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Recommended Citation
William Haywood Moreland, Equitable Defenses, 1 Wash. & Lee L. Rev. 153 (1939),
https://scholarlycommons.law.wlu.edu/wlulr/vol1/iss2/2
EQUITABLE DEFENSES
WILLIAM HAYWOOD MORELAND*

I. INTRODUCTION

The term which is the subject of this paper is used with a number of meanings which have varied with times and places and with different systems of procedure. It is therefore necessary to go into some detail in order to separate and discuss the various meanings of the term.

We may assume that from a group of circumstances, or facts, which have come into existence concerning Plaintiff and Defendant, Plaintiff selects such as suit his purpose, puts them forward in a law action, let us say in a declaration in special assumpsit, and claims damages from Defendant. Defendant in his turn may question the legal sufficiency of Plaintiff's facts to warrant a court in giving him damages; or Defendant may deny the existence of these facts; or he may from the same group of circumstances select other facts setting them up in a defensive pleading, claiming that the existence of these additional facts repels Plaintiff's claim to damages. In the first case, Defendant is said to demur. In the second case, he is said to traverse. In the third, he pleads in confession and avoidance.

But there may be other facts which Defendant may not assert in this law action but which he may set up in an equity suit in the same or in another court, and these facts, if established, will prevent Plaintiff from taking judgment in the law action, or will prevent the enforcement of a judgment if Plaintiff has taken one. These additional facts set up in an independent equity proceeding make up what is called an equitable defense. They cannot be used in the law action but may be used in a suit in equity. This then is the first sense in which the term equitable defense is used. It signifies a defense or set of facts which, if asserted and proved in a proceeding in equity, will prevent judgment from being rendered in an action at law, or will cause the enforcement of a judgment, if rendered, to be prevented.1

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Of course from our set of circumstances the Plaintiff may in the first instance select facts which will entitle him to go to equity for relief, but as we are concerned only with defenses we give no consideration to this. For purposes of explanation and analysis a tabulation is inserted in the note. In each of these instances in the tabulation time was when the defense could not be made in a law court. If we should ask which of them may be made in a law court today, we should have to put the question with reference to some particular time and place. For these phases of the law of procedure are in a course of constant change. These defenses, though equitable, have a way of “passing over” to the law side and becoming true legal defenses, a process which has been going on for a long time and on an irregular front. When defenses have so passed over the practice, as to many of them, is to continue to speak of them as equitable defenses; as to others, the transi-

7. Action to evict tenant for non-payment of rent. Defense, rent and interest tendered after due day.
8. Action of ejectment. Defense, plaintiff has deed and legal title, but procured it by fraudulent inducement.
10. Action on note for $1,500. Defense, that note was intended by the parties to be made for $1,000, but by mistake was written for $1,500.
11. Action of ejectment. Defendant had conveyed lots 1 and 2 to plaintiff by mistake, intending to convey only lot No. 1. Defendant is in possession of lot No. 2 and plaintiff brings ejectment to recover it.
12. Action of ejectment. Defense, unilateral mistake, which would undoubtedly be a good defense in equity to a suit for a specific performance, but defendant wishes to use it as a defense in this action.
13. Plaintiff sues defendant in general assumpsit to recover deposit on lot of land. Defendant, resisting rescission of the contract, wishes specific performance of the contract and a decree for the residue of the purchase price.
16. Same as No. 15, but replication sets up mistake, not fraud.

Hinton, Equitable Defenses under Modern Codes (1920) 18 Mich. L. Rev. 717, 721.
tion was made so long ago that we have forgotten that time ever was when they could not be set up on the law side.

There are three methods, or courses, by which this passing over may be effected:

First, by judicial legislation, which Professor Hinton calls the natural course of "evolution." 4

Second, by special legislation directed to a particular defense.

Third, by general statutes permitting equitable defenses to be set up in law actions.

Illustrating the first process, consider the defense of fraud in an action on a simple contract; 5 much of the law of counterclaim; 6 the law of conditions in contract; and personal defenses in suretyship. If we were dealing with causes of action, rather than defenses, attention should be called to the action of assumpsit. The law courts borrowed this from equity and the tremendous consequences of this borrowing may be appreciated by recalling Langdell's statement that when the action of assumpsit was developed the modern law of contract came into existence. 7 Returning to the first method, there is no reason to think that this process of passing over has ceased. In recent years a state court has decided that the defense of fraud to a sealed release might be set up on the law side, although there was no statutory authority for it. 8 As time passed many states have permitted equitable defenses to sealed instruments, without the aid of legislation. Efforts have been made in recent years to cause federal courts to extend this process to the defense of fraud to sealed instruments, but without success. 9

Illustrating the second process, that is special legislation directed to particular defenses, instances are to be found in statutes permitting equitable defense to an action on a penal bond which limits recovery to injury actually sustained; 10 permitting payment as a defense in an action upon a sealed instrument; 11 permitting defendant to defeat

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10 24 & 5 Anne Ch. 16 § 13; Code of Virginia (Michie, 1936) § 6261.
11 24 & 5 Anne Ch. 16 § 12; Robinson’s Practice (1892) 208; Code of Virginia (Michie, 1936) § 6141.
action of ejectment by proving payment of rent after due day;\textsuperscript{12} permitting equitable defenses to be set up in actions of ejectment.\textsuperscript{13}

With respect to the third process, that is to say general statutes permitting equitable defenses to be set up in law actions, we must go into a somewhat detailed discussion, beginning with the history of English procedure on the subject.

II. EQUITABLE DEFENSES IN ENGLISH COURTS

A. Before the Procedural Reform Statutes

With the opening of the Nineteenth Century, the great century of legal reform, the most powerful attacks on the procedure of that day were concentrated on two points—the separate procedures in law and equity, and the division of proceedings at law into forms of action. The well known Hilary Rules of \textsuperscript{14} gave us the first general attempt to reform English procedure, but those rules did not include the abolition of forms of action or provide for equitable defenses in actions at law. In fact, their main consequence was to narrow the general issue and multiply the number of special pleas, and thereby to usher in the most technical era in the whole history of common law pleading. The reforms effected by the Hilary Rules are, therefore, not highly regarded.\textsuperscript{15}

B. Under the Common Law Procedure Acts

The movement for procedural reform continued and increased in intensity. Learned commissions continued their work of exposing the deficiencies of the prevailing systems and of proposing reforms. This resulted in the great Common Law Procedure Acts of \textsuperscript{16} \textsuperscript{17} and \textsuperscript{18} and the statutes of the same period which reformed chancery procedure.\textsuperscript{19} These statutes to reform chancery procedure are now

\textsuperscript{12}Code of Virginia (Michie, 1936) § 5532.
\textsuperscript{13}Code of Virginia (Michie, 1936) §§ 5471, 5472; 18 Am. Jur., Ejectment § 60.
\textsuperscript{14}Rules adopted pursuant to § 4 William IV Ch. 42, § 1; 9 Holdsworth, History of English Law (1926) 324 et seq.
\textsuperscript{16}15 & 16 Victoria Ch. 76.
\textsuperscript{17}17 & 18 Victoria Ch. 125.
\textsuperscript{18}22 & 24 Victoria Ch. 126.
\textsuperscript{19}15 & 16 Victoria Ch. 80, 88, 87; 21 & 22 Victoria Ch. 27; 25 & 26 Victoria Ch. 42. A Century of Law Reform (1901) 191: "The year 1852 may fairly be taken as an epoch in the history of the Old Courts of Chancery. After 1852 it was a reformed Court."
forgotten, but a reading of them will show that they were far from futile. The form of the bill in equity was shortened and simplified. No longer was it subject to the criticism that it consisted of a thrice told tale, told the last time in an aggrieved tone. A bill drawn in accordance with these statutes will bear very favorable comparison with a complaint drawn under our most modern procedure. No longer was discovery asked for in the bill. This not only simplified the bill, but greatly simplified the answer, a reform not attained in the federal courts of this country until 1912, and not attained in some of the states to this day.

Under the statutes, allegations in the bill not denied in the answer were taken as true. Here again we have an improvement in equity procedure which was not attained in our federal system until 1912, nor yet in some of the states, where we still have the cumbersome exception to the answer for not responding to the allegations of the bill. Trials in open court rather than on deposition were provided for, another reform which came much later in equity courts in this country and is not found in all such courts today. But as our interest is in equitable defenses made on the law side rather than in equity procedure, we pursue that subject no further.

On the common law side, while the great Common Law Procedure Acts of 1852 and 1854 made many very beneficial changes, no effort was made to effect a general merger of law and equity. Powers not theretofore exercised by the equity court were in a few instances given to that tribunal. On the law side certain powers not before exercised by law courts, but only in the equity court were given to law courts. But of these reforms we are principally concerned with one; that is the power of setting up equitable defenses and equitable replications on the law side. This is found in the Common Law Procedure Act of 1854 in Sections 83 and 85 which read in order:

"It shall be lawful for the Defendant or Plaintiff in replevin in any Cause in any of the Superior Courts in which, if Judgment were obtained, he would be entitled to Relief against such Judgment on equitable Grounds, to plead the Facts which entitle him to such Relief by way of Defence, and the said Courts are hereby empowered to receive such Defence by way of plea; provided that such Plea shall begin with the Words 'For Defence on equitable Grounds,' or Words to the like Effect."


