule was subsequently altered by the Commission to provide specifically that: "Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest and must be subscribed or verified in accordance with Section 1.122."

The reasons for this change in the Commission's intervention rule were stated by the Attorney General's Committee on Administrative Procedure as follows: "The effects of this complete freedom of intervention (available under the old rule) upon the Commission's activities were very marked. Not only was the record unnecessarily prolonged by the discussion of non-controversial issues, but the evidence relevant to each issue was increased manyfold by virtue of the extended cross-examination of witnesses by each intervener. More often than not the interveners presented no affirmative evidence on the issues at hand. The major functions served by them were apparently to impede the progress of the hearing, to increase the size of the record, and to obfuscate the issues by prolonged and confusing cross-examination. Nor were these dilatory and destructive tactics restricted to the hearing itself. Each intervener would customarily avail himself of his rights to take excep-

provides: "Any station license after June 19, 1934, granted under the provisions of this chapter or the construction permit required hereby and after such date issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or any treaty ratified by the United States will be more fully complied with: Provided, however, That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."
tions to the examiner's report, to oral argument before the Commission, and, in many cases, to appeal from the Commission's order to the District of Columbia Court of Appeals. . . . If this (new) provision is enforced intelligently and forcefully, an important step will have been taken both toward the protection of applicants and the increase of the Commission's prestige."

It will be noted that the KOA case decides that the Commission, having ascertained that to grant the application before it will cause interference to an existing licensee, must then accord a hearing to adversely affected existing licensees on the question whether the public interest will be served by the grant of the conflicting license. The question whether the Commission must also accord a hearing to an outstanding licensee in the determination of whether the grant would actually cause objectionable interference to its facilities was not decided.

The recent case of L. B. Wilson v. Federal Communications Commission\(^{20}\) supplied the answer to this latter question. On May 10, 1946, the F.C.C. granted without a hearing the application of Patrick Joseph Stanton for a construction permit to erect a new standard broadcasting station. Stanton's application was filed January 21, 1946 for a license to operate a Class II station at Philadelphia, during the day time only, on 1530 kilocycles, power of 10 kilowatts. The application stated that the station would cause no objectionable interference to any existing station. The application was set down for hearing and notice of the hearing was published in the Federal Register on May 1, 1946.\(^{21}\) On May 13 (3 days prior to the expiration of the period within which according to the Commission's rules, it might do so) L. B. Wilson, Inc. (the licensee of station WCKY, Cincinnati, Ohio, authorized to operate on a frequency of 1530 kilocycles with a power of 50 kilowatts unlimited time as a Class I-B clear channel station) filed a petition to intervene in the hearing, properly alleging and offering to prove that objectionable and extensive interference would be caused to its facilities if the Stanton application were granted. But on May 10, 1946, without the knowledge of L. B. Wilson, Inc., the F. C. C. had withdrawn the


\(^{20}\)App. D. C., April 12, 1948. (It is interesting that this case was originally argued April 15, 1947, before Stephens, Clark and Wilbur K. Miller, Associate Justices; reargued by direction of the court before Stephens, Edgerton, Clark, Wilbur K. Miller and Prettyman, Associate Justices, June 11-12, 1947. Edgerton, J., concurred in the result; Prettyman concurred in the result but took exception to the statements of the majority as noted in the text of the above Note.)

\(^{21}\)Vol. 11, No. 85, p. 4739.
Stanton application from the hearing docket and granted a license without a hearing. On May 23, 1946, without a hearing the F. C. C. dismissed the Wilson Co.’s petition to intervene as moot. The Wilson Company on May 29 which was within the requisite time, pursuant to Section 1.387 (now Section 1.390(a)) of the Commission’s rules, filed a petition for reconsideration and rehearing of the order of May 10, 1946. It alleged that the field intensity measurements taken on the Wilson station by the Commission itself and contained in the files of the Commission, showed that there would be severe and objectionable interference. Without a hearing on this petition the Commission denied it by an order of November 14, 1946. On appeal the Court of Appeals for the District of Columbia reversed the Commission.

In arriving at its decision, the Court reasoned from the decision of the Supreme Court in the KOA case (and its own in the same case) declared that (1) since the Act had been construed to require the Commission to accord a hearing to an outstanding licensee before his license could be modified, it would give an unreasonable meaning to the act to hold now that the act denies a hearing to an outstanding licensee on the issue whether or not the extension of facilities to another station will cause objectionable interference within the protected contour of the outstanding license; (2) to construe the Communications Act as not according an outstanding licensee a hearing on the issue whether or not extension of facilities to another station would indirectly modify the outstanding license through objectionable interference within its protected contour would result in unequal treatment of outstanding licensees as compared with applicants for new facilities who, under Section 309(a) of the Act cannot be rejected without a hearing; (3) the Commission by its own rules provides for intervention by, and reconsideration at the instance of, an outstanding licensee under the circumstances of this case; (4) since, if the Act were construed as the Commission construes it, it would be unconstitutional as depriving the peti-

22Section 1.387 (now Section 1.390(a)) provides that “Where an application has been granted without a hearing, any person aggrieved or whose interest would be adversely affected thereby may file a petition for reconsideration of such action . . . within twenty days after public notice is given of the Commission’s action in granting the application.” The section provides further that such “petition will be granted if the petitioner shows . . . that petitioner “is an existing licensee . . . and a grant of the application would require the modification . . . of his license . . . ” or that “petitioner is an existing licensee . . . and a grant of the application would cause interference to his station within the normally protected contour as prescribed by applicable Rules and Regulations; or . . .” that a “grant of the application is not in the public interest.”
tioner of his property without due process of law, the opposite interpretation must, if reasonably possible, be selected.

Perhaps even more significant than its ruling, were the remarks of the court in disposing of the Commission's contention that what it had to decide was whether or not, under the petitioner's allegations, assuming their truth, the interference charged was "objectionable" within the terms of the Commission's standards, and that this was a matter of law to be determined as by a court upon demurrer. In answer the Court went further than the facts of the case required to declare that regardless of what facts a petitioner for intervention might allege in his petition, he would be entitled as of constitutional right to an oral hearing.

It is pertinent here to recall Mr. Justice Frankfurter's words in dissent from the opinion in the KOA case:

"Can it seriously be claimed that the Commission acted beyond its authority in providing that before a licensee can intervene in another proceeding he must indicate some solid ground by setting forth 'the facts on which the petitioner bases his claim that his intervention will be in the public interest'? Otherwise anyone who asserts generally that the grant of another's application will affect his license may become a party to a proceeding before the Commission and may, to the extent to which a party can shape and distort the direction of a proceeding, gain all the opportunities that a party has to affect a litigation although he has not made even a preliminary showing that his intervention will be in the public interest. I cannot read the requirement for 'reasonable opportunity to show cause why such an order of modification should not issue' as a denial to the Commission of power to make such a reasonable rule for sifting the responsibility of potential intervenors... To deny to the Commission the right to require a preliminary showing such as was found wanting here, before admitting a petitioner to the full rights of a party litigant is to fasten upon the Commission's administrative process the technical requirements evolved by courts for the adjudication of controversies over private interests. ..."

Mr. Justice Prettyman took exception to the majority opinion in the Wilson case insofar as it states that the petitioner for intervention must be furnished an opportunity for oral argument without regard to the sufficiency of the allegations of his opinion. His view was that a petitioner for intervention must allege some fact or facts presenting a substantial legal question as to the petitioner's rights. He states: "... the

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legal sufficiency of the allegations of fact in the petition may be tested (by the Commission) before it is necessary to test the truth of the allegations. Such is the regular procedure of courts."

It is of interest to note in the sentences quoted above from the two dissents that Mr. Justice Frankfurter in 1943 argued that the procedural powers of the administrative agencies should not be fettered by the strict rules of courts whereas Mr. Justice Prettyman in 1948 is arguing that administrative agencies be allowed at least as much latitude in their procedures as the courts permit themselves.

The principle that every man should have his day in court before his rights are adjudged is thus balanced by the courts against the principle that a license is a mere privilege or gratuity bestowed by the sovereign authority and capable, therefore, of summary revocation. Once the distinction is made between licenses which confer mere privileges and those which create in the licensee a property right, the door is closed to revocation without a hearing. "Revocation" then comes to include the "modification" of the rights of a non-party interest and such modification without an opportunity to be heard is declared to be a deprivation of property without due process of law—with or without benefit of statute. And finally it is declared that a hearing must be granted upon the mere allegation of a "modification" by a non-party interest. Here, it is suggested, the traditional notions of fair play have been pursued even beyond those prescribed by the courts for their own conduct and, that quixotry has again prevailed.

JAMES H. ENNIS

24App. D. C., April 12, 1948,
NOTE

THE CONSTITUTIONALITY OF THE NON-COMMUNIST AFFIDAVIT REQUIREMENT OF THE TAFT-HARTLEY ACT

The Labor-Management Relations Act of 1947, better known as the Taft-Hartley Act, has created as much public interest and controversy as any piece of legislation dealing with a domestic problem in recent years. The non-Communist affidavit requirement of the Act has been, perhaps, more widely publicized than any of its other provisions. There have been three cases in the Federal courts in which the constitutionality of the requirement has been sustained; yet in each of these cases the decision was rendered by a divided court.

The affidavit required by Section 9(h) of the Taft-Hartley Act is


Sec. 9(h) of the Act provides: "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection 9(e) of this section, no petition under section 9(e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits."

The first of these cases, National Maritime Union v. Hersog, 78 F. Supp. 146 (D. C. 1948), was decided on April 13, 1948. The second, the companion cases of American Communications Association v. Douds and Wholesale and Warehouse Workers' Union v. Douds, 15 CCH Labor Cases 64609 (S. D. N. Y. 1948), on June 29, 1948, approved the opinion of the Hersog case and adopted it as its own. Each of these two cases was decided by a three-judge statutory court. The third decision was that rendered in the companion cases of Inland Steel Company v. NLRB and United Steelworkers of America, C.I.O. v. NLRB in an opinion handed down on September 23, 1948, by the United States Court of Appeals for the Seventh Circuit.

The Hersog case has already been before the Supreme Court on one occasion. In addition to ruling on the non-Communist affidavit, § 9(h) of the Act, the District Court had also upheld the provisions of the Act which require unions to file statements concerning the manner in which members, annual financial reports, etc., § 9(f) and § 9(g). On June 21, 1948, the decision of the lower court was affirmed by the Supreme Court, 334 U. S. 854, to the extent that it passed on the validity of § 9(f) and § 9(g). The Court did not consider it necessary to reach or consider the validity of § 9(h).
composed of two parts; (1) that the officer is not a member of the Communist Party or affiliated therewith, and (2) that he does not believe in and is not a member of or supports any organization that believes in the overthrow of the government by force or illegal means. Only the first provision will be considered because there seems to be little question that Congress has the power to pass the second provision.4

The principal grounds upon which the constitutionality is questioned appear to be: (1) that it is a bill of attainder within the meaning of Article 1, § 9, clause 3 of the Constitution of the United States;6 (2) that it is invalid as being too vague, indefinite, and uncertain in its language; and (3) that it contravenes the provisions of the First, Fifth, Ninth, and Tenth Amendments to the Constitution.6 Since neither of the first two contentions are apparently of sufficient merit, this note will be concerned solely with the third.7

4This point is well exemplified by the case of Gitlow v. New York, 268 U. S. 652 (1925). Furthermore, even the dissenting judges seem to have no serious objection. In his dissent in the Herzog case, Judge Prettyman agreed that the requirement set forth in the second clause was constitutional in the following words, 78 F. Supp. 146, 177 (D. C. 1948):

“I agree in regard to the last clause of Section 9(h), which refers to persons and organizations which advocate the overthrow of the Government by force or illegal methods. Advocacy of such measures is so extreme that it could not be an inconspicuous or incidental part of a general program. Therefore, persons belonging to or believing in such an organization can properly be charged personally with that purpose, to the extent that they can be denied an operating participation in governmental facilities.”

Judge Major, in the Steelworkers case, apparently objects only on the basis of what he finds to be a vagueness and uncertainty in the language, saying:

“What does the word ‘supports’ include . . . and how can the ordinary person possibly be expected to make an affidavit that he is not a member of any organization that believes in or teaches the overthrow of the United States Government ‘by illegal or unconstitutional methods’?”

6U. S. Const. Art. I, §9, clause 3: “No bill of attainder or ex post facto law shall be passed.”

6U. S. Const. Amend. I: “Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

6U. S. Const. Amend. V: “No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .”

U. S. Const. Amend. IX: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

6U. 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.”

7With regard to the first contention, Justice Chase in Calder v. Bull, 3 Dall. 386, 389 (U. S. 1798) stated:

“Their prohibition against their making any ex post facto laws was introduced for greater caution, and very probably arose from the knowledge that the parliament of Great Britain claimed and exercised a power to pass such laws, under the denomina-
At the outset it is submitted that the requirement of the non-Communist affidavit violates none of the above amendments and that the constitutionality of Section 9(h) should be upheld by the Supreme Court of the United States when the question comes before that tribunal.\(^8\)

The key to this conclusion is the statutory concept of the exclusive bargaining agent, first established by the Wagner Act in 1935,\(^9\) which provides for compulsory collective bargaining by the employer with the representative of the majority of the employees and with no other. The exclusive bargaining agent, a creature of statute, stands in a position of trust toward those it represents—toward the minority which is compelled to accept it as its sole representative as well as toward the majority which desired it as such. The sovereign which gave its legal sanction to an exclusive bargaining agency in derogation of the previously recognized rights of employers and minority groups of employees, and which gave this sanction for the purpose of encouraging the free

tion of bills of attainder . . . inflicting capital and other less punishment. . . . I do not think it was inserted to secure the citizen in his private rights, of either property or contracts.'

Since the statements required by the affidavit are all couched in the present tense, it is difficult to see what "punishment" there is for a "passed" act.

With regard to the second contention, the court in the *Hersog* case, 78 F. Supp. 146, 172 (1948), stated:

"It was in *Bridges v. Wixon*, supra, that the Court found definition difficult and concluded that affiliation 'imports . . . less than membership but more than sympathy.'

In that case it was necessary to ascertain from extrinsic evidence whether Bridges was 'affiliated', i.e., whether he considered himself affiliated. We may safely assume that any man intelligent and schooled enough to be chosen as a union official will be familiar with the word 'affiliated' and will have a definite idea of its meaning. His notion of the word's significance may not coincide with that of another, and may not be what a dictionary gives. But he is not called upon to define 'affiliated' in his affidavit. He is asked to say whether he considers himself affiliated in the sense in which that word has significance to him. There is no vagueness or uncertainty in his own personal definition.'

The court, in the *Steelworkers* case, stated:

"In addition, I believe that the statute is as specific as the nature of the problem permits. Compare *Dunne v. United States*, 138 F. 2d 137, 143 (C. C. A. 8th, 1943). Moreover, the language is not so vague that men of common intelligence would have to guess at its meaning and differ as to its application.

It requires only that persons who knowingly engage in the activities set forth in Sec. 9(h), or who knowingly believe in the enumerated doctrines, or who knowingly support organizations which disseminate such doctrines, shall not obtain access to the machinery set up by Congress for the purpose of advancing a specific public policy.'

\(^8\)A special appeal has already been filed in the companion cases of *American Communications Association v. Douds* and *Wholesale and Warehouse Workmen's Union v. Douds*, 15 CCH Labor Cases 64609 (S. D. N. Y. 1948). See note 3, supra. Probable jurisdiction was noted by the Supreme Court on November 8, 1948.

flow of commerce by reducing strife between labor and management, has the right to establish reasonable standards for those who would occupy the position of exclusive bargaining agent. In requiring a non-Communist affidavit it has exercised this right for the purpose of better assuring the accomplishment of its objectives and preventing a breach of trust.