Cairns' Act, 21 & 22 Victoria Ch. 27, enabling equity courts to award damages and to assess them by a jury.
"The Plaintiff may reply, in answer to any Plea of the Defendant, Facts which avoid such Plea upon equitable Grounds; provided that such Replication shall begin with the Words 'for Replication on equitable Grounds,' or Words to the like Effect."

While these provisions were soon swept aside by the surge of reform which produced the present day English procedure, they were construed and applied during their brief lifetime in a series of cases decided by the ablest judges in England. And while these cases are of no importance in England today they are not without value in this country, for the English statute furnished the model for the statutes in many of the American states, and the decisions interpreting it have been influential in determining the construction to be put upon the American acts.

It is generally said that the usefulness of the English statute was greatly impaired by the conservative construction put on it by the English judges, but this criticism is not entirely justified. The statute was based upon a report of the Commission on Procedural Reform which urged far more drastic and radical reforms than Parliament was willing to put into effect. The commission recommended that courts of law should have power to give in a summary way the same relief against actions pending therein as might be obtained by resorting to chancery; but the act indicates that no such broad powers were given.\textsuperscript{22}

To determine the justice of the accusations of conservatism, we may refer briefly to some of the English decisions construing the statute. The courts held that a defense set up as an equitable defense became at once a legal defense, but the only relief which could be given was such as fell within the limits of the orthodox common law judgment. The courts were not empowered to give relief in equitable forms, such as specific performance, cancellation or reformation. The defense was required to be one which, if set up in an equity court, would be a complete answer to the plaintiff's claim and could be made effective by a perpetual injunction without condition. Thus, in an action to recover rent reserved by lease, the defendant in \textit{Mines Royal Societies v. Magnay}\textsuperscript{23} set up as an equitable defense that plaintiff had agreed to accept a surrender of the lease and to accept the assignment of leases which defendant had made to sub-tenants, whereupon the plaintiff's lease to the defendant was to be cancelled; that the defendant had then tendered a surrender of the lease, and the assignment of subleases,

\textsuperscript{23}10 Exch. 429, 156 Eng. Rep. 531 (1854).
which the plaintiff had refused to accept. This was held not a good equitable defense, for the court had no power to cancel or supervise the execution of the document of surrender.

Again, in *Wodehouse v. Farebrother* in an action against surety, a defense set up by special plea, that the principal debtor had put documents in the plaintiff's hands and that the defendant would pay the plaintiff's claim provided the documents were delivered to him, was held bad because it would not sustain a judgment for the defendant that the plaintiff recover nothing by his writ. Lord Campbell, C. J. in an excellent opinion pointed out that jurisdiction to claim relief on terms might probably be very conveniently administered by a law court, but no such jurisdiction had been given, and the law court had no power to enter judgment that plaintiff take nothing by his writ if defendant shall pay what is due the plaintiff. An equitable plea is good only when final justice may be done by the court of law in the pending action. Many other cases might be cited to the same effect.

There are, however, three cases which should be noted, in which the method of applying the statute should be of interest particularly in code states in this country, when the question is raised as to what issue shall be tried by jury.

In *Steele v. Haddock* in trover for goods, the defendant pleaded that plaintiff was owner of certain chemical works and stock in trade; that defendant by written contract had purchased both works and stock; that by mistake the contract failed to include the stock; that defendant had this in his possession and had paid for it; and that the plaintiff was unjustly availing himself of a mere mistake in wording the contract. This was held to be a good equitable defense, Baron Parke saying that if plaintiff had taken judgment without such plea equity would have enjoined the judgment without any condition. The case comes squarely within the terms of the Common Law Procedure Act, as the defendant was entitled in equity to relief absolute and unconditional; there was no need to reform the agreement which was wholly executed with nothing remaining to be done by either party.

In *Borrowman v. Rossell* an action was brought for not accepting

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petroleum tendered according to contract. The defense interposed by way of equitable plea was that by mistake the contract did not set out the real agreement, which was to deliver petroleum according to sample, and that the petroleum tendered by the plaintiff was not up to sample. This was held to be a good equitable plea because a judgment for the defendant would settle the whole controversy. The plaintiff, by failing to deliver the petroleum in accordance with the real terms of the contract, had put it out of his power to recover damages.

In the third case, Vorley v. Barrett, B was bound with another as an accommodation party to raise money by bill of exchange for D. B was forced to pay the bill and thereupon sued A, his co-surety, for contribution. To A's plea of a contract between B and the principal debtor by which B released his claim and thereby released the plaintiff, it was replied on equitable grounds that only by mistake did the contract set out in the plea cover the transaction on which B and A were sureties. On a demurrer to the replication on the ground that it did not set up an equitable defense to the plea, Creswell, J., remarking that "the only question is whether the mistake can be rectified at law," held that the plaintiff should be permitted to show that the agreement was not intended to include this bill. And Crowder, J., said that "the necessity for reforming an agreement in equity exists only in case of agreements that are executory and not where they are fully performed and executed."

These cases seem to refute the claim that the construction put upon the statute by the English courts was always too conservative. In fact, the method used in these cases will bear more than favorable comparison with that followed in the New York case of Susquehanna S. S. Co. v. Anderson & Co. There the question was whether the defense of mistake in expression set up in the answer was a defense which should be tried by the court or by jury. The court's judgment, holding that the defense should be tried by the jury, was and continues to be subjected to severe criticism.

C. Under the Judicature Acts

The reforms put into effect by the Common Law Procedure Acts, which prevailed for twenty years, worked very well; but the tide of
reform was running so strong that Parliament adopted the Judicature Acts of 1873 and 1875. These two acts and the rules of court formulated pursuant to the acts provided for England a most advanced form of procedure which remains to this day a model for all such reforms, and was admittedly drawn on generously by the draftsmen of the new Federal Rules of Civil Procedure.

Briefly, the new system adopted in England swept away all forms of action; permitted the defendant to set up all the defenses which he might have, regardless of their nature; and blotted out completely all distinction between legal and equitable forms of relief, in the sense that any court could give any form of relief that the case might merit. There are still English books on equity, and English judges and writers constantly refer to equitable rights and remedies; but we hear no more about distinguishing between legal defenses and equitable defenses. These terms are no longer important in English practice. But no one can deny, certainly not our practical-minded English brethren, that there are wide differences in the methods of handling law and equity controversies. Therefore, for convenience only, certain controversies are brought in the Chancery Division and not in the King's Bench. This, however, is a mere matter of procedure and in an action brought in the King's Bench, what we should call an equitable defense, may be developed and handled and need not be transferred to the Chancery Division.

We naturally inquire what becomes of the jury trial; and the answer is that with no written constitution to obstruct, it was possible to make an analytical and practical division of causes of action and to provide, without regard to historical antecedents, that certain of them might be tried by jury but that the others were to be tried by the court. Thus, the problem that has caused so much trouble in this country, that of ascertaining the proper issues for trial by jury, gives no trouble whatever in England.

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36 & 37 Victoria Ch. 66.
38 & 39 Victoria Ch. 77.
*These acts were consolidated in the Supreme Court of Judicature (Consolidation) Act, 1925.*

Rules of the Supreme Court, 1883-1935 (1935). The reference work generally used is The Annual Practice (White Book) published each year and fully annotated.

15 & 16 Geo. 5 Ch. 49 § 56.

*Odgers, Pleading and Practice (12 ed. 1939) 182, 215.*

The Administration of Justice (Miscellaneous Provisions) Act 1933, 23 & 24 Geo. 5 Ch. 56 § 6; The Annual Practice (1939) order 36, Rules 1-7; Jackson, The Incidence of Jury Trial During the Past Century (1937) 1 Mod. L. Rev. 132, 138.

See the Administration of Justice (Emergency Provisions) Act 1939, 2 & 3 Geo. 6
Recapitulating rapidly what has been said about the English procedure, we found that the Common Law Procedure Acts provided for certain equitable defenses, but did not in any way empower common law courts to grant relief on equitable terms. They effected no conjunction between law and equity, because the proceeding remained an action at law wherein only the orthodox common law judgment could be rendered. Nor did the interjection of these defenses into a law action raise any problem of jury trial. We found also that the present day English procedure, which dates from 1873, blots out all distinction between legal and equitable relief; permits the common law courts to issue injunctions, grant specific performance, order reformation, cancel documents and enter declaratory judgments.\textsuperscript{39} And finally, we found that the problem of jury trial is handled practically and realistically by assigning to that method of trial the controversies to which it seems best adapted.

III. Equitable Defenses in the State Courts

A. General Survey

Returning to our own country, we find that until nearly the end of the first third of the Nineteenth Century the subject of equitable defenses in the second sense, that is defenses formerly available only in equity but which by general legislation had become available in law actions, had received no attention. In some cases, equitable defenses had passed over to the law side either by the process of gradual evolution or by statute directed to the particular defense. Most of the cases in which it was attempted to assert equitable defenses in law actions arose on sealed instruments when efforts were made to set up total or partial failure of consideration, fraud in inducement, recoupment, and mistake; but in no case was the attempt successful.\textsuperscript{40} And of course no equitable defenses to ejectment were permitted.\textsuperscript{41}

The first general enactment permitting such defenses to be set up in law actions was adopted in Virginia in 1831.\textsuperscript{42} Thus it antedated the English legislation already referred to by more than twenty years, and

\textsuperscript{39} The Future of the Common Law (1937) 66, 69.
\textsuperscript{40} See Ames, Specialty Contracts and Equitable Defences (1895) 9 Harv. L. Rev. 49.
\textsuperscript{41} C. J. 1084.
\textsuperscript{42} Va. Acts of Assembly (1931) Ch. XI § 62.
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the reforms of code pleading in our own country by seventeen years. In brief, it permitted the defendant to set up in any contract action any matter which would entitle him to relief in equity against the obligation of the contract. But as this statute was not the model to which later American legislation was adapted, and as the Virginia cases will be the subject of a separate discussion, they will not be further referred to in this paper.

At the time the Common Law Procedure Acts were adopted, code pleading had already begun its career in the States, whereas the English reform did not proceed so far until the Judicature Acts of 1873 and 1875. New York adopted code pleading in 1848. Other states rapidly fell in line until, when Judge (formerly Dean) Charles E. Clark’s book on Code Pleading was published in 1928, the same or similar forms of procedure had been adopted by thirty jurisdictions. The last state to adopt the code was New Mexico which did so in 1897. From that date until 1934 no other state abandoned its procedure and adopted the code, although during the interval a number of states reformed their procedure. Then in January, 1934, Illinois, long a stronghold of common law pleading, went over bag and baggage to the code side. Today, the fifteen states which do not have code pleading include all of the New England states except Connecticut, and Alabama, Delaware, Florida, Maryland, Michigan, Mississippi, Pennsylvania, Virginia and West Virginia. The basis of their procedure is the common law, although of course, subject to many divergent modifications.

B. In Common Law States

Many of the common law states listed above, following the passage of the English Act of 1854, adopted statutes seemingly on the English model which permitted equitable defenses in law actions. Of course we cannot deal with each statute separately, nor can we develop the subject exhaustively in any one state. However, these enactments, which generally are brief, have several aspects in common which should be noted.

43 Supra, notes 32, 33.
44 Clark, Code Pleading (1928).
45 Clark, Code Pleading (1928) 19. See also, Throckmorton, Cases on Code Pleading (2d ed. 1938) 2.
We observe, first, that these statutes do not authorize common law courts to give relief in equitable forms. No power is given specifically to cancel, to grant specific performance, to direct an accounting, or to enjoin. Second, the applicability of the statute depends upon the question whether the relief requested can be fitted into the orthodox form of the common law judgment. Third, trial by jury is not a determinative factor. The defense, if turned in, becomes a legal defense and is

cause in any of the courts of this State in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, may plead by plea or subsequent pleading the facts which entitle him to such relief by way of defense.

"Such plea shall begin with the words, 'For defense on equitable grounds,' or words to the like effect. . . ."

§ 4302: "The plaintiff may reply, rejoin, etc., in answer to any plea, etc., of the defendant, facts which would avoid such plea, etc., upon equitable grounds . . . ."

Maine Rev. Stat. (1930) Ch. 95 § 18: "Any defendant may plead in defense to any action at law in the superior court, any matter which would be ground for relief in equity, and shall receive such relief as he would be entitled to receive in equity, against the claims of the plaintiff; such matter of defense shall be pleaded in the form of a brief statement under the general issue. And, by counter brief statement, any plaintiff may plead any matter which would be ground for relief in equity against any defense set up by any defendant in an action at law in said court, and shall receive such relief as he would be entitled to receive in equity against such claim of the defendant."

Md. Code of Pub. Gen. Laws Ann. (Bagby, 1924) Art. 75, § 91: "It shall be lawful for the defendant in any action at law (including plaintiff in replevin where avowry or cognizance is made) in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defense, and the court in which said action is pending is hereby empowered to receive such defense by way of plea; provided, that such plea shall begin with the words: 'For defense on equitable grounds,' or words to that effect."

§ 92: "The plaintiff or the defendant in replevin may demur to such plea for want of equity, or reply thereto facts which avoid such plea upon equitable grounds; provided, that such replication shall begin with the words: 'For replication on equitable grounds,' or words to the like effect."

Mass. Gen. Laws (Tercentenary ed., 1932) Ch. 231, § 31: "The defendant may allege in defense any facts which would entitle him in equity to be absolutely and unconditionally relieved against the plaintiff's claim or cause of action, or against a judgment recovered by the plaintiff in such action.

§ 35: "The plaintiff may, in reply to a defence alleged by the defendant, allege any facts which would in equity avoid such a defence or which would entitle the plaintiff to be absolutely and unconditionally relieved in equity against such defence."

R. I. Gen. Laws (1929) Title XXXIII, Ch. 333, § 22: "In any action at law pending the superior court the plaintiff or the defendant may plead any equitable defense, upon which an unconditional judgment can be rendered for the party pleading the same: Provided, that if such case he brought from a district court, such equitable plea shall be filed as other pleas are required to be filed in cases brought from district courts."
tried to the jury with the other issues in the case. The procedure out-
lined remains in effect in many of the states.

Of the cases arising under the statutes, *Hawkins v. Baker* from
Rhode Island is one of the most interesting and may be stated. The de-
fendant was indebted to the plaintiff on two notes, one in the amount
of $3,500, and one for $6,000. He was in weak financial condition and
full payment could not have been enforced against him. He entered
into this compromise agreement with the plaintiff: to pay the $3,500
note in full; then to incorporate his business, when he would permit
the plaintiff to subscribe to stock in the corporation to the amount of
$3,500, whereupon the plaintiff would cancel the $6,000 note. The cor-
poration was chartered and apparently the plaintiff became a sub-
scriber to the amount of $3,500. Afterwards, when both notes came due
they were renewed in one note. Then the plaintiff in violation of agree-
ment brought an action of assumpsit on the note. For his defense the
defendant pleaded the foregoing facts as an equitable defense which he
drew in the form of a bill in equity. The prayers were that the plaintiff
be required to answer the plea, but without oath; that he be enjoined
from taking judgment upon the note sued on; that upon the payment
to the plaintiff of the sum of $3,500, plaintiff be required to release
and discharge the defendant from liability upon the note and be re-
quired to cancel the same; and for such other relief as to equity and
justice may appertain. A demurrer to this plea was sustained.

The opinion is a valuable one because it indicates that the Rhode
Island statute is based upon the English statute of 1854, and because it
contains a review of the leading English cases construing that act.
Moreover, the opinion points out that though the Rhode Island statute
is more liberal in its terms than the English act, it provides for defensive
relief only, not for affirmative relief; that if defendant wished more
than that he must resort to a suit in equity. The court very emphati-
cally laid down the principle that forms of affirmative equitable relief,
which we assume to include cancellation, injunction and specific per-
formance, cannot be had in a law action, saying:

“We do not see that any advantage would accrue to the de-
fendant if obliged to resort to a suit in equity, by having it tried
within the bowels of an action at law. . . .”

To this day no one else has attempted to set up an equitable defense at
law in the form of a bill in equity.

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49 *14 R. I. at 142.*
The Rhode Island case may be compared with *Herrington v. Jones*,50 a recent West Virginia case. Plaintiff had bought land from the defendant, giving a note for the purchase price, had taken a conveyance of the land and had given a deed of trust to secure the purchase price. Claiming to have been defrauded in the sale, plaintiff filed his bill on the equity side asking for cancellation of the note and restoration to his original position. The court denied relief on the ground that plaintiff could defend an action at law on the note and could get full relief on the law side by reconveying the property to the defendant.

The value of the case is seriously impaired by the fact that the court went on to examine the bill and found that the plaintiff had not made out a case of fraud; also, by reason of its failure to cite any authority for its holding. It is remarkable that the case received no attention from reviewers. It would seem that it presented a clear case for equitable relief both on the ground of a bill of peace and also on the ground that relief was necessary to reinvest the defendant with the title to the land and to cancel the deed of trust. No other case has been found in which it was intimated that a law court could do either of these things. If the court means that a judgment for the defendant, in an action brought on the note, would completely dispose of the controversy, it is clearly wrong. If it means that under common law forms complete relief could be given, it is a remarkably liberal decision. It is hardly likely that the court meant so much.

We may consider a few other cases involving equitable defenses in law actions. A defense which would require an accounting cannot be set up at law.51 Equitable defenses in ejectment furnish separate studies in themselves and in fact are frequently the subject of special legislation. But if the plaintiff intending to convey lots number 1 and number 2 to the defendant, by fraud, or by mistake, conveys only lot number 1 but puts the defendant in possession of both lots, and afterwards brings ejectment for lot number 2, defendant has no defense except in equity, as relief would require a conveyance to him by the plaintiff.52

Of course if a defense may be made as a legal defense it is never permissible to set it up as an equitable defense. Therefore, fraud as a de-  

50117 W. Va. 188, 184 S. E. 853 (1936).
52Wright v. Lott, 155 Miss. 185, 124 So. 270 (1929); Sea Food Co. v. Meyer, 144 Miss. 96, 109 So. 674 (1926), 36 Yale L. J. 281.
fense to a simple contract and forgery are both legal defenses. Generally, as a result of judicial legislation or pursuant to one of these statutes fraudulent inducement as a defense, either to a sealed or unsealed instrument, may be made as a legal defense; but mistake gives more trouble. With respect to the types of mistake which prevent the formation of a contract, that is where the parties said the same thing but mean different things, or where unknown to the parties the subject of their negotiation was nonexistent, both of these being true legal defenses have always been available at law.