**The Exclusive Bargaining Agent**

In any discussion of this problem it is essential to bear constantly in mind the status of the exclusive bargaining agent; to remember always that the agent is *exclusive*; that by force of law it is the only agent that may represent the employees or any group of them, and that it is the only agent with which the employer may deal.

While the right of labor to organize and bargain collectively exists apart from statute, the right of a union to be the exclusive bargaining agent does not. Prior to the Norris-LaGuardia Act of 1932 employers might discharge employees for membership in a union. Prior to the Wagner Act, with the exception of railroads, employers were under no compulsion to engage in collective bargaining. The Wagner Act not only required employers to bargain collectively, but established the mechanism whereby they were required to bargain with one agent to the exclusion of all others. Without question these acts deprived

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12 The Supreme Court repeatedly has held that the employer is as free to make non-membership in a union a condition of employment as the working man is free to join the union, and that this is a part of the Constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power. *Hitchman Coal and Coke Co. v. Mitchell*, 245 U. S. 229 (1917). Congress has outlawed these "yellow dog" contracts under the principle that all rights of the individual are subordinate to governmental control in the exercise of its police power for the protection of the health, safety, and general welfare of the public at large. Norris-LaGuardia Act, § 3, 47 Stat. 70 (1932), 29 U. S. C. § 101 et seq. (1946).
15 The Wagner Act, in § 8(5), made it an unfair labor practice on the part of the employer "To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."
16 Section 9(a) provides: "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment."
employers and minority groups of employees of rights which theretofore had been jealously guarded by the courts. But these were not the arbitrary acts of a despotic sovereign; they were reasonable regulations within the inter-state commerce powers of Congress enacted for the purpose of effectuating a public policy of over-riding importance.

SECTION 9(h) AND THE POLICE POWER

The states and the federal government may, within limits, control the rights of individuals in their economic pursuits. It is well to recall the source of this power and the limitations upon it. The authority of the states springs from their police power; the limitation upon it is the "due process" and "equal protection" clauses of the Fourteenth Amendment. If the objective of a state statute be the promotion or preservation of the health, safety, morals, or welfare of the community; if the subject matter with which the act deals is a fact bearing upon the objective; and if the act has some real and substantial relationship to the accomplishment of the end sought, the statute will generally be held valid.17 Limited by the prohibitions of the Constitution, Congress has an analogous power in the field of interstate commerce. The Supreme Court has "frequently said that in the exercise of its control over interstate commerce, the means employed by Congress may have the quality of police regulations."18 The test is the same; the authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce.19 Although in exercising the police power in purely intrastate matters the states are limited by the Fourteenth Amendment, the "due process" clause of that amendment has been held to include the specific prohibitions of the First Amendment,20 which, as such, is a limitation only upon the Federal Government. This being so, cases decided by the Supreme Court; which arose as a result of the exercise

20Thus the states may not curtail freedom of religion, Cantwell v. Connecticut, 310 U. S. 296 (1940), or abridge the freedom of speech, Gitlow v. New York, 268 U. S. 652 (1925), or of the press, Near v. Minnesota, 283 U. S. 697 (1931), or the right of the people peaceably to assemble, De Jonge v. Oregon, 299 U. S. 353 (1937).
of police powers by the states, furnish the criterion with regard to the present question.\textsuperscript{21}

Inherent in the power to make police regulations is the power to classify with regard to the danger threatened. If the classification be reasonable, and not capricious or arbitrary, it is valid. In Patson\textit{e} v. Pennsylvania,\textsuperscript{22} sustaining the constitutionality of a statute designed for the preservation of game which forbade an alien to possess a shot-gun or rifle, the court said, "... a state may classify with reference to the evil to be prevented, and if the class discriminated against is or reasonably might be considered to define those from whom the evil is mainly to be feared, it properly may be picked out." If the distinction made be reasonable, a law which guards against a threatened danger is not unconstitutional because it fails to guard against a similar danger more remote.\textsuperscript{23}

The question involved in the non-Communist affidavit requirement is whether Congress, in attempting to bar unions with Communist officers from being certified as exclusive bargaining agents, made a reasonable classification to avoid a threatened danger. As said in Bridges \textit{v. California}, "... the inferences of the legislature's appraisal of the danger

\textsuperscript{22}The contention that Section 9(h) contravenes the Ninth and Tenth Amendments may be disposed of at once. Certainly, the non-Communist affidavit requirement cannot be held to contravene the Ninth and Tenth Amendments if the exclusive bargaining agent requirement of the Wagner Act, 49 Stat. 449 (1935), 29 U. S. C. § 151 \textit{et seq.} (1946), does not. Both acts have the same purpose; both provisions deal with the same subject matter; and an attack on one under these two amendments would be an attack on the other.

The Wagner Act, § 1, § 4, declares that it is the public policy of the United States "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." The Taft-Hartley Act, § 1(b), states that "It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, ... to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

\textsuperscript{23}232 U. S. 138, 144 (1913).

arise from the enactment. . . "24 Congress, in the Taft-Hartley Act, declared: 25

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members, have the intent [emphasis added] or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the rights herein guaranteed."

It then proceeded to amend the Wagner Act by requiring the non-Communist affidavit. The extensive testimony heard before the Congressional committees and which fills over three thousand pages is replete with statements that a Communist's first allegiance lies with his party and that this in many instances will influence his conduct in the union to the extent that he will be tempted to stir up industrial strife for political purposes. 26 There can be little doubt of Congress' appraisal of the danger.27 As to the reasonableness of the classification, Justice

24 314 U. S. 252, 261 (1941).
26 Worthy of note in this respect is the language of the Herszog case at page 171:

"In view of the avowed purpose of both the Wagner Act and the Taft-Hartley Act to bring about a peaceful solution of labor quarrels, and the discernible purpose of the Communist Party to foment strikes and industrial disorders, Congress could well conclude that persons occupying key positions in the administration of labor laws should not be subject to conflicting loyalties or interests. Congress not only may, but often does, legislate against such temptations. Thus, in United States v. Dietrich, 126 F. 671, Mr. Justice Van Devanter (then circuit judge), in explaining the purpose of legislation prohibiting Congressmen from holding any interests in contracts with the United States, said, 126 F. at page 673: '"... The purpose of the statute is to effectually close the door to temptation which is incident to contractual relations between the government and members of Congress.' [Emphasis supplied.]"

27 Counsel for the government in oral argument in the Herszog case, however, apparently took a somewhat milder view than did the majority of the court with regard to the evidence presented to Congress and Congressional appraisal of that evidence. National Maritime Union of America v. Herszog, Transcript of Proceedings, pp. 101-103:

JUSTICE PRETTYMAN: "Tell me exactly how you can do what you say Congress was doing by merely labelling, by merely using the single expression, the 'Communist Party'? In other words, you say if you were a member of the Communist Party it doesn't make any difference what the Communist Party stands for, believes in, or what its program is."

MR. RATNER: "Your Honor, we answer that question this way: There is, we believe, adequate evidence upon which Congress could conclude that part of the philosophy and program of the Communist Party is to regard labor unions as political rather than economic instrumentalities. We believe that Congress could further conclude and it did conclude that membership in the Communist Party or support of an organization dominated by the Communist Party gave reason to believe that an individual might—not necessarily must, but might—if he became an officer of a labor organization or was such
Holmes, in *Missouri, Kansas and Texas Railway Co. v. May,*\(^\text{28}\) stated:

"With regard to the manner in which such a question should be approached, it is obvious that the legislature is the only judge of the policy of a proposed discrimination . . . When a state legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched."

The power of the sovereign to limit and regulate the conduct of individuals in their economic pursuits is unquestioned. "With the Fifth Amendment in force Congress, in 1820, conferred power upon the city of Washington 'to regulate ... the sweeping of chimneys, and to fix the rates of fees therefor, ... and the weight and quality of bread,' ... and, in 1848, 'to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission auctioneers,' ...\(^\text{29}\) It has long been held that when "one devotes his property to a use in which the public has an interest, he, in effect, grants the public an interest in that use, and must submit to be con-

an officer, be influenced by the doctrine of the organization of which he was a member and utilize or tend to lead his organization into paths of political action in the interest of the Communist Party rather than in the paths of economic action that Congress wanted to promote."

**Justice Prettyman:** "Could Congress make membership in the Communist Party illegal on the ground that you have just stated?"

**Mr. Ratner:** "I believe, Your Honor, that it could not but I think that is not the issue here."

**Justice Prettyman:** "I didn't mean to interrupt you—"

**Mr. Ratner:** "That is perfectly all right."

**Justice Prettyman:** "—but you were linking your last clause with your first clause, and there is a wide gap between saying that a person who is a member of a given organization by name, no matter what it stands for or what it represents or what it might do, and holding that a person who believes in a certain thing, to wit, the overthrow of the United States Government by force or other illegal or unconstitutional methods shall not have available to him one of the processes of that Government. There is a wide gap there."

**Mr. Ratner:** "I agree there is a wide gap there and Congress did not find—I might as well make it perfectly clear now—it did not find and it did not purport to find, and it is our position that it did not need to and could not properly have found, that the Communist Party advocates the doctrine of violent overthrow of the Government by force or other unconstitutional means. That is just no part of the case."

\(^\text{28}\)194 U. S. 267, 269 (1903).

\(^\text{29}\)Munn v. Illinois, 94 U. S. 113, 125 (1876).
trolled by the public for the common good, to the extent of the interest he has thus created.30 In short, the power to control is as broad as the public interest, and the phrase "affected with a public interest" means "no more than that an industry, for adequate reason, is subject to control for the public good."31 Thus the court has sustained the validity of legislation regulating: rates charged by grain elevators32 and for fire insurance,33 the retail price of milk34 and that of coal at the mines;35 assessments on banks for the purpose of creating a deposit guaranty fund;36 fees charged by employment agencies; maximum hours and minimum wages,37 and many other things—including collective bargaining.38

Not only may the sovereign regulate and punish for the breach of its regulations, but it may prescribe standards for those who wish to follow certain callings and may exclude those who fail to meet those standards. These standards may be quite apart from those setting the degree of skill required of an individual in a given field and the prescription of such standards is not limited to the professions. If the classification be reasonable, whole classes may be excluded although some persons in the class might be preferable to some persons who are allowed to follow the calling. Thus aliens may be prohibited from operating pool halls,39 or engaging in the insurance business,40 since the class discriminated against was considered to be that from which the danger was mainly feared. The sovereign may forbid dealings in scarce materials by those considered undesirable on the basis of their past actions.41 A person convicted of a felony may be barred from the practice of medicine, and this not on the grounds of proficiency but on the grounds of good character where the statute made the conviction a conclusive test of character.42

30Id. at 126.
32Munn v. Illinois, 94 U. S. 113 (1876).
33German Alliance Insurance Co. v. Lewis, 233 U. S. 389 (1913).
37United States v. Darby, 312 U. S. 100 (1940).
While permission to practice certain professions or to operate certain types of business such as saloons and dance halls is often spoken of as a privilege granted by the sovereign, it is not the same type of privilege that the sovereign grants when acting in a proprietary, contractual, or gratuitous capacity. The employment of a person by the government is quite a different type of privilege than that which it grants in permitting him to practice a profession or operate a business which requires a license. The view that a privilege is granted to engage in a profession, which privilege may be conditioned by the state, is not as sound as the view that persons who follow certain callings owe a higher order of duty toward those with whom they deal than is required in ordinary commercial intercourse; and that it is a proper exercise of the police function to establish such regulations as will best assure the performance of such duty and so better protect the public against breaches of trust by those in the professions. As the attorney stands in a fiduciary position towards his client, so it is within the power of the state, in order to protect the public, to require that those who practice the law not only be possessed of skill, but be possessed of such character that they will not breach their trust. The skill without the character might prove more dangerous to the client than the character without the skill. Since character may not be measured with scientific accuracy, the sovereign may devise such reasonable tests as it sees fit. It is not a sufficient answer to say that the state, in barring an attorney from practice thereby deprives the public of their right to select him as their counsel.

It can hardly be doubted that an exclusive bargaining agent occupies a fiduciary capacity towards those whom he represents.43 It is equally true that he has a responsibility toward the general public. The Wagner Act, which created the exclusive bargaining agent, did so for the purpose of encouraging the "free flow of commerce" by "encouraging the practice and procedure of collective bargaining." If the exclusive bargaining agent stimulates labor-management strife and resorts to the weapon of the strike for political, rather than economic purposes, it has clearly breached its duty. That there is such a duty toward the general public and the employees it represents—both the majority which elected it and the minority which opposed it—is clear on reason, but

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43The fiduciary relationship occupied by the exclusive bargaining agent towards those it represents may also be likened to the relationship occupied by directors of a corporation towards the stockholders. Although elected by a majority of the stockholders, the directors stand in a position of trust towards the minority as well. *Southern Pacific Co. v. Bogert*, 250 U. S. 483 (1919); *Pepper v. Litton*, 308 U. S. 295 (1939).
authority is not lacking. In *Wallace v. NLRB* the Court said, "The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interest fairly and impartially." In *Steele v. Louisville & Nashville R. R.* the Court stated, "... the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights."

When one considers the exclusive nature of the bargaining agent, when one remembers that the minority employees have no choice but to be represented by it, the authority to establish standards for these who occupy the position would seem at least as reasonable as the authority to set similar standards in those professions where individual members of the public are free to choose their practitioner. A man has a choice as to his doctor or lawyer; a member of the minority has no such choice as to his bargaining agent. It will hardly be contended, we think, that the lawyer occupies a greater position of responsibility toward the average individual than the agent who negotiates the terms and conditions of his employment.

It is contended, however, that the requirement that union officers complete the non-Communist affidavit violates the rights guaranteed to them by the First Amendment; that unconstitutional restrictions are placed on the union officer’s freedom of speech (or freedom to remain silent) and upon his freedom of political association. But no such restriction is imposed; the law does not make membership in the Communist Party illegal, but only denies to the union officers who are members the right to participate in a particular function created by the government. To this it is rejoined that the restriction is no less unconstitutional because indirect; that the purpose being to exclude union leaders who are Communists, it restricts the right of union leaders in their speech, beliefs, and political associations.

The sovereign—though it may not restrict the rights of the individual—may exclude from the profession individuals holding certain

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*323 U. S. 248, 255 (1944).*

*323 U. S. 192, 198 (1944).*

*The majority required to elect the exclusive bargaining agent is not the majority of all the employees but a majority of those who vote, provided a substantial number take
beliefs or who wish to exercise these rights in certain ways. Thus a person may be excluded from the practice of law solely on the grounds of his belief in pacifism,\textsuperscript{47} and a dentist may be prohibited from advertising on billboards or using other means likely to attract the attention of the public—and this even though the statements made in the advertising are entirely truthful.\textsuperscript{48} If such limitations may be placed on membership in professions in which the individual citizen has the opportunity to select who will represent him, there would appear even stronger reasons for similar limitations in a field which has been made monopolistic in character. In labor matters, while the group may select its bargaining agent, the individual may not.