Other types of mistake, if they can be set up in a law action, are available only as equitable defenses, and are not available then unless complete relief can be given by an unconditional common law judgment. Even when to prove mistake would defeat completely the plaintiff's action, relief has been denied on the law side. This is due to the narrow attitude taken by some courts that the judgment itself is not full protection to the plaintiff or the defendant as the case may be, but must be followed by physical conduct such as reformation or cancellation. Again, in a real action to recover land conveyed by a mortgage to the plaintiff, defendant-mortgagor cannot set up as an equitable defense that the land was included in the mortgage by mistake. The question whether a defense, that a deed was intended as a mortgage, may be set up as an equitable defense has been held both ways. On the other hand, one sued on a contract may set up as an equitable defense that he signed as principal by mistake; that it was really understood by the parties that he was liable as a surety only. In an action on a covenant against incumbrances in a deed, the declaration alleging non-payment of taxes as a violation of the covenant, the defendant was not permitted to set up as an equitable defense that the covenant did not express the real agreement of the parties. The court thought that it would be necessary to reform the deed and, therefore, resort must be had to a court of equity.

\[\text{McGrath v. Peterson, 127 Md. 412, 96 Atl. 551 (1916).}\\  
\text{Harper v. Farmers' & Merchants' Bank, 155 Md. 693, 142 Atl. 590 (1928).}\\  
\text{Conner v. Groh, 90 Md. 674, 45 Atl. 1024 (1909); Nydegger v. Gitt, 125 Md. 572, 94 Atl. 157 (1915).}\\  
\text{Martin v. Smith, 102 Maine 27, 65 Atl. 257 (1906).}\\  
\text{That it may be: Walls v. Endel, 20 Fla. 86 (1889). That it may not be: Sherman v. Galbraith, 141 Mass. 440, 5 N. E. 858 (1885).}\\  
\text{Eustis Mfg. Co. v. Saco Brick Co., 198 Mass. 212, 84 N. E. 449 (1908). The relief in this case was in equity but the courts said the defense might have been set up in a law action as an equitable defense.}\\  
\text{Bond v. Hewitt, 111 Fla. 180, 149 So. 606 (1933). But see Bostwick v. Antuono, 116 Fla. 208, 156 So. 435 (1934).}\\  
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It is not easy to state all the circumstances to which these statutes apply but the statutes themselves are generally similar. Whether relief desired can be given depends upon whether it may be included within the orthodox form of a common law judgment. Forms of relief which are commonly called equitable are not available. Much depends upon whether the court applying the statute thinks it necessary to give relief in equitable form. Will a judgment for one party or the other settle the matter? Or must there be supervised equitable affirmative relief? There is great room here for an extension of the usefulness of these statutes by a modification of the more conservative view on this subject. Of course, if it is necessary actually to reform or cancel, the common law judgment is not enough and the defense cannot be set up in a law action.

The fact that the process of passing over from equity to law by judicial legislation is still going on is pointedly brought out in *Nelson v. Chesapeake Construction Co.*, a Maryland case. The statute of that state provides for equitable pleas but not for equitable replications. In a contract action there was a plea of release under seal. The defense to this release was fraud in procurement. Can this defense be made at law when the statute does not specifically provide for an equitable replication? The court said Yes, that there was no practical advantage in separate proceedings when the issue can be settled at law without complicating the law action. Clearly the defense of fraud to a sealed release had passed over to the law side because the court said that it had; and we must agree that the court adopted a very sensible attitude.

To sum up, an equitable defense can be made if the court thinks that the controversy may be disposed of by procedure which falls within the scope of the common law judgment. If it may be, the defendant is generally held to have his option to set it up in the law action as an equitable defense, or to go into equity. This latter privilege is probably being somewhat restricted in recent years. The right to jury trial plays no part in deciding the question and is never mentioned in the cases. This procedure pertains probably in most of the so-called common law states, and defenses, equitable in nature, that is to say which are of equitable derivation but which can be set up in law actions, are spoken of in those states as equitable defenses.

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60159 Md. 20, 149 Atl. 442 (1930).
C. In Code States

The outstanding characteristics of code pleading are these: the common law forms of actions are abolished; one form of action is adopted for all controversies, whether legal or equitable; and the defendant is required to set up all the defenses he has to what is contained in the complaint, whether those defenses have formerly been denominated legal or equitable. Thus, it is apparent that the term equitable defense has an entirely different meaning from that which has heretofore been discussed. In a code state the question is not whether the defense may be set up—in fact, it is required to be set up if it is ever to be availed of. The question is, how shall it be tried, by the court or by the jury.

In all of the states, code and common law, the state constitution preserves the jury trial, beyond the power of infringement by the legislature. Therefore, someone must determine, as to which of the issues developed, the parties, or either of them, may demand a jury. This is a matter to be decided by the courts in each state; and as the constitutional right to trial by jury depends upon the local interpretation of that term, we must not expect to find uniformity of decision. In a few states all issues, legal and equitable, are triable by jury. In many of the states, in order to assist the courts, statutes have been adopted which attempt to specify the issues or defenses which are to be so tried. Although uniformity is lacking, this is not to intimate that there is any doubt as to the law in any particular state. It is probably true that the practice in each state has by this time been worked out so that the practitioner has no trouble on this point. But if we ask for a theoretical rule by which we can determine whether or not the issue is one for the jury, it is believed that no one rule has been generally accepted.

Judge Clark, who is perhaps our best-known commentator on this subject, puts forward the rule that we should look merely at the particular issue under consideration. If that issue was one triable by the jury before the adoption of the code, it remains triable by jury under the code; whereas, if it was tried by the court before the code, it remains triable only to the court. But Professor McCaskill, also an able commentator on the subject, is unwilling to accept this rule. He contends that a complaint is not simply a set of facts with a demand for

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1Clark, Code Pleading (1928) 21, n. 66.
3See Clark, Code Pleading (1928) 52-67, 437-431; Clark, Trial of Actions under the Code (1926) 11 Corn. L. Q. 482.
relief, but that from the very beginning of the controversy it is subject to a directional control either toward what was formerly a suit in equity or an action at law. And, therefore, in his opinion we cannot solve our problem by simply looking at the issues which may be evolved.

The writer is inclined to think that neither rule holds for all cases, and that there is no one rule which can be relied upon. The reason for this view is that any classification we may attempt to make, of issues formerly tried by jury and formerly tried by the court, is of necessity overlapping, a result due principally to the fact that equity courts administer legal relief. And the writer also believes that no statute can be drafted which will furnish a rule which may be followed in every case, at least not within the pattern of the constitutional right to jury trial. The matter is one for each jurisdiction to work out for itself. What we may easily lose sight of is the fact that defenses formerly equitable drift over and become legal defenses, and there is no reason to presume that this process came to an end when the codes of procedure were adopted.

The fairly recent case in New York, the Susquehanna case, which was the subject of a great deal of comment, may be noted here. In an action on a contract to recover money, the defense set up in the answer was mistake in expression. That is to say, if the contract had been written as the parties intended to write it, there would have been no liability to the plaintiff on the facts set out in the complaint. The question presented was, how was this issue to be tried? Judge Cardozo, in a very careful opinion, held for a unanimous court, that under the statute this was an action brought to recover money and the issue should be tried by jury.

Clearly the court did not apply Judge Clark's rule, for the issue of mistake is generally held to be an equitable issue tried only to the court. Professor McCaskill finds the decision objectionable, but for a different reason. He thinks the issue of mistake is so complicated that it is unwise to permit a jury to try it.

The writer believes that the decision was right for the reason given by the English courts three quarters of a century ago in applying the equitable defense statute of 1854, that is, that a judgment for the de-

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64McCaskill, Actions and Causes of Action (1925) 34 Yale L. J. 614.
66See Judge Clark's vigorous criticism of the case in, Trial of Actions under the Code (1926) 11 Corn. L. Q. 482.
fendant on this issue would decide the entire case. The English cases reaching this conclusion have already been referred to. To state it another way, this type of defense, though based on mistake, formerly an equitable question, has drifted over and become a legal defense and this happened many years after the code of procedure was adopted. It might be added that the Virginia court under the statute permitting equitable defenses in law actions reached this same conclusion many years ago.

There is no occasion to go into any detailed discussion of the right to trial by jury in code states. Our point is that in code states the question is not whether a defense may be set up in the controversy, but how it is to be tried. Thus perhaps, when we speak of a defense as equitable in such a state, we mean that it is tried to the court. On the other hand, in a common law jurisdiction when we speak of a defense as equitable, we may mean that it must be made the subject of a bill in equity, or we may mean that although equitable, it has by operation of a statute been turned into a legal defense which may be set up in a law action.

IV. EQUITABLE DEFENSES IN THE FEDERAL COURTS

A. General Survey

When we come to discuss equitable defenses in the federal judicial system, we shall probably find ourselves in the most interesting field that we have to cover, for at different periods during the life of the system the term has been used with different meanings, and with the adoption of the new Federal Rules, an entirely new problem is posed for the courts. As is well known, from their inception in 1789 to the taking effect of the Rules of Civil Procedure in September, 1938, proceedings at law and in equity were kept rigidly separate. In fact there was much authority for the position that this separation was required by the Constitution. But of course, the adoption of the new Rules by the Supreme Court put this idea to rest.

Under the Judiciary Act of 1789, separate equity courts were set up, to be held, however, by the same judge who conducted proceedings at law—the familiar American arrangement. Congress endeavored to re-

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69See Note (1925) 25 Col. L. Rev. 630.
67Pound, Law and Equity in the Federal Courts—Abolishing the Distinction and Other Reforms (1911) 73 Cent. L. J. 204.
strain equity from infringing upon the jurisdiction of the law courts,\textsuperscript{71} and adopted for equity courts the orthodox procedure in effect in England in 1789, as practiced generally in this country and as set out in Daniell's \textit{Chancery Practice}.\textsuperscript{72} In 1822, in 1840, and again in 1912, elaborate systems of rules were adopted for the regulation of equity practice.\textsuperscript{73} These were ultimately superseded by the new Federal Rules.

The reforms in equity procedure in the states had no effect whatever upon the federal practice, whether in states which still retained common law procedure, or in states which had adopted code pleading. The state reforms were simply ignored. Of course, if new equitable rights were created by state law, such rights were enforced in federal equity courts.\textsuperscript{74} This rigid ignoring of the state practice becomes more emphatic upon a consideration of the federal procedure in law actions.

From the first, on the law side some sort of conformity with state practice was followed,\textsuperscript{75} but as it was the state practice in existence at the time the state was admitted to the Union, the practice in the federal court as time went on diverged more and more from the practice in the state court. This, together with the rules which the federal courts were permitted to adopt for the regulation of law practice, brought about what was considered an unbearable divergence between the two practices. The Conformity Act of 1872\textsuperscript{76} was adopted in order to bring about the desired uniformity. But as that statute prescribed uniformity only "as near as may be," and as acts of Congress were from time to time adopted pertaining, of course, only to the federal practice, the resulting divergence between law practice in state and that in federal courts became again the target for constant criticism and complaint.\textsuperscript{77}

Beginning with the middle of the Nineteenth Century, when the common law states began to adopt statutes permitting equitable defenses, and when other states—more than two-thirds of the total number—began to enact codes of procedure, the federal courts on the law

\textsuperscript{71}Judicial Code § 267, 36 Stat. 1163 (1911), 28 U. S. C. A. § 384 (1913): "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."


\textsuperscript{73}Hopkins, New Federal Equity Rules (6th ed. 1929) § 9 et seq.

\textsuperscript{74}Henrietta Mills v. Rutherford County, N. C., 281 U. S. 121, 50 S. Ct. 270 (1930).

\textsuperscript{75}Rose, Code of Federal Procedure (1907) § 10 a.

\textsuperscript{76}Rose, Code of Federal Procedure (1907) § 900 a.


side consistently refused to apply the statutes allowing equitable defenses to be set up in law actions. And, of course, they were not permitted to follow the state codes combining law and equity in one form of proceeding wherein all defenses might be set up.

To remedy this situation, in 1915 Congress adopted the statute which permitted equitable defenses in law actions in federal courts. This statute will be treated later at some length. Thus matters remained until law and equity were merged in one form of proceeding in the Rules of Civil Procedure for the District Courts of the United States which were adopted in 1938. Thus, in these new Rules, equity procedure, which had pursued one line of development, came to an end at the same time as did procedure at law, which had followed another line of development.

As this discussion is limited to defenses in law actions, there is no more to be said about true equity procedure. Turning our attention to the law side, we have three periods to consider in connection with the use of equitable defenses in federal courts:

First, the period from the establishment of the federal courts under the Constitution in 1789 to the adoption of the equitable defenses statute in 1915.

Second, the period from 1915 to the adoption of the new Rules in 1938.

Third, the period from 1938 to the present.

B. Before the Equitable Defenses Act of 1915

Taking up the first period, equitable defenses in the first sense, that is defenses which could not be made in the law court, but which required the assistance of a bill in equity, were very well established. The great transitions from equity to law had long since been made. The process of passing over from the equity to the law side by gradual evolution, while still possible, is very little in evidence during this period. The existence of the equity court and the rigid insistence upon the separation of law and equity are perhaps the explanation for this. While Congress might have shifted specific equitable defenses to legal defenses, there is almost no evidence of its having done this. Perhaps this era in the history of the federal courts represents their most conservative period since it involved the exclusion of equitable defenses and the necessity for the use of the bill in equity.

A brief examination of the general trend of the federal cases is in order. That the defense of fraud may be made in an action at law on an unsealed contract was well established and it follows that in such case equity will not interfere with a law action. The doubt on this point which appears in a few cases and which was certainly unjustified was removed by the decision in Enelow v. New York Life Ins. Co. in the Supreme Court of the United States. As the Supreme Court has noted that anciently equity took jurisdiction in any case of fraud, we have acknowledgment of the fact that this defense to an unsealed contract has been taken over by the law courts and is no longer an equitable defense. But whether the contract is sealed or unsealed, the plaintiff must sue on it as it is written. He cannot recover on the contract as it should have been written, but must first go into equity for reformation. Nor is mistake in expression available as a defense, nor mistake induced by fraud; but mistake as to existence of the subject matter and mistake which prevents a meeting of minds are clearly legal defenses.

In an action in a federal court on a sealed contract in a state in which the common law incidents of the seal still pertain, nothing is better settled than that the defense of fraudulent inducement cannot be made on the law side. But the courts have always insisted upon the distinction between fraud in the inducement and fraud in the execution, holding that the latter is a legal defense.

The action of ejectment furnishes many illustrations of the principle we are discussing. Equitable defenses cannot be made in such action, though they are provided for by the state practice; and a claim

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15Hartshorn v. Day, 19 Howard 211 (U. S. 1856); George v. Tate, 102 U. S. 564 (1880). And see Ames, Specialty Contracts and Equitable Defences (1895) 9 Harv. L. Rev. 49.
16George v. Tate, 102 U. S. 564 (1880); De Lamar v. Herderley, 167 Fed. 530 (C. C. A. 2d, 1909). There are innumerable cases which make this distinction.
for betterments cannot be set up, though permitted by the practice in the state.\textsuperscript{90} Estoppel, which in some states cannot be set up as a legal defense, may be so set up in the federal courts.\textsuperscript{91} It follows, of course, that a defense which cannot be set up in ejectment, will support a bill in equity.\textsuperscript{92} But if the plaintiff in an action of ejectment permits an equitable defense to be set up and tried, he cannot later object.\textsuperscript{93} A defense which requires some form of equitable relief, such as partnership accounting, of course is barred from a law action.\textsuperscript{94} And a federal court would not entertain a bill to subject property to the payment of a simple contract debt before judgment is taken.\textsuperscript{95}

In an action in a federal court to enforce a judgment rendered in another state, equitable defenses to the judgment cannot be set up on the law side, though this would be permitted in the state law court. In this case, the court said that such a practice would overthrow the whole scheme for the administration of equity in the courts of the United States.\textsuperscript{96} Nor will the federal practice permit a legal cause of action to be presented on the equity side, when the remedy at law is adequate. The courts are alert to detect attempts to violate this rule. In \textit{Buzard v. Houston}\textsuperscript{97} in which the plaintiff, who had been induced by fraud to enter into a contract, filed a bill to cancel, the Supreme Court held that he was excluded from equity, saying that damages in an action of deceit would give him full relief. Two justices dissented, however, on the ground that his bill called for cancellation which he could not get at law.

The cases show that trespass to land may not be turned into a proceeding in equity by calling for an accounting.\textsuperscript{98} Nor can an action on a note in which the defense of fraud is available be taken into equity by calling for cancellation.\textsuperscript{99} Illegality is a legal defense.\textsuperscript{100} In an action against a surety on a penal bond conditioned on performance of the

\textsuperscript{92}Davis v. Davis, 72 Fed. 81 (C. C. A. 5th, 1896).
\textsuperscript{93}Highland Boy Gold Min. Co. v. Strickley, 116 Fed. 582 (C. C. A. 8th, 1902).
\textsuperscript{94}Burnes v. Scott, 117 U. S. 582, 6 S. Ct. 865 (1886).
\textsuperscript{96}Montejo v. Owen, 17 Fed. Cas. No. 9722 at 610 (C. C. S. D. N. Y. 1877).
\textsuperscript{97}119 U. S. 347, 7 S. Ct. 249 (1886).
\textsuperscript{100}Maine Northwestern Dev. Co. v. Northern Commercial Co., 313 Fed. 103 (W. D. Wash. 1914).
terms of a lease, a defense that the lease secured was a different one from that described in the plaintiff's pleading is a legal defense, which is sustained by evidence which merely identifies the instrument secured by the bond.\(^\text{101}\)

The same principles are applied to replications to the defense of fraud pleaded. If the release is not under seal,\(^\text{102}\) or if under the state law, the seal has been stripped of its common law characteristics, it is treated as an unsealed release.\(^\text{103}\) But where the seal retains its common law effect, a replication of fraudulent inducement to a sealed release cannot be set up on the law side.\(^\text{104}\) And, of course, such fraud gives the plaintiff his opportunity to go into equity to enjoin the law action and have the whole case decided on the equity side. Or, if a judgment is taken at law, he may go into equity for an injunction against its enforcement.\(^\text{105}\) In one case a plaintiff so situated was permitted to sue at law for deceit in securing the release by fraud, but this seems very questionable.\(^\text{106}\) We note here, as well as in the case of pleas, that fraud in execution is available at law\(^\text{107}\) and if the point in controversy is merely the construction of the release, there is no need of the assistance of equity.\(^\text{108}\)