Even where no fiduciary problem is involved, statutes requiring disclosure of membership in associations have been upheld. The non-Communist affidavit requirement is not penal in nature—it merely denies the services of the government to those who fail to comply. A New York statute made it a misdemeanor for anyone to be a member of an association of twenty or more which required an oath as a condition of membership unless the association had filed with the Secretary of State copies of its constitution, rules, the oath of membership and a list of its members. The Ku Klux Klan did not comply with the requirements of the statute. In \textit{Bryant v. Zimmerman}\textsuperscript{49} the Supreme Court affirmed the conviction of a Klan member and upheld the constitutionality of the statute. The New York statute interfered with the freedom of association of Bryant in an organization not per se illegal, and yet the statute was upheld although it exempted from its operation a large number of organizations. This case stands as authority for the proposition that the state may make reasonable classifications with regard to the evil to be prevented, and that the right of persons to join together in associations is subject to reasonable regulation.

**Conclusion**

The requirement of the non-Communist affidavit is then a valid exercise of Congressional power over interstate commerce—a power

\textsuperscript{47}\textit{In re Summers}, 325 U. S. 561 (1944).


\textsuperscript{49}278 U. S. 63 (1928).
analogous to the police powers of the states. Having created the position of exclusive bargaining agent for the purpose of reducing labor-management strife, Congress has the power to establish qualifications for those who would occupy such a position in order that this objective may be better achieved and that the position of trust occupied by the exclusive bargaining agent will not be violated.50

W. C. CHAMBERLIN

50Other arguments have been advanced to support the constitutionality of the requirement against the attack that it violates the First Amendment. While they are not without merit, in the author's opinion they do not have the force of the argument advanced in this note. Thus it may be argued that in the creation of the exclusive bargaining agent, the government granted a privilege which it might condition. For example, in United Public Workers v. Mitchell, 278 U. S. 63 (1928), it was held that Congress might bar from public employment those who exercised their constitutional right to engage in political activity and the court quoted Justice Holmes' statement that "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." Likewise, in Oklahoma v. Civil Service Commission, 330 U. S. 127 (1946), the authority of Congress to withhold grants of money to the states whose employees engage in political activity was affirmed. Cases in which the government offers employment, or makes a contract or a grant, or offers a gratuity are cases of pure privileges extended by the government. They are therefore cases which are based on a somewhat stronger position than the present. While the exclusive bargaining agent occupies a highly strategic position which was created by an act of the government and may be likened to a government office and may be termed quasi-governmental in character, still it is not a governmental office and is not a pure privilege conferred by the government.

It may also be argued that communist activity in labor unions presents a "clear and present danger" and thus justifies an abridgement of rights guaranteed by the First Amendment. Such a position, however, is not necessary to uphold the constitutionality of the non-Communist affidavit.
RECENT DECISIONS

ANTI-TRUST—Exclusive Supply Provisions in Contracts between Oil Producers and Dealers are Void under Both the Sherman and Clayton Anti-Trust Acts if affecting an Appreciable Segment of Interstate Commerce.

Proceedings in equity were brought by the Government to enjoin, under Section 1 of the Sherman Act and Section 3 of the Clayton Act, the defendant Standard Oil of California and its subsidiary, Standard Stations, from entering into exclusive supply contracts with its dealers. Standard Oil produces and markets its gasoline and oil products in seven western states through its own stations and independent dealers, using five types of dealers’ contracts limiting the dealer to the handling of petroleum products, tubes, tires, batteries, and other accessories either produced or controlled by Standard Oil. Defendant contended that the contracts did not unreasonably restrain commerce or substantially lessen competition or affect a sufficient portion of interstate commerce. The Government maintained that such contracts denied dealers access to competitor’s products and were illegal per se. Held, that the contracts constituted an unreasonable restraint of trade under the Sherman Act and resulted in a substantial lessening of competition and tended to create a monopoly under the Clayton Act. United States v. Standard Oil Co. of California and Standard Stations Inc., 78 F. Supp. 850 (S. D. Cal. 1948), (appeal to U. S. Supreme Court filed Sept. 16, 1948. Docket No. 279; probable jurisdiction noted Oct. 18, 1948).

Because of the Social Security Act and other increasingly expensive duties which the employer must render his employees, there has been a steady trend by big business towards the transferring of distributive functions from hired agents to independent dealers. The difficulty has been in the persistence of the producer to treat the independent dealer as if he were still an agent.

This case marks the Government’s invasion of the oil industry against a practice that has been commonly used by such companies as the defendant for the past fifteen years. A contract containing exclusive supply provisions is not illegal per se. Pick Manufacturing Co. v. General Motors Corp., 299 U. S. 3 (1936). It remains a question of fact whether such contracts result in violations of Section 1 of the Sherman Act, 26 STAT. 209 (1890), 15 U. S. C. § 1 (1946), and Section 3 of the Clayton Act, 38 STAT. 730 (1914), 15 U. S. C. § 14 (1946).

was broken, the court introduced the rule of reason as the criterion for determining its validity. In two cases, Appalachian Coal Inc. v. U. S., 288 U. S. 344 (1933) and Sugar Institute Inc. v. U. S., 297 U. S. 553 (1936), the court held the particular trade combinations reasonable under the Act. This wholly external rule which has been read into the Act has been the subject of much controversy in that it was thought to tend to defeat the purpose of the Act, making it a question of interpretation for each court and that the rule should apply only to Section 2 of the Sherman Act concerning monopolies. See Kronstein and Leighton, Cartel Control—A Record of Failure, 55 Yale L. J. 297 (1946); Jackson and Dumbauld, Monopolies and the Courts, 86 U. of Pa. L. Rev. 231 (1938); Eldridge, The Appalachian Coal Case and the Rule of Reason, 1 Geo. Wash. L. Rev. 513 (1931).


The fact that a restrictive practice is beneficial is not material if, in effect, it is an unreasonable restraint. Mandeville Island Farms Inc. v. American Crystal Sugar Co., *supra*. The reasoning of the Socony-Vacuum case was applied by Judge Learned Hand in Fashion Originators Guild v. F. T. C., 144 F.2d 80 (C. C. A. 2d 1940), to a case not concerning price fixing where he said:

"... it is also unlawful to exclude from the market any of those who supply it ... and it is no excuse for doing so that their exclusion will result in benefits to consumers or to the producers who remain."

Congress did not condone good trusts and condemn bad ones, it forbade them all. *U. S. v. Aluminum Co. of America*, 148 F.2d 416 (C. C. A. 2d 1945).

In the instant case the contracts were held unreasonable, but if the doctrine of the Fashion Guild case were to be taken together with the accepted practices declared illegal *per se*, the question of whether a restraint by agreement is reasonable or not might be restricted to such narrow ground that a practice, as in the instant case, could, as a result, be illegal *per se*.

The Clayton Act was intended to supplement the Sherman Act and established its own rule within its limited sphere. Three elements must concur to make a violation of Section 3 of the Act. There must be a sale or lease, a condition that the purchaser shall not use or deal in goods of a competitor of the seller, and the effect of such contract must be to substantially lessen competition or tend to create a monopoly. *R. C. A. v. Lord*, 28 F.2d 257

"... practices ... likely to curtail or affect injuriously a measurable or sizeable part of commerce are prohibited under both Acts." *United States v. Standard Oil of California, supra*.

The question of what is an appreciable segment of commerce was decided in *U. S. v. Yellow Cab, 332 U. S. 218 (1947)*. In that case the court held agreements by a number of cab operators in four cities to purchase cabs exclusively from one cab manufacturer to be invalid. It was held that it was enough that some appreciable part of interstate commerce was affected and that the importance of such commerce affected in relation to the entire amount of that type of commerce in the United States was irrelevant. This concept grew from a group of older cases which were in conflict with the old quantitative view that the amount should be measured against the entire United States. *Associated Press v. U. S., 326 U. S. 1 (1945)*; *Indian Farmer's Guide Co. v. Prairie Farmer Publishing Co., 293 U. S. 268 (1934)*; *Steers v. U. S., 192 Fed. 1 (C. C. A. 6th 1911)*; *O'Brien v. U. S., 290 Fed. 185 (C. C. A. 6th 1923)*.

In the instant case Standard Oil had 6.7% of the total number of gasoline dealers in the seven western states, 2% of the tires sales, 1.8% of the battery sales, but these outlets numbered 5,197 and the value of its trade was 68 million annually, which represented respectively the market foreclosed and the volume of controlled business. Although the business done by Standard's competitors was fractionally much greater than that of Standard's, the court held it was considerable, amounting to "... a substantial lessening of competition and a monopoly of a sizeable segment of a line of commerce in a definite area." *U. S. v. Standard Oil of Cal., supra*.

The decision in the instant case upholds the rule of the *Yellow Cab* case in disregarding the total amount of commerce. It is enough that the business was "considerable". It marks the extension to the oil industry of a series of cases where tying-in provisions were held void in other industries. *F. T. C. Morton Salt Co., supra*; *International Salt Co. v. U. S. supra*; *Judson L. Thompson Mfg. Co. v. F. T. C., 150 F.2d 952 (C. C. A. 1st'1945)*; *Signode Steel Stropping Co. v. F. T. C., 132 F.2d 48 (C. C. A. 4th 1942)*; *Oxford Varnish Corp. v. Ault and Wiborg Co., 83 F.2d 764 (C. C. A. 6th 1936)* *International Business Machines Corp. v. U. S., 298 U. S. 131 (1936)*.
Exceptions have been made in exclusive supply contracts where it was deemed necessary to maintain certain standards as a matter of public policy, as in the automobile industry, when the court held a manufacture of cars could limit its dealers to the use of parts made solely by it in order to protect the manufacturer's product, *Pick Mfg. Co. v. General Motors Corp.*, supra, and was distinguished in *Oxford Varnish Corp. v. Ault and Wiborg Corp.*, supra; when it said that it would result in impairment of good will and damage to the reputation of the product, that the Clayton Act "... is the proverbial shield of the fair trader not the sword of his unfair competitor." See also *General Talking Pictures Corp. v. DeMarco*, 203 Minn. 128, 229 N. W. 750 (1938). The *General Motors* case was decided in 1936 and it would be a matter of debate whether the present Supreme Court would follow that decision today. See *U. S. v. General Motors Corp.*, 121 F.2d 376 (C. C. A. 7th 1941), cert. denied, 314 U. S. 618 (1941).

The court in the instant case seems to provide an out for the producer, stating that contracts under which the dealers agree to purchase a definite quantity of products over a given period of time would accomplish the same result without coming under the limitations of the Anti-Trust Acts. It would, however, take the initiative away from the producer and give it to the dealer, and if the time limit were too long, it seems probable that it would still be within the Anti-Trust Acts.

The instant case is but another step in the active prosecution by the Government of all types of contracts which foreclose from competition any substantial part of the market.

The contention on appeal by the defendant that the instant decision is overruled by the Supreme Court's opinion in *United States v. Columbia Steel Co.*, 334 U. S. 495 (1948), where it held that U. S. Steel was not violating the Sherman Act when it contracted to purchase the largest independent steel fabricator on the west coast, has little merit. The facts are entirely different and deal with uncertain future circumstances, not actualities.

RALPH S. MANN

ATTORNEY AND CLIENT—Certified Public Accountant Held Guilty of Contempt and Enjoined from Further "Illegal Practice of Law" for Giving Client Advice on Manner of Handling Past-Due Sales Tax on Federal Income Tax Returns When Not Connected With an Audit or Client's Accounting Work.

In 1943 respondent, Bernard Bercu, certified public accountant, was consulted by the president of the Croft Steel Products, Inc., as to the proper manner of handling certain New York City excise taxes for prior years on the Croft Company’s current federal income tax returns. After making his
own research of Internal Revenue decisions, respondent advised the company's president to deduct the taxes as a business expense in the year of settlement of the dispute, notwithstanding the fact that the company kept its books on an accrual basis. This consultation and advice rendered by respondent was not done in connection with any audit he was performing of the Croft Company's accounts nor in its regular accounting work. On failure of the Croft Company to pay respondent for the service rendered, respondent brought suit, but the action was dismissed at the close of the plaintiff's case on the ground that Bercu's testimony showed that what he had done constituted unlawful practice of law. After discontinuance of an appeal at respondent's request, petitioner, New York County Lawyers Association, sought an order in the Supreme Court, Special Term, New York County, adjudging Bercu in contempt of court for such unlawful practice and enjoining him from its continuance. The court refused to grant the injunction on a procedural ground and found as a matter of substance that respondent's activities lay within the proper scope of the accounting profession and, therefore, did not constitute the unlawful practice of law. In re Bercu, 188 N. Y. Misc. 406 (Sup. Ct. 1947), 69 N. Y. S. 2d 730. From this order petitioner appealed. Held, that respondent should be adjudged in contempt and fined $50 and an injunction as prayed for issued on the ground that respondent had, "... set himself up as a public consultant on the law of his specialty," such practice being unlawful, the respondent not being a member of the bar. Application of New York County Lawyers Ass'n In re Bercu, N. Y. App. Div. (1st Dep't 1948), 78 N. Y. S. 2d 209. This order was later modified when respondent was enjoined, "... from holding himself out or assuming, using or advertising himself as a tax counsel, tax counsel or tax consultant, or by any equivalent designation." 17 U. S. L. Week 2136 (U. S. Oct. 4, 1948).

This case is but one of the many attempts of the various bar associations throughout the United States to stamp out the unauthorized practice of law by the lay practitioner and to establish an understandable and guiding division line between lawyers and accountants in the tax field. Merrick v. Am. Sec. & Trust Co., 107 F. 2d 271 (App. D. C. 1939); Chicago Bar Ass'n. v. United Taxpayers of America, 312 Ill. App. 243, 38 N. E. 2d 349 (1942); Application of New York County Lawyers Ass'n, In re Standard Tax and Management Corp., 181 Misc. 632, 43 N. Y. S. 2d 479, (Sup. Ct. 1943). The area comprised within the definitive words "tax field" has proven to be exceedingly perplexing to both lawyers and accountants in attempting to establish divisions of exclusive legal or accounting practice within the field because of the mutual ground each must tread in handling any tax problem. See Maxwell and Charles, Joint Statement as to Tax Accountancy and Law Practice, 32 A. B. A. J. 5 (1946). This perplexing problem becomes evident in a consideration of the principal case as decided by the Supreme Court, Special Term, where the court stated, "The respondent Bercu limited his research
and his advice to principles of accounting, to a study of the tax law, the court decisions and the departmental rulings on a specific subject with which he was concerned. He did not go outside the tax law; he did not inquire into other law." Yet the Supreme Court, Appellate Division, in reversing the order appealed from in a review of the principal case reached the diametrically opposite viewpoint on the same statement of facts when it said, "It is difficult, therefore, to draw a precise line in the tax area between the field of the accountant and the field of the lawyer. Unless we are to say, however, that because common ground exists between the lawyer and the accountant in the tax area no bounds may be recognized between them, some line of demarcation must be observed. We believe the line has not been altogether obliterated, and with due regard to the latitude which should be given to the accountant, a majority of this court is quite clear in its mind that respondent's services in this matter were well into the field of the law and outside of the field of accounting. To hold otherwise would be tantamount to saying that an accountant may practice tax law." Application of New York County Lawyers Ass'n In re Bercu, supra.

It is admitted by a majority of the courts that an accountant may determine questions of a legal nature that arise as an incident in the preparation of his client's tax reports, Humphreys v. Comm'v of Int. Rev., 88 F. 2d 430 (1937); or where the accountant issues tax information, see Groninger v. Fletcher Trust Co., 220 Ind. 202, 208, 41 N. E. 2d 140, 142 (1942); but where the accountant goes beyond these incidental interpretations of the law and enters the field where his advice can no longer be considered that of an accountant but rather an invasion of the legal realm without being held to the professional requirements of a member of the bar or his high degree of fiduciary responsibility, as where the accountant renders advice on tax law interpretation, Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N. E. 2d 27 (1943), the courts do not hesitate in holding such practice illegal.

Therefore, the question to be decided in establishing the mutually exclusive ground of the lawyer and the accountant in the tax field seems to be whether the advice given is primarily legal or only incidentally legal. This distinction was recognized in Merrick v. Am. Sec. & Trust Co., supra, where the court in deciding that a trust company was not engaged in the illegal practice of law when in carrying out its authorized fiduciary business as executor, administrator, trustee, guardian, agent, custodian, and manager it performed legal services reasonably incidental to the conduct of its authorized business, stated, " . . . we accept the general distinction between the primary and the incidental." This judicial distinction, however, leaves much to be desired, for under such rule nearly every individual service performed by the accountant in the tax field would have to be litigated to determine whether it was primarily one of law, thus to be reserved to members of the bar, or only legally incidental to the practice of accounting and thus within the proper sphere of advice of the accountant.
The distinction is further complicated by the attitude on the part of accountants that, "... taxable income should be determined in accordance with generally accepted accounting principles rather than in accordance with a long line of statutory and judicial concepts, many of which seem highly artificial." See, 83 Journal of Accountancy 457 (1947). This opinion of accountants that taxation is primarily a problem in accounting seems to be borne out in part by the Supreme Court of the United States when it held that questions of accounting are at times questions of fact and not of law. Dobson v. Comm'r of Int. Rev., 320 U. S. 489 (1943). However, the problem is far from settled and it would seem that the legislative halls are the proper place to resolve the boundary lines between the accountant and the lawyer in the tax field, and not the court rooms, nor the "market place." See, Note, 56 Yale L. J. 1448 (1947).

JON R. COLLINS

CONFLICT OF LAWS—The Doctrine of Res Judicata under the Full Faith and Credit Clause Applies to Divorce Proceedings When the Jurisdictional Facts Have Once Been Litigated by the Party Instituting the Collateral Attack, or Where There Has Been Opportunity to Litigate the Same.

These are companion cases which have been argued together in the United States Supreme Court on certiorari from the Supreme Judicial Court of Massachusetts. The petitioners in both cases in the State court collaterally attacked divorce proceedings which had resulted in absolute decrees being granted by sister states. In Sherrer v. Sherrer, infra, the wife had gone to Florida and instituted a divorce proceeding. The husband received notice by mail, and then retained Florida counsel who entered a general appearance and filed an answer denying generally the allegations of the petition, including the averment that the petitioner was a domiciliary of Florida. The husband appeared personally to contest the suit and on determination of the facts the Florida court entered a decree of divorce, specifically finding the jurisdictional fact of domicile. The husband did not avail himself of direct appeal. In the case of Coe v. Coe, infra, the husband had gone to Nevada and instituted divorce proceedings. The wife, upon receiving notice, personally appeared, filed an answer and a cross-complaint seeking a divorce. The question of the jurisdiction over either party was never raised, and the Nevada court after finding that it had jurisdiction of both parties, and of the subject matter, entered a decree of divorce on the cross-petition. Subsequently, the losing parties in both cases instituted proceedings in the courts of Massachusetts, the original domicile of all parties, collaterally attacking the decrees for want of jurisdiction. In both cases the results were substantially the same; the Massachusetts court finding that the Florida and Nevada courts
did not have jurisdiction, and that the requirement of "full faith and credit" did not preclude the Massachusetts court from re-examining the finding of domicile made by the Florida and Nevada courts. Held; The Massachusetts court was in error in both cases, because Art. 1, Sec. 4 of the Federal Constitution requires a state court to give "full faith and credit" to the adjudications of sister states where such adjudications have been made in proceedings in which the issue of jurisdiction, either of the parties or the res, was actually litigated, or the parties had the opportunity to litigate the same. Sherrr v. Sherrr, 68 Sup. Ct. 1087 (1948); Coe v. Coe, 68 Sup. Ct. 1094 (1948).

The instant cases represent the second attempt by the Supreme Court to bring the problem of foreign divorce decrees within the limits of a recognized pattern of law. Prior to these decisions lower courts have been in hopeless confusion as to when they were required to honor judgments which sister states made in divorce actions. This uncertainty was caused mainly by the policy of the law to treat divorce as a mixture of an "in rem" and personam action. See, Haddock v. Haddock, 201 U. S. 562 (1906). It was also caused by the policy of the law to attempt to preserve the marriage relationship by not allowing a person who was at fault to leave the state of marriage domicile and obtain a divorce in a state with more lax divorce laws. Haddock v. Haddock, supra. As a result it was within the right of a state to refuse to give "full faith and credit" as provided by the Constitution, if it could be established that the petitioner in the foreign divorce proceeding was at fault; as well as to refuse such recognition on the grounds of lack of jurisdiction of the foreign court over the residents of the state which jealously sought to preserve its jurisdiction over the marital status. It was not until the Supreme Court handed down its decision in the first Williams case, Williams v. North Carolina, 317 U. S. 287 (1942), that a definite pattern began to develop. The net effect of that case was to destroy the doctrine of jurisdiction predicated on default, and to lay down the law that "full faith and credit" must be given to the foreign divorce decree if the divorcing state permits the bringing of the action, the petitioner acquires domicile and appropriate service is made. Since domicile is a necessary prerequisite in divorce cases, see, Bell v. Bell, 181 U. S. 175 (1901), the Williams case merely provided that once having established the jurisdictional fact, foreign divorce decrees must be res judicata of the action. As a necessary corollary, if jurisdiction is not present the attacking state need not accord "full faith and credit." The question then arose as to who is to establish whether the jurisdictional fact was present. That is the primary importance of the second Williams case, Williams v. North Carolina, 325 U. S. 226 (1945). It was there declared that so long as the attacking state does not act arbitrarily and capriciously it may re-examine the jurisdictional facts, and if it finds that such were not present, then the original action is not res judicata. In arriving at this conclusion the court merely followed the conflict of laws doctrine as laid down in
Thompson v. Whitman, 12 Wall. 457 (U. S. 1873). However, the Williams cases, it must be remembered, were based solely upon the domicile of the petitioning party and constructive service upon the respondent.

Thus the law evolved until the instant cases came before the court. These cases presented an essential element not present when the Williams cases were under consideration. Here the respondents personally appeared in the litigation, and in the Sherrer case the respondent contested the question of the petitioner's alleged domicile. In the Coe case the respondent in her cross-complaint admitted as true the allegation of the petitioner's bill relating to his residence, and the court found that such constituted domicile. In the light of such facts the court had little difficulty in bringing the divorce problem more definitely within the scope of recognized conflict of laws rules. Two familiar and well recognized doctrines were relied on by the court in arriving at its conclusion: (1) where a party voluntarily appears in an action and litigates the question of jurisdiction over the person, the issue becomes res judicata and cannot be collaterally attacked in another court. Baldwin v. Iowa State Traveling Men's Association, 283 U. S. 522 (1931); (2) or where the question of the jurisdiction over the subject matter was raised and determined adversely, the judgment is res judicata generally as to the jurisdictional issue. Stoll v. Gottlieb, 305 U. S. 165 (1938). There is no question but that the respondent in the Sherrer case brought himself squarely under the first of these rules as well as under the second, if the divorce action is looked at as an "in rem" proceeding. The court believed that even in the Coe case the respondent brought herself within these two doctrines, although the fact that she actually has litigated the issue may be argued. However, in spite of the fact that the court may have conceded that she had not litigated the issue, this case falls within the principle of Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371 (1940) res judicata may be pleaded as a bar, not only as respects matters actually presented in litigation, but also as respects any other available matters which might have been litigated.

Thus it may be safely assumed that dating from these decisions the problem of foreign divorce proceedings are within the orbit of conflict of laws rules, and the former decisions in which divorce was considered as a thing apart, to be settled by its own rules, no longer prevails. The effect, which was to draw this type of judgments within the "full faith and credit" clause, strengthens the importance of this section of the Federal Constitution, and gives it a greater scope and definiteness. As pointed out by the court in the majority opinion, it was urged that the peculiar nature of divorce demanded that it not be regulated by the application of the "full faith and credit" clause, but that its regulation be reserved to the state, even to the point of allowing freedom of collateral attack. The court while recognizing the nature of a divorce action nevertheless contended that where the case involves incon-
sistent assertions of power by courts of two states of the Federal Union, this peculiar characteristic must give way, and local policy cannot be allowed to abrogate the provisions of the Federal Constitution. This saving declaration by the court has closed the door to the possible argument that divorce might come under the doctrine of Kalb v. Feuerstein, 308 U. S. 433 (1940) where it was declared that there may be an exception to the rule of the Chicot case, supra, decision dictated upon public policy.

As a result of the instant decision, it is possible to predict with an element of certainty just what will be the effect of foreign divorce actions, by applying the evolved conflict of laws principles. The maxim, "if you go in, you do so at your peril" has meaning. Should the respondent in a divorce action seek to contest the suit in any manner which may indicate that he had the opportunity to litigate the question of jurisdiction, then upon the strength of the law as it has developed he has no further recourse than a direct appeal. Should he stay out of the foreign proceeding and not contest it in any way, he may attack collaterally to determine if there did exist the necessary jurisdictional facts. The dissenting opinion clearly points out the fallacy of this development in that it leaves open to "bargain counter divorces" a state of the law fraught with "untoward consequences", and that fraud and sham will allow a divorcing state to adjudicate that it possesses the necessary jurisdictional facts, when in fact it does not. Meanwhile, the interested state of marital domicile is helpless to question the asserted jurisdiction. Whether such result will develop remains for the future, but for the present the "full faith and credit" clause will be the test.

Francis J. Nicholson, S.J.

CONSTITUTIONAL LAW—The House Committee on Un-American Activities has the Power to Inquire Whether an Individual Witness is or is not a Believer in Communism or a Member of the Communist Party.

The chairman of the Joint Anti-Fascist Refugee Committee was cited for for contempt of the House Committee on Un-American Activities because of his refusal to produce the books and papers of his organization which the Committee had requested. On appeal from a conviction by the U. S. District Court of the District of Columbia the U. S. Court of Appeals of D. C. held: there was justification for the power of inquiry and therefore appellant was rightly convicted for his recalcitrance. Barsky v. U. S., 167 F. 2d 241 (App. D. C. 1948) Cert. denied, June 14, 1948.

The power of Congress to investigate, while not expressly granted by the Constitution, has always been considered by the judiciary as an essential auxiliary of the legislative function. The Supreme Court has tended to extend this power rather than restrict it, holding it to be broader than the power to legislate.
In *McGrain v. Daugherty*, 273 U. S. 135 (1917), the court reversed an order releasing a contumacious witness from custody, deciding that the court is bound to presume that the action of Congress in investigating is with a legitimate object where such construction of the action is not without foundation. Legislation may result from information derived from an inquiry of an extensive nature, and it is that potentiality which limits the power of inquiry. Nor need the object of the investigation be stated in advance.

It has been held that the relevancy of a Congressional committee's interrogations is a question of law; the pertinency of these inquiries a witness judges at his own peril. Congress may make inquiries concerning the public domain and in so doing may compel witnesses to reveal even their private business affairs, *Sinclair v. U. S.*, 279 U. S. 263 (1928). The fact that a certain committee has not produced any legislation does not invalidate its inquiries. *Townsend v. U. S.*, 95 F. 2d 352 (App. D. C. 1938), *Cert. denied* 303 U. S. 664 (1938).

Congressional investigatory power, on the other hand, is not unrestricted. In the leading case, *Kilbourn v. Thompson*, 103 U. S. 168 (1881), the court acknowledged Congress' wide investigatory power but held invalid an investigation of a judicial nature because "no person can be punished for contumacy as a witness before either House unless his testimony is required in a matter into which that House has jurisdiction to inquire." This is the only Supreme Court case, however, in which a Congressional committee has been held to have exceeded its investigatory powers. Another restriction appears in *U. S. v. Lovett*, 328 U. S. 303 (1942):—"Congressional action aimed at . . . named individuals which stigmatizes their reputation and seriously impairs their chance to earn a living" cannot be sustained. For the most comprehensive treatment of Congressional power of inquiry see McGearie, Development of Congressional Investigatory Power, Columbia Univ. Press, 1940.

The courts have not found it easy to apply this settled doctrine to the cases of the witnesses cited for contempt of the House Committee on Un-American Activities. "The problem is difficult and delicate. In it we have . . . the real problems of balancing the public interest against public security," *Barsky v. U. S.*, supra. There are two problems involved in the instant case: may Congress investigate Communism as an alleged threat to the government and, if so, is a witness' relationship to Communism a private, personal matter beyond the scope of Congressional investigation.

The investigation of Communism is clearly within the power of Congress, the court holds. Congress has the power to investigate threats to the nation's political life. It is charged with part of the responsibility imposed on the federal government by the clause in the Constitution which provides that "the United States shall guarantee to every state in the Union a republican form of government." *U. S. Const. Art. IV, § 4.* This clause alone would provide the authority for Congressional inquiry into potential dangers to
the state. And although Communism is not a crime, *Schneiderman v. U. S.*, 320 U. S. 118 (1943), even the recitations in the opinion of the *Scheiderman* case, the court holds, would be sufficient to justify inquiry. Nor is the investigatory power limited by the “clear and present danger” rule expressed by Mr. Justice Holmes in *Schenck v. U. S.*, 249 U. S. 47 (1919).

“There is a vast difference between the necessities of inquiry and the necessities for action. The latter may be only when danger is clear and present, but the former is when danger is reasonably represented as potential.” *Barsky v. U. S.*, *supra*.

In determining the second question involved, the constitutionality of compelling a witness to reveal his affiliation to the Communist Party, the court admits that “neither House has the general power of making inquiry into the private affairs of the citizen”, *Klaxon v. Thompson*, *supra*, but counters with the paradox that “the protection of private rights upon occasion involves an invasion of those rights.” One’s relation to Communism is not such a personal concern that it is exempt from Congressional investigation because inquiry into this point relates to the personal affairs of private individuals only to the extent that those individuals are a part of the government as a whole. And, moreover, that which potentially affects the very survival of the government is by no means the purely personal concern of one man. Congress has without doubt the power to investigate the Communist Party; it has thereby the power to learn the names of the individuals who make up the Party.

The *Barsky* case therefore is in accord with the settled law on Congressional investigatory power. It reaffirms the wide latitude given to Congress in this regard and extends its power to an investigation of threats to the existing form of government by extra-constitutional processes of change and includes within this broad power the capacity to compel a witness to reveal his connection with Communism and/or the Communist Party. The instant case supplements and broadens *Josephson v. U. S.*, 74 F. Supp. 958 (C. C. A. 2d 1947), *Cert. denied* 68 Sup. Ct. 609, the only other completely litigated case on the extent of the investigatory power of the House Committee on Un-American Activities. In the latter case Josephson refused to be sworn or to testify before this Committee until he had the opportunity to determine through the court the constitutionality of its existence. The witness became the first person actually imprisoned for contempt of this Committee, the court holding that the subject of un-American activities is not too vague a term to justify a Congressional investigation and that therefore the witness who refused to testify did so at his own peril. In both these cases the court has carefully delimited its holding and in each there is a vigorous, well reasoned dissent.