Thus, we see that in the federal system there was during this long period no blending or merging of causes of action in law and equity and no blending or merging of legal and equitable defenses. The latter must be availed of in a suit in equity; and no distinction was drawn between defenses which were equitable only as a matter of legal history, and those which required some form of equitable relief, such as cancellation, specific performance, or accounting. And very little evidence is seen of any passing over of defenses from the equity to the law side.\(^\text{109}\)


\(^{109}\) See Abbott, Fraud as a Defence at Law in the Federal Courts (1915) 15 Col. L. Rev. 489.
C. Under the Equitable Defenses Act of 1915

The first period closed with the adoption by Congress in 1915 of the statute permitting equitable defenses in law actions in federal courts, being Section 274b of the Judicial Code, which reads as follows:

"In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of [or?] seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."\textsuperscript{110}

While the new Rules render the act inapplicable, many interesting cases were decided under it during its twenty-three years of life; interesting not only in their day, but perhaps of controlling influence on the practice under the new Rules. The procedure authorized by Section 274b is entirely different from anything we have already considered. The scope of the respective defenses as legal or equitable is not altered in any way. Defenses which formerly could be set up at law are still required to be so set up\textsuperscript{111} and no warrant is found for carrying equitable defenses over on the law side for trial by jury. Provision is made for equitable replications as well as equitable pleas. A procedure heretofore unknown is presented—a forked or hybrid proceeding, part law and part equity. Thus it differs from a common law proceeding in which equitable defenses are permitted, but at once become legal defenses. And it differs as well from the familiar code pleading in which there is only one form of action and all defenses whether legal or equitable are set up in the answer, the only problem remaining being the method of trial.

Now, we find presented for the first time the importance and necessity of distinguishing between law and equity with respect to the jury trial secured by the Seventh Amendment to the Constitution of


the United States. While there are many cases arising under Section 274b in the lower federal courts, it is remarkable that so few cases reached the Supreme Court. The first case to reach that Court was *Liberty Oil Co. v. Condon National Bank*, decided in 1922, in which Taft, C. J. in an admirable opinion sketched the new procedural framework. This case arose in a code state. The plaintiff sued a bank to recover money which had been deposited there to be held in accordance with the terms of a contract with third persons, plaintiff claiming that by reason of the third persons' defaults it was entitled to reclaim its deposit. Thus the proceeding was what we should call in a common law jurisdiction an action of assumpsit for money had and received. The bank set up in its answer that it was a disinterested stakeholder; that third persons were interested in the deposit and were claiming it of the bank. It prayed that the claimants be made parties, and this was done. The court heard and decided the case without a jury. The principal question was whether the Supreme Court was reviewing a decision at law or in equity.

Summarizing from the opinion, the proceeding began as a law action to recover money, but the answer which was authorized by Section 274b changed it at once to one in equity. Section 274b permits affirmative equitable defenses. It is an important step toward a consolidation of law and equity. While the practice is not the code procedure of the states, it is a long step in that direction. When an equitable defense is pleaded, an equitable issue is raised which is tried by the court as a chancellor. The answer in this case caused the proceeding to become in effect a bill in equity. The court properly tried the issue and the review was that of an equity case. However, the new procedure does not change the nature of any defense. What was legal before the act remains legal and what was equitable before the act remains equitable. When an equitable defense is interposed to a suit at law, the equitable issue should be first disposed of as in a court of equity and then if an issue at law remains, it is triable to a jury. The equitable defense makes the issue equitable, but the trial by jury is preserved exactly as it was at common law.

The second authoritative case, *Enelow v. New York Life Ins. Co.*, was decided twelve years later. This was an action upon a life insurance policy which contained the usual two year incontestable clause. The defense was that the policy had been obtained by false statements as to

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the health of the insured. This was set up as a defense under Section 274b in a plea in which the defendant prayed that this "equitable issue" be tried by the court as a chancellor. The Court, speaking through Hughes, C. J., asked: "Was the defense set up by the defendant of such a nature that defendant was entitled to have it heard and determined in equity and to enjoin the proceedings at law pending that determination?" The Court replying in the negative, said that "The test under Section 274b is whether the defendant could have maintained a bill in equity on the same averments."114 Its position was that there was no intent to change or enlarge the substantive jurisdiction of equity. Hence it followed that this procedure cannot aid the defendant, when a bill for the same relief would not lie because the defense is one which is completely available in the action at law. The Court pointed out the distinction between this case and a case in which a bill to cancel would lie. But here an action had already been brought. The defense was available in the law action. No bill in equity would have lain to cancel. The issue would be tried by jury. Respondent was in no better position under Section 274b and, therefore, the case was reversed and remanded to be proceeded with as an action at law.

Another case to the same effect was decided by the Supreme Court on the same day.115 And in the later case of American Life Ins. Co. v. Stewart116 the Court pointed out the conditions under which a bill to cancel could be maintained. These cases then give us our outline of the proper application and effect of Section 274b, but it may be profitable to refer to some of the cases in the lower federal courts.

These cases show that orthodox legal defenses remain such. This, of course, is the principle of the Enelow case117 just discussed. Fraud in execution118 and fraud as a defense to an unsealed contract cannot be turned into equitable defenses simply by setting them up under Section 274b and praying for "cancellation and surrender," as such relief is not necessary.119 Many cases of this type are actions on insurance policies to which the defense of fraud is made. It is clear that unless there are grounds which would sustain a bill to cancel, only a legal

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114293 U. S. at 383, 55 S. Ct. at 312.
116500 U. S. 293, 57 S. Ct. 377 (1937).
issue is raised. Such grounds are set out in many cases.¹²⁰ If a bill to cancel is first filed and later a law action is brought to recover on the policy, the future of the proceeding in equity depends on a number of factors, including the court's discretion. In the Stewart case,¹²¹ decided by the Supreme Court in 1937, this subject was gone into thoroughly.

In any insurance case, if the policy must be treated as a sealed instrument, fraud in the inducement cannot be made as a law defense, and, therefore, the equity suit will continue.¹²² But if the defense can be made under Section 274b, or can be made as a law defense, the suit may be dismissed or at least suspended during the proceedings in the law action.¹²³ In a law action in a state court on an insurance policy in which the defense was material misrepresentation, the defendant afterwards filed a bill in a federal district court to cancel the policy and such relief was given;¹²⁴ but it is clear that if the defendant had been sued in the federal court he must have made his defense either as a law issue or as an equitable issue under Section 274b.

The cases show that if the plaintiff wishes to sue on the contract not as it is written, but as it was intended to be written, he must proceed in equity for reformation.¹²⁵ Section 274b does not affect such a case. Estoppel is a legal defense.¹²⁶ Fraud in the procurement is an equitable defense to an action on an instrument under seal, where the seal retains its historical incidents. And despite the growing dissatisfaction with this position, it seems clearly the law in federal courts.¹²⁷ But if


the issue of fraud is tried to the jury without objection, the point is waived.128

To a replication to a release under seal the same rules pertain. Fraud in execution is a legal defense, while fraud in procurement is equitable. Since this view leads to close and sometimes questionable distinctions between fraud in execution and in inducement,129 it is easy to understand the dissatisfaction with the requirement. For more than a century in Virginia, and in England since 1854, and in most of the states, whether under the code or at common law, such a defense of fraud in inducement may be made at law. But the federal courts are painfully conservative on this subject. Of course if the release is not under seal fraud raises only a law issue.130 An able district judge has held in a very careful opinion that fraud in inducement as a defense to a sealed instrument presents a law issue.131 But the most instructive opinion rejecting the generally accepted federal view is found in a case decided in the First Circuit in which all the cases are reviewed and the conclusion reached that fraud may be availed of as a legal defense to a sealed instrument.132 But unfortunately, when the case went to the Supreme Court it held that the real defense to the release was illegality, which undoubtedly was a legal defense. The Court said it was enough for present purposes that no equitable issues were presented, and, therefore, it would be premature to review "not a little" of what had been said in the court below.133 This seems to be where the matter stands at this time.

It is clear that affirmative equitable relief may be asked for under Section 274b. The statute itself provides for it. The relief in the Liberty Oil case134 was essentially affirmative. Reformation for mistake may be given to which, of course, laches may be replied.135 Also, cancella-

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130 Patterson v. C. N. O. & T. P. Ry., 5 F. Supp. 595 (D. C. Ky. 1932). As to replication that release was executed while plaintiff was insane see Farmers Bank & Trust Co. v. Public Service Co. of Indiana, 13 F. Supp. 548 (D. C. Ky. 1936).


tion and release of cloud on title to land may be decreed.\textsuperscript{136} Here also, we find that while the defense of mutual mistake to a release presents an equitable issue, if the parties permit it to be tried to the jury they cannot afterwards object.\textsuperscript{137} And if a party fails to set up his equitable defenses under 274b, he cannot afterwards file a bill for equitable relief.\textsuperscript{138}

Enough has been given to show how the Supreme Court and the lower federal courts applied the equitable defenses statute of 1915. The review of the cases brings us to 1938 and the new Rules.

\textbf{D. Under the New Rules}

When the Rules of Civil Procedure for the District Courts of the United States went into effect on September 16, 1938, procedure in federal courts passed into its third stage. Recapitulating very rapidly, before that event there was a sharp division between proceedings in law and in equity. In proceedings at law under the uncertain guidance of the Conformity Act, and with equitable issues capable of being raised at law under Section 274b, there was no doubt as to what controversies belonged on the law side. There was likewise no doubt as to which controversies belonged in equity where the procedure was regulated in the main by the rules of 1912. With respect to transferring cases, Section 274a of the Judicial Code provided for shifting to the law side cases which were improperly brought in equity. The converse proceeding, shifting to the equity side cases originally brought in law but which had become equitable by reason of pleas under Section 274b, was explained by Taft, C. J., in the \textit{Liberty Oil} case. Equity Rule 23 provided for trying in equity, law questions which arose in equity suits. It is noteworthy that the English rule,\textsuperscript{139} from which this rule was taken, does not contemplate a jury trial, whereas Rule 23 seems to do so;\textsuperscript{140} but no doubt the rule is superseded today.

With the adoption of the new Rules an entirely different picture is presented. No addition to the tremendous bibliography on the subject

\begin{itemize}
\item Kneberg v. H. L. Green Co., Inc., 89 F. (2d) 100 (C. C. A. 7th, 1937).
\item Atlantic Greyhound Lines Inc. v. Metz, 70 F. (2d) 166 (C. C. A. 4th, 1934), cert. denied, 293 U. S. 562, 55 S. Ct. 73 (1934).
\item Rules of the Supreme Court, 1883-1935 (1935) 108, Order XXXVI, rule 3.
\end{itemize}
will be made here.\textsuperscript{141} Attention will be confined to equitable defenses, a subject which under the new Rules, as in code pleading, generally becomes for all practical purposes a study of what controversies or issues are entitled to trial by jury. The Rules cover all suits of a civil nature in the District Courts of the United States, whether cognizable in law or in equity.\textsuperscript{142} There is to be one form of action known as the "civil action."\textsuperscript{143} The complaint shall contain a demand for judgment for the relief to which the plaintiff deems himself entitled.\textsuperscript{144} Forms of denials\textsuperscript{145} in the answer are provided for, as are affirmative defenses,\textsuperscript{146} and the answer may contain as many defenses as the defendant has, whether on legal or equitable grounds, or both.\textsuperscript{147} A party waives all defenses which he does not present.\textsuperscript{148} And this is true also of counterclaims which arise out of the same transaction or occurrence.\textsuperscript{149}

In the Enabling Act, which authorized the Supreme Court of the United States to prescribe the Rules, Congress was careful to provide:

"That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate."\textsuperscript{150}

Obedient to this direction, Rule 38(a) prescribes that the right of trial by jury as declared by the Seventh Amendment to the Constitution, or as given by a statute of the United States shall be preserved to the parties inviolate; and the advisory committee which prepared the Rules assures us that it had neither the power nor the desire to deprive any party of his jury trial. It should be noted, however, that Rule 38(b) makes it easy for a party to lose his jury trial by inadvertence.

Now the problem is, what controversies or issues are triable by jury under the new procedure? The very few reported cases which have interpreted Rule 38 will be referred to later. Other decisions will be awaited with keenest interest by all who are interested in civil procedure. To the able discussions of the problem which have already ap-

\textsuperscript{141}Rules of Civil Procedure for the District Courts of the United States (Government Printing Office, 1939) 309 et seq.
\textsuperscript{146}Fed. Rules Civ. Proc., Rule 8 (c).
\textsuperscript{147}Fed. Rules Civ. Proc., Rule 8 (e) (2).
peared,¹⁵¹ the writer can hope to add but little. The problem now presented to the federal courts is the same which courts in code pleading states have already faced. It is interesting and important to practitioners and, therefore, has been the subject of lively discussion in the institutes held under the auspices of the American Bar Association for the purpose of explaining the Rules. Until certainty is brought by decisions of the Supreme Court, or by legislation, it is only to be expected that the interpretations of the Rules will vary with the training and experience of the judges who interpret them. Judges from code states are certain to view the Rules in a somewhat different light from that in which judges from common law jurisdictions will view them. The leading voice in the exposition of the Rules has been that of Judge Clark. His attitude seems to be the same as that which he expressed in his well known book on code pleading.¹⁵² It is, that we need not concern ourselves about how the case is to be tried until we first have discovered what the issues are, and then each issue will be tried under the Rules just as it would have been tried before they were adopted.¹⁵³

The writer ventures the opinion, however, that this view is not realistic and offers an over-simple generalization. Lawyers think not only of issues but of controversies, and it is impossible not to think of controversies as being legal or equitable. If lawyers and judges continue to do this in England, and we have seen that they do, then surely they will continue to do so in our own country. It is submitted that in a complaint drawn under these Rules the draftsman will know from the start whether he intends to ask for legal or equitable relief, and will draw his complaint accordingly. In England courts freely speak of relief in equity, meaning, of course, on the principles of equity, and the Chancery Division of the Supreme Court has assigned to it a variety of controversies because they are equitable in nature. The same controversies arise here and the complaint likewise will be equitable in nature. If an insurance company sues to cancel a policy because of fraud, the insured still being alive, it will ask for the equitable relief of cancellation. There is no need to wait until the issues are made up to de-


¹⁵²Clark, Code Pleading (1928) 52, 431.

¹⁵³The subject was discussed at the Institutes held by the American Bar Association. Reports of Institute at Cleveland, 200, 274, 275; Washington, 115; New York, 310.
termine whether the trial shall be by jury or by the court. Again, if an insured person has released his claim and wishes to set aside the release, because procured by fraud, and to recover on the original claim, he sues for cancellation of the release and for recovery on the policy. The proceeding is in equity and he knows it. So when a vendee sues to recover from the vendor money paid on a contract by which the vendor is to convey land to the plaintiff, the vendee basing his action on his rescission of the contract because of the vendee’s default, he knows he is suing at law. If the vendor wishes to retain the money and have the vendee ordered to pay the balance when the vendor will convey the property to the vendee, the situation requires more attention. At common law there was no relief except in a separate equitable proceeding. In those common law jurisdictions having the usual statute permitting equitable defenses, the vendor will probably likewise be required to go into equity, as a common law court could not afford the requisite equitable relief; while in a federal court, under Section 274b, the situation is perfectly clear. The federal court would realize that there are, or may be, two issues presented: the first, to recover the money, is at-law and triable by jury; the second, to require the payment of the balance and direct and supervise the conveyance of the land, is in equity and triable by the court.

The objection to Judge Clark’s position is that he concentrates all of his attention on the issues, when, as a matter of fact, the issues are governed by the controversy and the nature of the controversy is reflected to some extent by the issues.

Before proceeding to a discussion of the cases decided under the new Rules, it may be possible to list certain situations which are relatively clear. First, claims for equitable relief which is not needed for proper disposition of the controversy, whether in the complaint or in the answer, will not be permitted by the courts to carry true legal controversies or issues over into equity; that is to say, will not under the new Rules deprive the party of his jury trial. Second, defenses which were equitable under Section 274b will remain equitable and therefore not triable by jury. Third, the great group of cases, such as those of which the Chancery Division in England is given jurisdiction, are essentially equitable and there will be no jury.

There is another type of case, however, which is certain to cause trouble and that is the familiar controversy in equity in which, in order

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to give full relief, the equity court must decide questions of law and award damages. For example, the plaintiff sues to establish a nuisance, to recover the damages already inflicted by it, and to secure an injunction against its continuance. Clearly two of these issues are legal, but under the equity practice all three might be decided by the chancellor, and if a jury were impaneled it would act in an advisory capacity only. This is not to lose sight of the long struggle that has been gone through in order to get rid of the idea that the establishment of a nuisance, easement, or a trespass is essentially a law issue which must be tried by a law court, or at least by a common law jury. The attitude toward the problem today is one of convenience and policy rather than of inherent right, and federal courts have not hesitated to try such issues in the case imagined without a jury, and as a part of relief in a suit in equity.

Now, when the supposed case is brought under the new Rules, to apply Judge Clark's rule, we should be compelled to say that either party would have a right to a jury on the issues of the existence of nuisance and the amount of damage suffered. But if it was the intention of Congress when it authorized the new Rules to require the jury trial to be continued as it then existed in federal courts, we should certainly not reach that conclusion.