The *Josephson* and *Barsky* decisions set the pattern for the several appeals now pending. The two most important cases are *U. S. v. Lawson* and *U. S. v. Trumbo*, (Civil Nos. 9872, 9873 App. D. C. 1948). The government’s coun-
CONSTITUTIONAL LAW—To complains of an unlawful search and seizure
defendant must have an interest in the place searched or the property
seized.

Before trial in the District Court for the District of Columbia on four
counts for promoting a lottery, possession of lottery tickets and keeping a
place and a table for betting on horse races, defendants McDonald and
Washington moved for the return of seized property and the suppression of
same as evidence. The property had been acquired by police officers, who,
without a warrant of any kind, unlawfully entered a lodging house in which
McDonald was a roomer, searched all the rooms until encountering McDonald's
locked door on the second floor rear. Then standing on a chair and peering
through a transom into the room, one of the officers arrested the occupants,
McDonald and Washington, for the commission of a misdemeanor in his
presence. Motion to suppress was denied and both defendants were found
guilty on all counts. Instant case arose from an appeal of this ruling to the
Court of Appeals for the District of Columbia. Held, that McDonald as a
mere roomer and Washington as his guest did not have a right to protest the
unlawful entry into the rooming house and the ensuing search of McDonald's
room by means of the transom, since neither defendant had an interest in the
premises searched or the property seized. McDonald v. U. S., 166 F.2d 957
(1948); cert. granted 68 S. Ct. 905.

This case represents an extension of the doctrine of Gibson v. United States,
80 U. S. App. D. C. 81, 149 F.2d 381 (1945). The court ruled in that case
that objection to evidence obtained in violation of the 4th Amendment may
be raised only by one who claims ownership in or a right to possession of the
premises searched or the property seized. In that case the aggrieved was
neither roomer nor owner, but a mere guest.
As a basis for its ruling in the Gibson case, Shore v. United States, 60 App. D. C. 137, 49 F.2d 519 (1931), and Shields v. United States, 58 App. D. C. 215 (1928), were cited. The connotation of the phrase, "One who does not claim—", is quite different when employed in the Shore and Shields cases than that of the same phrase when used in the Gibson case. In the former cases those moving to have the evidence suppressed, had, by word, Shore v. United States, supra, by conduct, Shields v. United States, supra, effected an affirmative disclaimer of possession in the property seized. Shore, when arrested, disclaimed ownership of the contraband; later when he inconsistently made a motion to suppress, then alleging possession, this was overruled. Shields in his motion to suppress submitted an affidavit which was fatally defective because it failed to allege ownership of the articles seized and lacked a necessary request that they be returned. That motion was denied.

When the rule of the Shore and Shields cases was applied in the Gibson case and now in the instant case the sense of the words was considerably altered, viz: from the idea of "One who disclaims possession—" referring to an individual who has either verbally or by his conduct affirmatively disavowed ownership, to the idea of "One who does not claim possession—" indicating a person who cannot, by virtue of the fact that he is not the real owner, claim property interest in the articles seized or the premises searched. It is a misleading and false generalization occasioned by now defining negatively what was originally described by an affirmative rule. Interpreting the rule in its enhanced negative application it would appear that a property owner should be accorded a constitutional right which was not available to a non-property owner. That a roofer has a right to be free from unreasonable search and seizure is a doctrine upheld by the decisions of a U. S. District Court and two U. S. Circuit Courts of Appeal. In United States v. DeBousi, 32 F.2d 902 (Mass. 1929), the court ruled that a lessee or a licensee, occupying a dwelling house, who claims ownership of property unlawfully seized without a warrant, is entitled to invoke the protection of the 4th Amendment to compel the exclusion of evidence so obtained; the fact that he was not the owner of the building does not disqualify him from asserting the invalidity of the search and seizure.

The 9th Circuit Court of Appeals in Alvau v. United States, 33 F.2d 467 (C. C. A. 9th 1929), reversing a district court, sustained a motion to suppress evidence, stating that such evidence seized as a result of an illegal search of a private dwelling cannot be used either against the owner or his guest, as the latter for the time being, as the guest or employee of the owner, was domiciled in the residence.

In Brown et al v. United States, 83 F.2d 383 (C. C. A. 3d 1936), the court decided that roomers in private dwelling houses are protected by the constitutional prohibition of unreasonable search and seizure and that evidence obtained during, and by means of, an illegal search is inadmissible.
In the instant case the evidence proved that McDonald was a roomer and Washington was a guest. As such, both men were protected by the unreasonable search and seizure clause of the 4th Amendment according to the weight of authority of those federal courts which have had occasion to rule on the matter. The sole federal ruling to the contrary is the Gibson case. By a maladroit negative statement of a settled and valid rule of law affirmatively expressed in the Shore and Shields cases, the court in the Gibson case fell victim to a fallacious false generalization which, reduced to the concrete, would make at least one of the citizen's constitutional rights dependent upon the feudalistic concept of estate in land.

JOSEPH M. F. RYAN

CONSTITUTIONAL LAW—In criminal prosecutions of non-capital offenses the Fourteenth Amendment does not require that the court either inquire into or assign counsel to defendants unable to provide counsel of their own choosing.

In the Circuit of La Salle County, Illinois, Roy Bute pleaded guilty to two charges of “taking indecent liberties with children” and on each one was sentenced to a prison term of from one to twenty years. He was not represented by counsel and the common law records of the proceedings failed to indicate whether or not the court inquired as to his desire to be so represented. While serving his sentence, he petitioned the Supreme Court of Illinois for a writ of error, basing his claim on the common law record, relying particularly on the allegation that he had been denied representation by counsel and that the trial court had not advised him of his right to assistance of counsel. The Illinois Court denied his claims and affirmed the judgment. The Supreme Court of the United States granted certiorari. Held, the silence in the record as to the petitioner’s desire for counsel is insufficient to invalidate the sentence, and further, in the absence of any showing of facts outside the record, the due process clause of the Fourteenth Amendment does not require the state court to make the inquiries or the offer of an assignment of counsel. Bute v. Illinois, 333 U. S. 640 (1948).

Whether the language of the Sixth Amendment to the Constitution of the United States meant that the right to have “Assistance of Counsel” included more than the mere right to be represented by counsel of the accused’s own choosing was not made clear until the decision by the Supreme Court in Johnson v. Zerbst, 304 U. S. 458 (1938), which held, in effect, that in federal courts a defendant unable to secure his own, must be provided counsel.

Under the “due process” clause of the Fourteenth Amendment the question of its applicability to the right of counsel first came before the Supreme Court in the famed Scottsboro Case. There it was held that “in a capital case, where
the defendant is unable to employ counsel, and is incapable adequately of
making his own defense because of ignorance, feeble mindedness, illiteracy,
or the like, it is the duty of the court, whether requested or not, to assign
counsel for him as a necessary requisite of due process of law; and that duty
is not discharged by an assignment at such a time under such circumstances
as to preclude the giving of effective aid in the preparation and trial of the
case.” Powell v. Alabama, 287 U. S. 45, 71 (1932). Whether, the rule in this
case would likewise be applied to non-capital felonies remained undecided
for a decade. To many observers it seemed likely that the Court would so
hold, for the oft-quoted language of Mr. Justice Sutherland in the Powell case
287 U. S. 45, 69 (1932), is as effective an argument for the right to have
counsel assigned in all felonies as it is for capital offenses.

“... the intelligent and educated layman . . . lacks both the skill and the
knowledge to prepare his defense, even though he have a perfect one. He
requires the guiding hand of a counsel at every step in the proceeding against
him. . . . If that be true of men of intelligence, how much more true is it of
the ignorant and illiterate, or those of feeble intellect.”

However effective the above words may have been the Supreme Court refused
to apply them to its ruling in Betts v. Brady, 316 U. S. 455 (1941), a
robbery case in which an indigent defendant requested and was refused an
assignment of counsel by the trial court. The Court held that due process
of law did not require that in every criminal case a state must furnish counsel
to a defendant unable to provide his own.

In the very few years since the Betts case the pressure to overturn this
decision has steadily increased. The most generally voiced opinion, while
not always flatly opposed to the rule of Betts v. Brady, supra, is to the effect
that the states should not be content with providing the bare minimum of
protection to the defendant necessary to satisfy that rule. See 13 U. of Chi.
L. Rev. 266 (1946); 46 Col. L. Rev. 647 (1946); 95 U. of Pa. L. Rev. 793
(1947); 23 Tex. L. Rev. 66 (1944). Implementing this opinion, cases con-
testing this very point have in the last few years come before the Supreme
Court with increasing frequency. See Carter v. Illinois, 329 U. S. 173 (1946);
Foster v. Illinois, 332 U. S. 134 (1947). In these cases, as in the instant
case, a group of four justices, led by Mr. Justice Black, has dissented vigorously.

While refusing to extend the rule of the Powell case, supra, the Supreme
Court and the Circuit Courts of Appeal, have in a series of cases, all of them
subsequent to 1940, specified the requirements of a fair trial under the “due
process” clause with respect to representation by counsel. In a federal court
or in a capital case in a state court a defendant may waive his right to have
counsel appointed for him if necessary, but such waiver must be intelligent
Missouri, 323 U. S. 485 (1945); Adams v. United States ex. rel. McCann,
317 U. S. 269 (1942); Walker v. Johnson, 312 U. S. 275 (1941), Johnson
v. Zerbst, supra. But the waiver must be an actual one and cannot be implied from a plea of guilty. Rice v. Olson, 324 U. S. 786 (1945). Where counsel is appointed by the court, such appointment must be an effective one, Powell v. Alabama, supra. Counsel must be competent, Achten v. Dowd, 117 F.2d 989 (C. C. A. 7th 1941), and must not have conflicting interests, Glasser v. United States, 315 U. S. 60 (1942). Counsel must be given a reasonable opportunity to prepare the defense, Thomas v. United States, 90 F.2d 424 (App. D. C. 1937); but cf. Avery v. Alabama, 308 U. S. 444 (1940). The accused must be given opportunity to consult with counsel on every material step after indictment, but cf. Hawk v. Olson, 326 U. S. 271 (1945); Canzio v. New York, 327 U. S. 82 (1946).

The above applies to court-appointed counsel. Where the defendant indicates his desire to obtain his own counsel, he seems to acquire somewhat broader rights. The court must allow him sufficient time to obtain and consult with his lawyer, Hawk v. Olson, supra. Furthermore he may not be required to take any important step, such as pleading to additional charges, during any temporary absence of his counsel. White v. Ragen, 324 U. S. 760 (1945); House v. Mayo, 324 U. S. 42 (1945).

In listing these rules as drawn from the various decisions it would seem at first glance that in non-capital offenses in state courts, the defendant is not entitled to counsel as a matter of right if he cannot afford that luxury but may be forced to trial without one; however, if he is able to afford one the trial cannot proceed in his counsel’s absence. Actually, such an absurdity is not reached, because the courts in applying these subordinate rules which support due process of law apply them in relation to whether the total facts of the case indicate a trial lacking in fundamental fairness, rather than applying them rigidly. See Betts v. Brady, supra, at 462.

The Supreme Court, properly, has insisted that the keystone of “due process” in criminal prosecution is “fairness”. For that reason it has been loath to insist on particular procedural aspects as essentials of “due process”, but rather it has weighed all of the facts present in each specific case to determine whether they add up to a fair trial or fall short of it. Certain items have been held to be essential, but not of their own merit. They have been insisted on because the court has felt that no trial however otherwise conducted, could be deemed to have been a fair hearing without them. Nevertheless, the Supreme Court has frequently crystallized its meaning of “fairness”, so that when we ask the question—what are some of the requirements of a fair trial—we find certain hard and fast rules which have been applied almost rigidly. For instance, a confession induced by coercion is inadmissible, Brown v. Mississippi, 297 U. S. 278 (1936), but exemption from self-incrimination is not included under the protection of “due process”. Adamson v. California, 332 U. S. 46 (1947). Furthermore, the same rule as the petitioner is striving for in the instant case has already been accepted by the Court in trials for
capital offenses. While the growth of "due process" into rigidity should very certainly be resisted, in this aspect the rule as to the right of counsel, once having been laid down, there is no reason why the Court should not apply it to all felonies. The line could very well be drawn at misdemeanors as a practical cutting-off point.

Although it would appear that the rule contended for in the series of cases beginning with Betts v. Brady, supra, is making no headway with the Supreme Court, it is, nevertheless, knocking at the gates of established law with increasing insistence. The very fact that certiorari is now frequently granted to review the question of the right of counsel is in itself a reflection of the temper of the times and an indication that the Court may be waver ing in its viewpoint. The flood of cases involving the various aspects of the problem which have been decided since 1940 is a further indication that the law is still unsettled on this point. The extensive review of state statutory and constitutional material on the right of counsel undertaken both by the Court in Betts v. Brady, supra, 467-471, and by the dissent, 477-480, illustrates that in every state there is at least some provision for the assignment of counsel to indigent defendants, although some states leave it to the discretion of the court in non-capital cases. These state provisions reflect, as was pointed out in the opinion of the Court in Powell v. Alabama, supra, at 73, the growing inclination throughout country to regard the right as fundamental. All these trends, plus the implacable urging of the vigorous minority of four in every case, including the instant case, which has affirmed the rule of Betts v. Brady, supra, lead to the conclusion that that rule has at the most but a few more years of existence.

J. E. GREENBACKER

CRIMINAL PROCEDURE—Payment of a Fine in a Criminal Suit Does Not Precede Defendant's Right to Appeal.

Indicted and convicted for assault and battery, the defendant was sentenced to pay a fine of $500 plus costs, with which order he immediately complied. Subsequently, he filed an appeal from the judgment. Held; one convicted of assault and battery is entitled to appeal from the judgment, notwithstanding he has paid the fine imposed. Duncan v. State 58 A. 2d 906 (Md. May 19, 1948).

This procedural right is the subject of a conflict of views. In the majority of jurisdictions, it has been the rule that payment of a fine, or serving a sentence resulting from a criminal conviction, constitutes a waiver of the right to appeal. The reasoning leading toward this conclusion is that the accused has no further interest in the action and the question of conviction is moot. This view is especially adhered to where the accused cannot have the
fine remitted and where the accused has voluntarily paid the fine. *State v. Westfall* 37 Iowa 575 (1873); *Eutsler v. Commonwealth* 154 Ky. 35, 156 S. W. 855 (1913); *State v. People's Ice Company*, 127 Minn. 252, 149 N. W. 286 (1914).

In *State v. Winthrop*, 148 Wash. 526, 269 Pac. 793 (1928), the court said in referring to the majority view: "These decisions, it seems to us, lose sight of or purposely ignore that damaging effect of such a judgment which everybody knows reaches far beyond its satisfaction by payment of a fine or serving a term of imprisonment." In *State ex rel Lopez v. Killigrew*, 202 Ind. 397, 174 N. E. 808 (1931), the Court held that even though the prisoner may not recover the fine imposed, the machinery of legal redress should be available to him to vindicate his good name in order to achieve results more consonant with justice. Likewise, Judge Cowen decided in *Barthelemy v. People*, 2 Hill 248, 255 (N. Y. 1842) in relation to a conviction for criminal libel that, "—the payment or satisfaction of an erroneous judgment against a party can never be allowed as a bar to a writ of error, even in a case where we must see that no restitution could follow the reversal as a legal consequence and no costs be recovered. An erroneous judgment against him is an injury *per se*, from which the law will intend he is or will be damnedified by its continuing against him unreversed."

While courts have said that voluntary payments constitute waiver of the right to appeal, the majority's conception of such voluntary satisfaction has been consistently much broader than that of the minority. Under the minority view, submission to the judgment rendered against him is always payment without his consent and the accused does not waive his right to appeal, for waiver is effectuated only by compromise of the judgment and agreement not to appeal. *Metcalf v. Drew*, 75 Cal. App. 2d 711, 171 P.2d 488 (1946). "To hold otherwise would be manifestly unjust to such appellant... Courts should never lend their aid to the possible achievement of injustice. Law and good morals should be one and inseparable. Both law and good morals dictate that satisfaction of a judgment under the conditions present... should not preclude appellant... from prosecuting an appeal taken by him in good faith to vindicate rights vital to him." *Metcalf v. Drew*, *supra*.

The Court said in *Commonwealth v. Fleckner*, 167 Mass. 13, 44 N. E. 1053 (1896): "We should be slow to suppose that the legislature meant to take away the right to undo the disgrace and legal discredit of a conviction merely because a wrongly convicted person has paid his fine or served his term... Of course, the payment of a fine in accordance with the sentence was not a consent to the sentence, but a payment under duress." See further: *Fiswick v. United States*, 329 U. S. 211 (1946); *Johnson v. State*, 172 Ala. 424, 55 So. 226 (1911); *People v. Marks*, 120 N. Y. S. 1106 (1909); *Roby v. State*, 96 Wisc. 667, 71 N. W. 1046 (1897).

In the instant case, it is clear that the Maryland Court of Appeals has
placed Maryland in the company of the jurisdictions propounding the minority doctrine as the sounder view, and because Art. 2, § 20, of the Maryland Constitution allows remission of fines. Therefore, Judge Delaphaine declared in his opinion, "We hold that the payment of the fine did not deprive him of his statutory right of appeal, since he has a substantial stake in the judgment of conviction in view of our Constitutional provision that the Governor has the power to remit fines and forfeitures for offenses against the State."

It would, perhaps, be at variance with fact to state that the majority holding is slipping steadily into disclaim. Nevertheless, it would not seem amiss to declare that the opinion in the instant case represents a strong, well-reasoned minority preferred by many courts and legal writers, regardless of whether the satisfaction of the judgment was voluntary or involuntary, or whether the fine could or could not be returned to the accused.

NICOLAUS BRUNS, JR.

EQUITY—Automobile Dealer is Entitled to a Temporary Injunction Restraining Further Transfer of an Automobile Sold Under a Contract Giving the Dealer an Option to Repurchase the Automobile Should the Purchaser Decide to Resell within Six Months, where the Purchaser and a Used Car Dealer Have Apparently Colluded to Transfer the Automobile to the Used Car Dealer.

Plaintiff, Larson Buick Co., sold a new automobile to the defendant, Mosca, under a contract which afforded the plaintiff an option to repurchase the automobile if the purchaser should decide to resell it within six months. Mosca assured plaintiff that he was purchasing it for his own use, with no intention of transferring the car to a used car dealer, but the following day he transferred the car to the co-defendant Joni Lynn, Inc., one of whose officers had been present when Mosca made his statement of intention to keep the automobile for his own use. Held: Plaintiff is entitled to a temporary injunction to prevent further transfer of the automobile in view of the fraud perpetrated on the plaintiff by the defendants. Larson Buick Co. v. Mosca, 79 N. Y. S. 2d 654 (N. Y. 1948).

In general, equity will not interfere with contracts involving the disposition of chattels. But in this case the court apparently found fraud in the inducement on the part of the defendants Mosca and Joni Lynn, Inc., and for this reason granted the temporary injunction.

But it is axiomatic that suits in equity shall not be sustained in any case where plain, adequate and complete remedy may be had at law. The so-called English Doctrine holds that the jurisdiction of equity exists over every case of fraud, whether the primary rights of the parties are legal or equitable, even though the law courts may have concurrent jurisdiction. But the Ameri-
can Doctrine holds that where the right involved is a legal right, then equitable jurisdiction is concurrent with legal jurisdiction only where the remedy at law is inadequate. 4 Pomeroy, *Equity Jurisprudence*, 580, 589 (5th ed.). Thus it is not in every case of fraud that relief is to be administered by a court of equity. In cases involving the fraudulent sales of personal property, the remedy at law is complete, as a defrauded seller may recover the chattels by replevin or their value in conversion, and a defrauded buyer may recover the price which he paid, eliminating any possible need of equitable intervention. Walsh, *Equity* § 100 (1930).

It is a well settled rule that wherever a matter respects only the sale of chattels, and lies merely in damages, the remedy is at law only, even though there be fraud present. *Bzard v. Houston*, 119 U. S. 347 (1886); *Dennin v. Powers*, 160 N. Y. Supp. 636 (1916); *East River Nat'l Bank v. Columbia Trust Co.*, 171 N. Y. Supp. 384 (1918); *Walter v. Garland Auto Co.*, 149 N. Y. Supp. 653 (1914); *Newham v. May*, 13 Price 749, 147 Eng. Rep. 1142 (Ex. 1824). In such matters the granting of relief by injunction, which, in effect, at least temporarily decides the issues in favor of one litigant against another, is an extraordinary remedy which is discouraged by the courts and should not be resorted to where there is a plain and adequate remedy at law. *Missouri K. T. R. Co. v. Sanders*, 45 F. Supp. 606 (1942); *Tharp v. St. Georges Trust Co.*, 34 A2d 253 (Del. Ch. 1943). Consonant with the above principles, it has been held that suits to enjoin the fraudulent disposition of personal property cannot be maintained where there is an adequate remedy at law. *Gillispie v. Riggs*, 248 Fed. 843 (1918), *aff'd*, 253 Fed. 943 (1918); *Broadfoot v. Miller*, 174 N. Y. Supp. 497 (1918). From this, it would seem that fraud alone is not enough for equity to take jurisdiction in the instant case.

If fraud alone is insufficient to form a basis for equity to take jurisdiction and to grant an injunction, it is necessary to find in addition that there was no adequate remedy at law because of the uniqueness of the chattel in question, the peculiar features of the contract, the peculiar situations and needs of the parties thereto, or the fact that the damages would be so speculative and conjectural that no recovery can be had at law.

The basis of "unique chattel" would seem to be a poor one on which equity should take jurisdiction in this case. The courts that have used this ground have generally found irreplaceability, rather than a mere difficulty or inconvenience of replacement, the essence of uniqueness. *Williams et al. v. Carpenter*, 14 Colo. 477, 24 Pac. 558 (1890) (deeds); *Farnsworth v. Whiting*, 104 Me. 488, 72 Atl. 314 (1908) (keys); *Pattison v. Skillman*, 34 N. J. Eq. 344 (1881) (documents); *Duke of Somerset v. Cookson*, 3 P. Wms. 390 (1735) (altar-piece). Automobiles do not come within this category since other similar automobiles may be acquired on the market, although it may be necessary to pay a higher price, and pay that price to the very party whose
transactions plaintiff seeks to limit in this suit. But the difficulty of procuring
an automobile has been held not to make it a "unique chattel" so as to require

Equity may intervene in contracts involving the disposition of chattels on
the basis of peculiar features of the contract or of peculiar needs of the
parties thereto, which make a remedy at law inadequate. *Gloucester Isinglass
and Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 27 N. E. 1005 (1891)
(fish skins); *Dahlstrom Metallic Door Co. v. Evatt Const. Co.*, 256 Mass.
404, 152 N. E. 715 (1926) (pre-fabricated doors); *Curtice Bros. v. Cats*,
72 N. J. Eq. 831, 66 Atl. 935 (1907) (tomato crop). In these cases, however,
 extreme economic loss would have ensued without equitable intervention,
whereas the loss in the instant case is at most speculative. In addition the
chattels were practically unobtainable, because of local quasi-monopolies,
without serious interference with the economic arrangements of the plants,
while here, as pointed out above, another automobile could be obtained.
Finally, performance of the contracts in the cited cases was an absolute pre-
requisite to the continued successful operation of the respective businesses,
whereas it can scarcely be contended that Larson Buick, Inc. would go out
of business unless the defendants are restrained from further transfer of the
automobile in question. It would seem that the mere scarcity of automobiles
today does not create such a situation as to alter the circumstances and needs
of parties to an automobile sales contract or repurchase option which will
make a remedy at law inadequate and so command equitable intervention.
72 N. E. 2d 158 (Ohio 1947); *criticized, 36 Georgetown Law Journal* 460
(1948).

The question of the certainty of damages recoverable at law remains to be
considered. Equity will enforce valid contracts where the damages are so
speculative and conjectural that no recovery can be had at law. *General
Securities Corp. v. Welton*, 223 Ala. 299, 135 So. 329 (1931). Here the profit
that might be obtained in a subsequent sale cannot be the measure of damages
for automobile dealers are forced by manufacturers to sell at a fixed level,
and therefore this profit cannot represent the damage to the dealer. No
special or general damages were allowed in *Schuler v. Dearing*, *supra*. The
ture damages in this type of case are the damages to an automobile dealer's
relations with his manufacturer and with his other prospective customers
ensuing from one of his automobiles being re-offered for sale on the "gray
market". These damages would be extremely conjectural and difficult to
assess. It is then the speculativeness of the damages, coupled with fraud in the
inducement, that justifies equitable relief in this case.

It is difficult to say whether this case represents an inroad on the general
rule leaving those who contract with respect to the transfer of chattels to their
remedy at law, or whether it is only of importance in determining the proper remedy on a particular set of facts. The court seems to base its opinion chiefly on the fraud involved and properly so, since on no other basis could remedy be had against Joni Lynn, Inc. But since the law is that fraud alone does not justify equitable intervention, this case does represent a recognition of the fact that the condition of the present day automobile market is such that a dealer who obtains an option to repurchase a car he sells has no adequate remedy at law on the breach of that option.

CALVIN H. COBB, JR.

TORTS—In an Action for Damages Resulting from Injuries Caused by Horseplay, Liability Attaches on the Basis of Negligence unless the Injury is Intentionally Administered.

The plaintiff was engaged in a card game with the defendant and others. In the course of the game the plaintiff in jest pushed some money belonging to the defendant onto the floor. The defendant on picking up the money grabbed the plaintiff's foot in a spirit of horseplay and lifted it upwards with such force that the chair upon which the plaintiff was sitting skidded across the highly polished floor and tipped over backwards. As a result the plaintiff sustained the injury to his back for which he is now suing. In Nebraska there is a one year statute of limitations for assault and battery cases, whereas the statute runs for four years in actions based on negligence. This action was brought within the four year period but after one year had elapsed. Held, assault and battery as used by the legislature was meant to cover only those actions based on intentionally administered injuries, and therefore it was necessary for the defendant to have a hostile intent in order to constitute such a battery as was intended to be covered by the statute limiting such actions to one year. Since the defendant intended no injury but did what he did in the spirit of a joke, the tort committed was one sounding in negligence rather than on a battery and so is not barred by the statute. *Newman v. Christensen*, 149 Neb. 471, 31 N. W. 2d 417 (1948).

This problem was one of first instance with the Nebraska Supreme Court, and the solution is mainly a product of statutory interpretation. Decisions of the Minnesota and Wisconsin courts construing statutes similar to the one here in question were resorted to. In Minnesota a battery such as would be governed by the statute had to include an intentionally administered injury to the person. *Ott v. The Great Northern Ry.*, 70 Minn. 50, 72 N. W. 833 (1897). The Wisconsin decision relied on involved a situation similar to the one in the instant case, and there also it was held that to constitute such a battery as would fall within the statute there had to be an intentionally administered injury. *Donner v. Graap*, 134 Wis. 523, 115 N. W.
The only case in point referred to in the annotations of the statute, Neb. Rev. Stat., c. 25, § 208 (1943), is Borchert v. Bash, 97 Neb. 593, 150 N. W. 830 (1915), where it is said that it is a settled doctrine of statutory construction that words shall be taken to have their ordinary and customary meaning.

To say, as does the court in the instant case, that in a civil action a battery in its ordinary and customary sense must include an intentionally administered injury to the person is to deny the weight of authority and to confine the meaning of the term "battery" within too narrow limits.

There is no doubt that injuries sustained from practical jokes and horseplay are actionable even though the damages sustained were not the intended result, and generally there was no intention to inflict any injury. Parker v. Enslow, 102 Ill. 272 (1882); Reynolds v. Pierson, 29 Ind. App. 873, 64 N. E. 484 (1902); Markley v. Whitman, 95 Mich. 236, 54 N. W. 763 (1893); Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403 (1891). And considerable authorities sustain the theory that such actions involve a battery. Prosser on Torts, § 9 (1941).

The ultimate problem, however, is to decide what constitutes a battery in civil actions according to the ordinary and customary meaning of the word. The most common definition of a battery is, "The slightest touching of another, or of his clothes or anything else attached to his person, if done in a rude, insolent or angry manner." Black's Law Dictionary. The essence of a battery as opposed to an action in negligence is the element of intent. McGovern v. Weis, 265 App. Div. 367, 39 N. Y. S. 2d 115 (1943), reargument denied, 266 App. Div. 248, 41 N. Y. S. 2d 629 (1943). This does not have to be a hostile intent. It is rather the absence of consent to the contact on the part of the plaintiff. Clerk and Lindsell, Law of Torts, (8th ed. 1929), 173. Nor does it include a desire to do any harm. Burge v. Forbes, 23 Ala. App. 67, 120 So. 577, cert. denied, 219 Ala. 700, 120 So. 915 (1929); Pizitz v. Bloomburgh, 206 Ala. 136, 89 So. 287 (1921); Restatement, Torts, § 13, comment (e). Rather it is an intent to bring about a result which will invade the interests of another in a way which the law will not sanction. Prosser on Torts, § 8 (1941). Once the invasion has been established a battery has been committed, and the defendant will be liable for all the results that are substantially certain to follow from his act. Prosser 42.

Thus in order to constitute a battery, the element of intent need not be hostile nor need the injury itself be intentionally administered. The defendant who commits a legal wrong will be liable for the actual damages even though he acted in good faith. Gebhardt v. Holmes, 149 Wis. 428, 135 N. W. 860 (1912). In the case of a willful tort the wrongdoer is responsible for the direct and proximate consequences of his act without regard to his intention to produce the particular injury. Rogers v. Williard, 144 Ark. 587, 223 S. W.
15 (1920), because where the acts of a party necessarily tend to injure another the law imputes a design to effect that object, Van Pelt v. McGraw, 4 N.Y. (4 Comst.) 110 (1850), and it is not necessary that the wrongdoer shall contemplate the precise way in which the injury will occur or that any damages will follow. Fottler v. Moseley, 185 Mass. 563, 70 N. E. 1040 (1904).

In the principal case the defendant did what he did in the sense of a joke or horseplay. He grabbed the plaintiff’s leg and jerked it upward. There was no consent express or implied from the plaintiff. Thus though the defendant may not have intended the consequences of his act, he did intend to touch the plaintiff in an insolent manner, and this constituted a battery according to the weight of authority.

To say then that in order to have such a battery as was meant to be covered by the Nebraska statute of limitations, it is necessary that there be a hostile intent to administer an injury to the person of the plaintiff amounts to a failure to give the word its ordinary and customary meaning, and the result is tantamount to judicial legislation, sacrificing the force of the statute to the equities of a single case.

C. B. CHAPMAN, JR

TORTS—Liability of Landlord for Repairs and Maintenance of Premises Under his Control Extends to the Electrical Systems in Apartment Houses, and Includes the Wiring and Fixtures in Individual Apartments.

Under a lease containing a provision that the lessor would not be liable to the lessee for injury or damage resulting from the handling of defective wires or lights, the plaintiff leased an apartment in the defendant’s apartment house, in which the electricity was channelled to the individual apartments through separate meters. When notified by the lessee that certain light switches were out of order, the lessor sent an electrician to repair them. Several months later the lessee again called the attention of the lessor to defective switches, and three days later, before the lessor had made any attempt to repair them, the lessee’s wife was severely injured when she inadvertently leaned against one of them. In affirming a judgment for the plaintiff rendered by the Municipal Court for the District of Columbia, after a reversal thereof by the Municipal Court of Appeals for the District of Columbia, the U. S. Court of Appeals for the District of Columbia, Held; The landlord has a duty to maintain and repair the electrical system of an apartment house under his control, and this duty extends to the entire circuit, including the electrical fixtures within the individual apartments. Richardson S. and Hazel Gladden v. Walker and Dunlop Inc., 168 F. 2d 321 (App. D. C. 1948).

The real question before the court was the scope of a landlord’s duty to
maintain and repair the premises retained under his control, and specifically, whether or not an electrical system is under the control of the landlord.

The landlord has been universally required to exercise reasonable care in maintaining those parts of an apartment house under his control. *Whitcomb v. Mason*, 102 Md. 275, 62 Atl. 749 (1905); *Roman v. King*, 289 Mo. 641, 233 S. W. 161 (1921); *Markussen v. Mengedoht*, 132 Neb. 472, 272 N. W. 241 (1937); *Dollard v. Roberts*, 130 N. Y. 269, 29 N. E. 104 (1891); *Sciolaro v. Asch*, 198 N. Y. 77, 91 N. E. 263 (1910). It is also generally held that the landlord has no duty to make ordinary repairs, *Sheets v. Selden*, 7 Wall. 416 (U. S. 1868), *Kirby v. Wylie*, 108 Md. 501, 70 Atl. 213 (1908); *Iowa Apartment House Co. v. Herschel*, 36 App. D. C. 457 (1911), unless the duty is imposed upon him by the terms of the lease. If he does undertake to make ordinary repairs, he is required to exercise reasonable care and is liable for injuries caused by his negligence or unskillfulness. *Kimmons v. Crawford*, 92 Fla. 652, 109 So. 585 (1926); *Nelson v. Meyers*, 94 Cal. App. 66, 270 P. 719 (1928). This rule applies where the property of the tenant is injured as well as where personal injuries are received. *Glickhauf v. Maurer*, 75 Ill. 289, 20 Am. Rep. 238 (1874); *Horton v. Early*, 39 Okla. 99, 134 P. 436 (1913).

Prior to this case the furthest extension of the landlord's liability as to premises under his control, was to include plumbing and heating systems. *Paratino v. Gildenhorn*, 4 F. 2d 938 (App. D. C. 1925); *Wardman v. Hanlon*, 280 Fed. 988 (App. D. C. 1922). In *Wardman* case, *supra*, the landlord had exclusive control of the supply of water to the apartment house, and the court ruled he was liable if he failed to exercise reasonable care to prevent steam and scalding water from entering a toilet tank and injuring the tenant. In *O'Hanlon v. Grubb*, 38 App. D. C. 251 (1912) and *Iowa Apartment House Co. v. Herschel, supra*, the landlord was held liable for damages to tenant's furniture because of a leaky steam radiator in the apartment. These cases are especially analogous to the instant case, for they all consist of a general system controlled by the landlord, with fixtures in each apartment.

Obviously the prime consideration is not what type of system is involved, or where it is located, but whether or not the landlord has exclusive control. *Wardman v. Hanlon, supra, Iowa Apartment House Co. v. Herschel, supra*.

In the instant case, the court distinguished sharply between control and use. The defendant had full control over the supply of electricity furnished the apartment house through the main switch in the basement, and maintained the circuits and meters leading to the individual apartments. The plaintiffs merely utilized the current provided by the defendant, by means of the switches and fixtures.

Electrical fixtures are similar to plumbing and heating fixtures, in that they are neither isolated in use or in maintenance, nor are they under the exclusive control of the tenant. The court here points out that they are under the landlord's control and must be maintained and used, if at all, in con-
junction with the system of which they are parts, and therefore the tenant is not required to repair them, but has the duty only of notifying the landlord of any defect therein. This the plaintiff did several months before the accident. Since the defendant sent an electrician to repair the switches, the usual liability for his employee's negligence and lack of skill attaches, Nelson v. Meyers, supra; Kimmons v. Crawford, supra.

The Court ruled that the provision in the lease, that the landlord would be under no liability to the tenant for injuries suffered in handling the electric wires or lights was inapplicable, since injuries were sustained from a defective switch; but added, quoting Kay v. Cain, 154 F. 2d 305 (App. D. C. 1946), "it is doubtful whether a clause which did undertake to exempt a landlord from responsibility for such negligence would now be valid."

The rationale behind the ruling in the instant case may be somewhat explained by the reasoning of the court in Paratino v. Gildenhorn, supra. In that case the court stated, that, formerly when a landlord leased parts of his building to different tenants, the tenancy of each was independent of the others; but because of the advent of large apartment houses and modern conveniences, such as central plumbing and heating plants, conditions have greatly changed, and the landlord's liability must change and expand with these conditions.

The instant case holds that electrical systems are within this expanded concept of the landlord's liability.

This extension of the scope of a landlord's liability for negligent maintenance and repair of premises under his control, does not affect the settled principle that a landlord is not an insurer of the premises he controls, but is only required to exercise reasonable care, and a tenant must prove negligence, and establish its proximate causality to his injury, to recover, Ruff Drug Co. v. Western Iowa Co., 191 Iowa 1035, 181 N. W. 408 (1921); Phelan v. Fitz Patrick, 188 Mass. 237, 74 N. E. 326 (1905).

JOHN J. SWEENEY, JR.

TORTS—The Federal Tort Claims Act does not Exclude Suits Against the Government on Subrogated Claims.

In 1945, a United States Army airplane crashed into the Empire State Building in New York City, precipitating widespread property damage and personal injury. The insurers of the persons sustaining property damage paid the amount of the claims in due course and, claiming ownership of the right by subrogation, commenced proceedings against the United States under the Federal Tort Claims Act in the District Court. The Commissioner of the State Insurance Fund, having paid compensation to several injured persons, instituted suit under the same Act. The cases were argued together. The Govern-
ment sought dismissal of the complaints on the ground that subrogated claims are not within the purview of the statute. Held, that the Federal Tort Claims Act does not exclude suits on subrogated claims. *Niagara Fire Insurance Company et al. v. United States*, 76 F. Supp. 850 (S. D. N. Y. 1948).

Traditionally no principle is better established in the law than that the sovereign is immune from suit except to the extent and under the conditions wherein he expressly consents to be sued. *Price v. United States*, 174 U. S. 373 (1899). There has been a decided legislative tendency to relax this sovereign immunity as undue hardship was deemed to result therefrom. Various statutory enactments have accorded relief to injured parties, culminating in 1946 with the enactment of the Federal Tort Claims Act whereby relief in tort as a matter of grace at the will of the legislature was transformed overnight into a matter of right to be sought in the courts. The legislative relaxation has been met squarely by the courts which have jealously guarded the sovereign immunity by construing strictly any statute authorizing suits in derogation thereof. This attitude is very aptly expressed by the words of Mr. Justice Brewer in *Schillinger v. United States*, 155 U. S. 163 (1894).

"The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination. Beyond the letter of such consent the courts may not go, no matter how beneficial they may deem, or in fact might be, their possession of a larger jurisdiction over the liabilities of the Government."

Whether or not a given party can identify himself within the class privileged to sue has been a vexing problem for the judiciary under every statute authorizing suits against the state. No matter how well framed, how conscientiously worded, how painstakingly denominated, the very right itself in given cases has not been conferred with sufficient clarity and has awaited judicial resolution. In this class is the right of the subrogee under the Federal Tort Claims Act.

Subrogation "is the method which equity employs to require the payment of the debt by him who in good conscience ought to pay it, and to relieve him whom none but the creditor could ask to pay." *Meyers v. Bank of America*, 11 Cal. 2nd 92, 77 P.2d 1084 (1938). It is an act of law and a creature of a court of equity depending, not upon contract, but upon the principles of equity and justice. *Louisville Trust Co., v. Royal Indemnity Co.*, 230 Ky. 482, 20 S. W. 2d 71 (1929). He who seeks to assert his claim by subrogation must show that he has been compelled to pay, in virtue of his contract, claims to or on behalf of the insured, for damages arising out of the acts of the party against whom the right is asserted. Having done so, in fairness and justice he ought to have the right of the insured to recover against the party responsible for the loss. *Ocean Accident and Guarantee Corp. v. Hooker Electro-
Chemical Co., 240 N. Y. 37, 147 N. E. 351 (1925). This claim is not a new one distinct from that of the insured, but is the same claim, issuing out of the same cause, and asserted only in the right of the insured. United States v. American Tobacco Co., 166 U. S. 468 (1897).

The portion of the statute giving the right to sue provides that the United States District Courts will have jurisdiction to render judgment.

"... on any claim against the United States ... on account of damage to or loss of property or on account of personal injury or death where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death ... in accordance with the law of the place where the act or omission occurred ... ", further providing that "the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent, as a private individual under like circumstances." 60 Stat. 842, 28 U. S. C. 931 (1946).

The precise question involved is whether within the words "claim" and "claimant" as used in the statute, the legislature intended to include claims arising by subrogation, the right not having been otherwise expressly conferred. The tendency has been to construe the statute to exclude recovery by subrogees, Bewick v. United States, 74 F. Supp. 730 (N. D. Tex. 1947); or on derivative claims, Old Colony Insurance Co. v. United States, 74 F. Supp. 723 (S. D. Ohio 1947). It has also been held that since the act did not expressly grant consent to suit by the subrogee of a claimant, none would be given by implication, Rusconi et al. v. United States, 74 F. Supp. 669 (S. D. Cal. 1947); that disregarding the doctrine of strict construction, the words of the statute excluded recovery on subrogated claims, Cascade County, Montana v. United States, 75 F. Supp. 850 (D. Mont. 1948); and finally, that to hold that the act covered the case of a subrogee was to do violence to the language of the statute, Acme Casualty and Surety Co. v. United States, 76 F. Supp. 333 (E. D. N. Y. 1948). The reasoning in support of these cases follows three distinct veins. First, that the consent of Congress to be sued on a subrogated claim, not having been granted in so many words, was not intended. Second, that not only is the subrogee excluded by the absence of express consent, he may not even be included by recourse to the language used. The right is granted "on account of damage to or loss of property or on account of personal injury or death." The claim of a subrogee arises voluntarily out of his contract with the party sustaining the loss and is not directly occasioned by the tortious act. Such a claim is not within the meaning of the words used in the statute. Third, that the insurance company is compensated by the premium it exacts from the insured and to allow recovery under the law would be in this sense to permit a double recovery by the company. The instant case casts aside the above reasoning and finds that the plain meaning of the terms used imparts the right to sue on a subrogated claim. In the light of a limited existing precedent and a common sense approach to the factors involved, the force of its position seems irresistible.
Adapting the concept that subrogation is not a new and distinct claim from that of the insured, but is the same claim, issuing out of the same cause and asserted only in the right of the insured, the court reasoned that, since the claim asserted by the plaintiffs, arose out of damage to property and personal injury for which the United States, if a private party, would have been liable in the State of New York, Commissioner of the State Insurance Fund v. Gladstone, 186 Misc. 91, 61 N. Y. S. 2d 792 (Sup. Ct. 1945); Ocean Accident and Guarantee Corp. v. Hooker Electrochemical Co., supra, the conclusion is inescapable that the subrogee, presenting the claim of the injured party should have the same right of recovery as the injured party. The objection, that the subrogated claim did not arise out of damage to property or personal injury, but rather out of contract with the insured whereby the subrogee voluntarily assumed such liability, was treated with a reassertion that the claim remains the same claim as that of the injured party, arising out of the same cause and that the statute itself exposes the United States to liability on “any claim” that arises from that cause. In refutation of the reasoning, that to permit a subrogee to recover under the act would be to authorize a recovery in addition to the premium exacted, recourse was had to a Report of the House of Representative Committee on Claims H. R. Rep. 2655, 79th Congress, 2nd Session, 6-7 (1946), which treated directly the point of subrogation and adopted the conclusion that since the right of subrogation is preserved from the common law, made a consideration for which certain policies are issued, and the recovery by this means reflected in the rate level of premiums charged, there was no double recovery by the insurer and no sound basis for a denial of consideration on that point alone.

A great deal of support for the Court’s conclusion is found when an eye is cast on the prior constructions of statutes in pari materia. The Suits in Admiralty Act, 41 STAT. 525 (1921), 46 U. S. C. 742 (1946), was a limited waiver of the sovereign immunity from suits in tort, and like the Federal Tort Claims Act, expressly placed the United States on a parity with private litigants under prescribed conditions. The subrogee of the injured party was held to be within the jurisdiction conferred. U. S. Fidelity and Guaranty Co. v. United States et al., 56 F. Supp. 452 (S. D. N. Y. 1944). The Small Tort Claims Act, 42 STAT. 1066 (1922), 31 U. S. C. 215 (1946), gave authority to department heads to hear and adjust “any claim” for property damage caused by the negligence of government employees and to certify the amount found due to Congress. The claims of subrogees were certified on the ground that the statute applied to “any claim” and even a strict construction did not warrant disregarding its plain terms. 36 Ops. Atty. Gen. 553 (1932). The Emergency Relief Appropriation Act of 1939, 53 STAT. 936, 15 U. S. C. 721-728, Sec. 26 (1940), provided that the Commissioner and the National Youth Administrator might pay “any claim” arising due to the negligence of employees of the Works Progress Administration or the National Youth
Administration. It was held that "... the use of the broad and comprehensive term 'any claim' would appear to cover all claims of the type described (subrogated) when filed by any person to whom the United States would have been liable prior to the enactment of the statute but for its sovereign immunity." 19 Comp. Gen. 503 (1939). The Act of June 16, 1921, 42 Stat. 63, 31 U. S. C. 224(c) (1946), gave the Postmaster General authority to settle "any claim" for damage done to person or property through the operation of the department. The statute was held applicable to subrogees. 21 Comp. Gen. 341 (1941). The Act of June 11, 1919, 41 Stat. 132, 34 U. S. C. 600 (1946), authorized the Secretary of the Navy to pay "any claim" for loss or damage resulting from acts of Naval or Marine Corps personnel. It was held that "the act involved contains nothing supportive of the view that the general rule of subrogation ... should not be regarded as applicable to claims filed under said act." 22 Comp. Gen. 611 (1943). These opinions are important as reflecting the considered views of government officials on the construction of statutes which, like the Federal Tort Claims Act, contained the term "any claim". In view of the construction given in favor of the subrogee, of which Congress was doubtless cognizant when it enacted the Act, it would seem groundless to hold, without greater particularity, that the subrogee was excluded by the rule of strict construction.

Finally, from a common sense approach, it would seem absurd that an overworked Congress having freed itself of the onerous task of adjusting claims by private bills, would, without specific exclusion, intend that the claims of subrogees be reserved to itself for consideration. See Employers Fire Insurance Co. et al. v. United States, 167 F. 2d 655, (C. C. A. Cal. 1948).

Conclusion—that the instant case was properly decided along lines of existing precedent, in keeping with the intention of Congress, and should be entitled to great weight if and when the question comes before the Supreme Court.

RICHARD J. FLYNN

TORTS—The Federal Tort Claims Act Excludes Claims Made by Members of the Armed Forces of the United States for Service-Connected Injuries Sustained While in Such Service.

The plaintiff, Arthur K. Jefferson, brought an action against the United States of America for damages sustained as the result of an abdominal operation negligently performed by an Army surgeon. The plaintiff had enlisted in the United States Army in October 1942. In July 1945, while still in the Army, Jefferson underwent a gall bladder operation at the Army regional hospital at Fort Belvoir, Virginia. The operation was performed by a United States Army medical officer who, at that time, was chief hospital surgeon.
The plaintiff alleged total and permanent disability as the result of a large
towel (2½ feet long by 1½ feet wide) being negligently left in the plaintiff's
abdomen during the operation and remaining there until discovered in a sub-
sequent operation in March 1946. Held, that a claim by a member of the
armed forces for service-connected injuries could not be prosecuted under the
1948).

"This case," the opinion states, "is an unusual one on the facts, and novel as
to the law, and difficult as to both." Until August 2, 1946, the United States
was not generally amenable to suit for the torts of its agents. On August
2, 1946, the Federal Tort Claims Act became law as Title IV of the Legisla-

The question of primary importance in this case is whether the Congress
intended the scope of the Act to extend to cases involving claims of members
of the armed forces for service-connected disabilities. In the first two years
of the Act's existence this precise point was not decided by the courts.

Although this difficult problem of statutory construction had not been
presented to the courts prior to the subject case, there are a considerable
number of decisions interpreting the two Sections of the Act that principally
determine the scope of its applicability. Section 410 (a) of the Act, 60 Stat.
843, 28 U. S. C. § 931 (a) (1946) and Section 421 of the Act, 60 Stat. 845,

Section 410 (a) provides that the United States district courts shall have
jurisdiction to determine "any claim against the United States, for money
only, accruing on and after January 1, 1945, on account of damage to or
loss of property or on account of personal injury or death caused by the
negligent or wrongful act or omission of any employee of the Government. . . ."

It would be difficult to conceive of a more comprehensive provision for gov-
ernment liability in tort. However, in considering the intention of Congress
with respect to the scope of the Act, it has been held that the practical aspects
of cases likely to arise under this Section are relevant. Cf. Englehardt v.
construction consistent with its terms which will be in accord with a fair ap-
1948).

It is clear from the language of the report of the House Judiciary Committee
that jurisdiction under this Section was similar to that exercised under the
Tucker Act and, in the light of judicial construction of the Tucker Act, suits
under this Act are subject to the same rigid rule of construction in favor of
the government as any other waiver statute. Uarte v. United States, 7 F. R. D.
705 (S. D. Cal. 1948).

Section 421 of the Act, 60 Stat. 845, 28 U. S. C. § 943 (1946), makes
specific provision for certain claims that are not to be included within the
Act. This Section provides for 12 separate and distinct classes of cases that are exceptions to the general liability imposed by Section 410. It has been held that any claim which was not included in any of the 12 enumerated categories of claims under this Section could be regarded as covered by the Act under the doctrine of expressio unius est exclusio alterius. Wojciuk v. United States, 74 F. Supp. 914 (E. D. Wisc. 1947).

The difficulty of the court's decision in the case at hand is clearly defined by the doctrine enunciated above. The only possible relevant exception is Section 421 (j): "Any claim arising out of the combatant activities of the military or naval forces or the Coast Guard, during time of war." 60 Stat. 846, 28 U. S. C. § 943 (1946). This exception is clearly not applicable in the present case.

The very significant Wojciuk decision (opinion filed December 3, 1947) is not mentioned in the Jefferson opinion although the court admits that the failure of Congress to include the type of claim in question under Section 421 "made the problem more difficult." The doctrine of expressio unius est exclusio alterius was not discussed.

When the government first made its motion to dismiss the complaint, the motion was overruled without prejudice because of the novelty and difficulty of the question. Judge Chesnut wrote an extended opinion outlining the problem and expressing the hope that further argument might make clearer the proper application of the Act. Jefferson v. United States, 74 F. Supp. 209 (D. Md. 1947).

Despite the broad provision for government liability in Section 410 (a), supra, and the failure to include the type of claim in question in Section 421, supra, Judge Chesnut in the instant case found it necessary to hold that an implied exception existed. Essentially, the reasoning of the court in excluding the claim lies in the fact that it was based on a service-connected disability while the plaintiff was a member of the armed forces. The Federal Tort Claims Act was narrowed by construction to exclude such claims because of the special relationship traditionally existing between the United States and the members of the armed forces, and the elaborate legislative provisions already existing with respect to this relationship. The court applied the rule of statutory interpretation that the literal reading of the Act may be narrowed by construction where the court can see that the literal reading is contrary to established policy and the real intention of Congress. The implied exception exists not from the wording of the Act but from other legislation which makes extensive provision for service-connected disabilities and establishes a regular procedure for settling such claims by the Veterans Administration.

It is to be noted that the recommended waiver of the sovereign's immunity to suit was advanced under the topic heading: "More Efficient Use of Congressional Time." Before the passage of the Act, special legislation by Congress was required to settle claims against the Federal Government. The justifi-
cation for the Act thus flowed from the desire of the Congress to achieve organizational reform. See Gottleib, Federal Tort Claims Act—A Statutory Interpretation, 35 Georgetown L. J. 1, 4 (1946). Since private bills for the benefit of soldiers for damages resulting from service-connected injuries were quite uncommon as the result of a regular established procedure for settling such claims, it seems clear that claims of this nature were never within the contemplation of Congress in providing the subject legislation.

Apparently the question of the liability of the Federal Government for service-connected disabilities under the Federal Tort Claims Act came before a court for the first time in Jefferson v. United States, supra. The decision in the instant case is in keeping with the rule that any waiver of sovereign immunity must be strictly construed.

The instant case adheres to a previous opinion of Judge Chesnut in which he held that "in considering the intention of Congress with respect to the scope of the Tort Claims Act it is at least relevant to bear in mind the practical aspects of cases likely to arise under the Act." Englehardt v. United States, supra, at 454.

The facts on which this claim was based are calculated to startle the most blasé. However, other claims based on more prosaic service-connected disabilities must exist by the thousands. Any other decision by the court in the subject case would have unloosed an unprecedented flood of damage suits against the Federal Government. Congress in passing the Federal Tort Claims Act surely could not have contemplated or intended such a result.

GEORGE H. BEUCHERT, JR.
BOOK REVIEWS


Several years ago, Dean Arthur T. Vanderbilt of New York University School of Law (now Chief Justice of the Supreme Court of New Jersey) inaugurated the Annual Survey of American Law, which has since become a permanent institution. This publication presents a comprehensive review of legal developments in the law from year to year. It is indispensable to every lawyer who desires to keep himself abreast of the growth and changes in various fields of the law. The 1946 volume, consisting of about 1300 pages, is at hand.

The book comprises fifty-three articles, written by various authors and each dealing with a different subject. Some of the essays are elaborate and approach the size of monographs. Every traditional topic in the field of public and private law is covered. In addition, new subjects, such as “Public Housing, Planning and Conservation”, “Cooperatives”, “Price Control”, “Communications”, and other similar topics, find their way into this publication. Dean Vanderbilt contributes a far sighted and constructive article on “Administrative Law”, as well as essays on “War Powers” and on “Legal Education, Bar Activities, and Economics”. Professor Reppy of New York University Law School, deals with “Constitutional Law” and “Civil Remedies and Procedure”. A very interesting article is contributed by Professor Niles on “Future Interests”. Leonard S. Saxe deals with judicial administration and other aspects of law reform. Practically every phase of the law is treated in one of the numerous essays.

The year 1946 marks a milestone in the progress of the law and legal procedure. The Administrative Procedure Act was passed by the Congress in 1946. This epoch-making statute endeavors to introduce order and system into which administrative procedure had fallen. It seeks to safeguard the rights of the citizen in dealing with administrative agencies, and in addition it codifies, broadens, and expands the right of judicial review of administrative action. The year also marked the enactment of the Federal Tort Claims Act, by which the Federal Government almost completely relinquished its traditional immunity against suit in tort, thereby according legal rights to citizens who have sustained damages as the result of a tortious action of a Government agency, or representative. The Federal Rules of Criminal

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Procedure, which have simplified and practically revolutionized the disposition of criminal cases in the federal courts, also became effective in 1946. All of these matters, as well as many others, are adequately dealt with in the articles comprised in the Survey.

To give an adequate summary of the contents of the book is impossible within the brief scope of a book review. It is practicable merely to call attention to a few provocative discussions that have attracted the reviewer's attention. Thus, the article on "Conflict of Laws" deals with the difficult problems in the field of divorce originating in the decision of the Supreme Court in the case of Williams v. North Carolina. The chapter on Constitutional Law devotes considerable attention to novel questions arising out of the Yamashita case. That it is dangerous to make any prognostication in respect to decisions of the Supreme Court of the United States is demonstrated by the author of the essay on "Labor Law", who makes a bold prediction as to the future fate of the Lea Act (the so-called "Anti-Petrillo Act"). The validity of the statute has since been sustained, contrary to the author's prophesy that "it seems difficult to believe that the Act will be upheld in any important particular" (p. 568).

The article on "Equity" is somewhat less detached and objective than most of the other chapters. Its author makes a strong presentation of the case against the doctrine of mutuality, but in the reviewer's opinion fails to distinguish between mutuality of remedy and mutuality of obligation. There are those who believe that the doctrine is sound as applied to obligations as distinguished from remedies.

The reviewer was interested in the discussion of the subject of separation of jurors, found in Professor Reppy's article on "Civil Remedies and Procedure". In the District of Columbia this practice was introduced several years ago in respect to criminal cases and has been approved by the Court of Appeals. War conditions made it impossible to find overnight hotel accommodations for jurors. This practical difficulty led to the practice of permitting jurors to separate overnight even after the final submission of the case.

In concluding this brief discussion of this valuable and constructive volume, the reviewer suggests that it should be considered required reading for every one who desires to keep posted on new developments in any field of law.

ALEXANDER HOLTZOFF*

*Judge of the District Court of the United States for the District of Columbia.

Since John Maynard Keynes proclaimed "the end of laissez-faire" in 1924, economists have tended to split into two groups on the issue of public economic policy. The genuine unreconstructed liberal-individualists, now led by Professor F. A. Hayek The Road to Serfdom and by Professor Ludwig von Mises Planned Chaos prescribe competition, established and enforced by the government, to cure our ills. They oppose, both in principle and in practice, virtually all other government interference with a free economy. With respect to monetary issues they generally advocate a rigid "neutral" currency system, and they look back nostalgically to the pre-1914 gold standard, which they believe to have operated "automatically".

In the other camp are now found all of those whom Lord Keynes succeeded in convincing by his General Theory of Employment, Interest, and Money (first published 1936). That radical recasting of the theory of money and "output as a whole" has destroyed their faith in the automaticity of the economic circulation and turned their energies toward formulating and advocating public policies which will insure sufficient aggregate demand for the products of industry. The system cannot be left to itself, but must be continuously regulated if we are not to lapse into a condition of chronic under-employment. This kind of regulation does not involve the regimenting of markets, price-fixing, and the like, but does require certain over-all policies with respect to government spending, interest rates, wages, taxes, management of the public debt, and consumer finance—all designed to bolster total spending when unemployment threatens, and to damp it down where there is danger of inflation.

Professor Hansen is the foremost American Keynesian. This work is his third on the general theme of economic policy and full employment, having been preceded by Full Recovery or Stagnation in 1938, and by Fiscal Policy and Business Cycles in 1941. Dr. Hansen terms it a "companion volume" to the latter. Like its predecessors, it places the greatest emphasis on the problem of keeping aggregate demand at a high level, of preventing depression, inflation, and unemployment. But unlike them, it gives a share of attention to the opposite danger, namely, having achieved full employment, what must we do to prevent the expansion of income from getting out of hand, to forestall a drastic price inflation? In the author's words "We are compelled continually to keep
our hand on the throttle in order to ensure an adequate, but not excessive, aggregate demand.” (Reviewer’s italics)

In the present situation of over-full employment (instead of a post-war goal of 60 million jobs we have a fact of 61 million) and serious price inflation, the parts of the work which deal with the second danger are the most interesting. But it is in this respect that the book is disappointing. Dr. Hansen leads off with a first chapter on “Inflation Dangers Ahead”, in which he attempts an assessment of the inflationary potential existing immediately after, and as a result of, the war. The chapter was evidently written in 1946, and ungracious hindsight must judge that his estimate was too conservative. Part Six of the book is entitled “Managing a Full Employment Economy” and boldly grasps the troublesome problem, “Full employment programs are loaded with inflationary dangers. To deny that would be folly. We must learn what they are; and we must gird ourselves to master them.” (page 234). And so he makes several excursions into the terra incognita which lies beyond full employment. But to Dr. Hansen the inflationary danger seems never to be really serious. He sees no necessity, for example, for a permanently higher level of prices because of the greatly increased money supply (see Appendix D, Inflation). Nor should the first round of wage increases have made it necessary to raise prices (page 323). All the long run factors, in the author’s opinion, are basically deflationary (page 12), and the inflationary risk is only a short term one—it can scarcely last longer than the war-created scarcities.

Reviewing the economic trends of the past three years, and comparing them with the Keynesian diagnoses and recommendations, it is difficult to avoid the conclusion that the school is much better at prescribing measures to bolster aggregate demand than at recommending policies to damp it down. One may recall their predictions of unemployment and depression dangers to follow the drastic cutting of war spending. Indeed, to that bad estimate may be laid many of the mistaken postwar policies (and some of the sorrow) of the present administration—premature abolition of rationing, removal of the excess profits tax, and support of union demands for wage increases, among others. An explosively inflationary situation was mistaken for a deflationary one; a wider miss would be hard to imagine.

This “depression bias” is perhaps to be expected. The general theory of money and output as a whole was born in the stagnation of the thirties, and it bears deep marks of the great depression. Chronic unemployment was the rule from 1929 until the second World War. Con-
sequently, the pressing need after the war for strong anti-inflationary policies found us comparatively unprepared. As Dr. Hansen remarks, "There is some truth, probably, in the assertion that in economic no less than in military matters, 'we are always fighting the last war'". (page 122).

The writer ventures the opinion that the Keynesian General Theory may perhaps be in need of some further generalizing, with respect to the area beyond the line (or lines) of full employment. The classical formulation of uniform price inflation is probably not adequate, since there is little reason to think that all industries will strike the point of full employment simultaneously, as the inflation proceeds. Professor Hansen has in Part Six of this work made a beginning at such a theory. In The American Economic Review for September 1947 he has pushed the analysis farther. It may well be that he will provide us with a theory of employment, interest, and money, which will be valid for conditions of underemployment, full employment, and overemployment. Practical recommendations will then follow.

Whatever one's convictions may be with respect to the Keynesian thesis, the stagnation doctrine, or the most practical means of full employment it is impossible not to admire the optimism, the courage, and the vigor of Dr. Hansen and his followers. Like the first economists, they feel that they have a mission and a message, and they will be heard. Of the two other dominant schools, that of Dr. Hayek looks backward with longing and forward with dread, and the American institutionalists continue to make factual studies. It is regrettable, in a way, that the American Keynesians have no more vigorous competition.

SAMUEL L. BROWN*

*Istructor in Economics, College of Arts and Sciences, Georgetown University.
BOOKS RECEIVED