It cannot be too strongly emphasized that the decisions in the lower federal courts will be controlled largely by the professional training and experience of the judges. If in an action on a contract, the defendant wishes to set up mistake in expression which, if established, will show that the plaintiff has no cause of action, a federal judge in New York might be expected to hold that this is a legal issue following the Susquehanna case;\textsuperscript{156} whereas, if we looked only at the issue of mistake, we should say with Judge Clark that the case is wrong.\textsuperscript{157} Then again, a federal judge may hold that the defense of fraud to a sealed instrument has passed over and become a legal defense triable by jury, and he may be sustained in that position. In fact it is altogether likely that he would be. If he were federal judge in Virginia, this would not seem at all unusual to him as this has been a legal defense in Virginia for more than a hundred years. Furthermore, in some code states both fraud and mistake are legal defenses tried by jury. However, a federal court in such a state making a similar ruling is certainly in danger of reversal as to the latter defense, because under the former equity practice mistake in expression was an equitable defense. It seems apparent, there-

\textsuperscript{157} Clark, Trial of Actions Under the Code (1926) 11 Corn. L. Q. 482.
fore, that though the same Rule is being interpreted, different conclusions may be reached because of the attitudes of the federal judges toward different issues when the new Federal Rules went into effect. Thus it would seem that any expression of opinion as to what portions of a case set up in a federal court in a civil complaint are to be tried by a jury, is at this time little more than prediction, and that the answer depends not only upon the issue raised but upon the controversy itself.

The cases thus far decided under the new Federal Rules though few in number are not without interest. The jury trial preserved by Rule 38(a) includes controversies on special statutes which provide for such method of trial.\footnote{168} The distinction between law and equity abolished by the new Rules is a distinction in procedure and not a distinction between remedies, and a distinction still remains between jury actions and non-jury actions. What was before the adoption of the Rules an action at law is a jury action, and what was a suit in equity is a non-jury action. And in an action brought to enjoin infringement of a patent and to recover damages, no jury is used, whereas, if the action is for damages only, a jury may be demanded.\footnote{168} Likewise, if the complaint is for the rescission of a contract for fraud, the issue is equitable with no jury, but if the complaint is amended, abandoning rescission and asking only for damages, either party has a right to a jury.\footnote{160} Clearly there is no warrant in this case for the position that it is the issues which determine the right to trial by jury. Again, it has been held that an action for breach of a royalty agreement was triable as a matter of right by a jury, although the complaint also prayed that the defendant be enjoined from refusing access to its plant. The court reached this conclusion since the information sought by the injunction might be obtained as successfully by discovery.\footnote{161}

An interesting case, \textit{Union Central Life Ins. Co. v. Burger},\footnote{162} was decided recently in the Southern District of New York. An insurance company brought an action to cancel a life insurance policy for fraud. The policy, which was incontestable after two years from the date of issue, was issued on September 30, 1936. The insured died March 10,
1938, and no action had been brought to recover on the policy when
the suit to cancel was commenced on August 25, 1938. The defendant
beneficiary denied fraud and set up in a counterclaim a demand for
benefits under the policy. The court, speaking through Coxe, D. J.,
held that Rule 13(a) made it compulsory on the defendant to set up
the counterclaim, whether it be legal or equitable, and that on this
counterclaim the defendant was entitled to trial by jury. It should be
noted that this case follows the rule of procedure advocated by Judge
Clark. Thereby it differs from the orthodox equity practice, for there
if the insurance company's complaint is sustained as a bill of peace,
while the defendant may assert his rights under the policy, they would
be tried as in an equity suit with no right to a jury.

How should the following controversy be decided? Plaintiff sets out
the policy, the loss under the policy, a release under seal executed by
him, that the release was secured by fraud, and asks that the release be
cancelled and that he be permitted to recover on the policy. Here again,
under the orthodox equity practice, this is a proper proceeding in
equity in which full relief may be given. Now, under the new Rules,
do we have an equitable issue on the claim to cancellation, and if that
be decided in favor of the plaintiff, a law issue on his right to recover
under the policy? Many such problems will come before the courts
under the new Rules.

It has been decided by two district courts that the defense of fraud
to a release under seal presents a non-jury issue. But another district
court has held that the issue in such a case is a jury issue. The case
of Ford v. Wilson & Co. decided in the District Court of Connecti-
cut presents very interesting features. In a complaint containing two
counts, plaintiff set out in the first count sale and delivery of a large
number of rose bushes to the first defendant for which plaintiff had not
been paid, and in the same count charged the second defendant with
having interfered with the performance of the contract. The second
count charged that the second defendant took over the control of first
defendant's business, rendering it impossible for it to perform its contract with plaintiff. The relief asked for on the second count was, $20,000 damages, a decree setting aside the fraudulent transfer, and the appointment of a receiver. The question before the court was, which of these issues was triable by jury. The court said, "Clearly the first count states a cause of action for breach of contract against the defendant, Wilson Company [the first defendant]," and also "states a cause of action against the Bank [the second defendant] in tort by reason of its interference with the contract between Wilson & Company and the plaintiff." Therefore, "the plaintiff is entitled to a jury trial upon all the issues raised upon the first count." If the bank, as charged in the complaint, concealed its interest in the first defendant's property and thereby caused injury to the plaintiff, such a cause is a legal cause of action for fraud involving purely legal issues to be tried to the jury. While the second count, in its aspect as an equitable proceeding for setting aside the fraudulent assignment, is to be tried to the court. Now if the plaintiff in preparing his complaint followed the newer learning and merely hewed out the operative facts, letting the issues fall where they might, he seems to follow Judge Clark. But is that what the plaintiff did? It seems rather that he knew he had, or at least thought he had, four causes of action, three clearly at law and one in equity; and that he knew from the beginning how the issues should be tried. And it seems that the court's attitude was the same. Another interesting problem is joinder of parties and causes, but so far as mode of trial is concerned, the complaint contains three legal causes of action triable by jury and one equitable cause of action triable by the court.

The last case to be noted is Williams v. Collier, decided in the District Court for the Eastern District of Pennsylvania on March 28, 1940. This was an action by a trustee in bankruptcy to set aside a fraudulent transfer, to recover the value of assets alleged to have been fraudulently transferred to defendant, and to impress a trust on proceeds of resale. The plaintiff demanded a jury trial. The court (Kalodner, D. J.) said:

"Whether or not plaintiff is entitled to a jury trial as 'of right' is the question to be determined. The decision must rest upon a prior determination as to the nature of the complaint—

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is the action in its essence one at law or in equity? If it is in law, the plaintiff is entitled to a jury trial; otherwise not.”

And further,

“Thus, to determine the validity of plaintiff’s demand, inquiry must be made into the status of the case had it arisen when the formal distinctions between an action at law and a suit in equity still existed.”

In an opinion which will well repay careful study the court abandoned entirely the theory that the right to trial by jury depended on the issues and held that the entire case should be tried by the court.

It will be recalled that in England, with no constitution to interfere with Parliament, the cases in which there is a right to a trial by jury may be established by legislation without the hindrance of historical concepts and cases. Would such a statute be permissible in this country? In view of the tremendous liberties which have been taken in the last two or three years with the constructions previously put upon various sections of the Constitution, it is not unthinkable that a statute of this type would be upheld by the Supreme Court. The Court might well reason that the right to trial by jury, which in its main outlines means the jury trial as already established in England at the time this Government was formed, is subject to readjustment and classification provided what is preserved is the essence of the jury trial. Every student of procedure is familiar with similar changes. The new Rules themselves contain some of them. Furthermore, if the old construction placed upon the Constitution may be modified in the light of our later experience, why would not the same principle apply to legislation which modernized on an analytical, practical and fair basis the right to jury trial as it should exist today? Such a statute might hasten that certainty and uniformity in procedural matters in all federal courts which we hope may be soon attained in this matter of trial by jury.

V. Conclusion

To conclude this lengthy discussion, the term equitable defense in a common law state which has not adopted a statute permitting such a defense to be pleaded at law, signifies a fact or set of facts which may be set up in a bill in equity to enjoin the entry of a judgment at law or to enjoin its enforcement, if such a judgment has been entered. In many common law jurisdictions the term signifies a defense which under a statute may be set up as a legal defense in the law action. The
statutes which permit this to be done are largely modelled on the English Common Law Procedure Act of 1854. The defense cannot be affirmative; that is, it will not sustain affirmative relief in equitable forms such as specific performance or cancellation. In the states which have adopted code procedure, the term equitable defense has an entirely different meaning. Any defense, whether legal or equitable, may be availed of in the answer. The question is, how shall the issues be tried—by court or jury?

In federal courts during the long first period between 1789 and 1915, the term equitable defense had the meaning first spoken of above. From the adoption of the act of 1915 to the adoption of the Federal Rules for the District Courts in 1938, an anomalous procedure was in effect. A law action in which an equitable plea or replication was pleaded became a split or hybrid proceeding, part law and part equity, the first portion tried by jury, the second by the court. This period came to an end when the Federal Rules went into effect on September 16, 1938. Now there is but one form of action and in it the defendant may set up all defenses, legal or equitable. This results in laying before the federal courts the same problem which the courts in code states have long struggled with—how shall the various issues be tried? It is believed that the long series of cases in the federal courts are still controlling, and if before the adoption of the new Rules the controversy was triable to a jury, it remains triable to a jury still, while if it was formerly tried by the court sitting as a chancellor, it remains so triable.
POST-WAR PROTECTION OF FREEDOM OF OPINION

A Study of Supreme Court Attitudes

RAYMON T. JOHNSON*

Introduction

The English struggle to vindicate the rights of the individual from Magna Carta in 1215 through and beyond the Bill of Rights of 1689 was not without influence in shaping the American conception of personal liberty. It would be error to assume, however, that such influence was of a controlling character. The inhabitants of the New World were more influenced by environment than they were impressed by history. Pioneer conditions, reacting upon a middle-class people, produced a point of view unhampered by conventions and unfettered by traditions. The American people were ideally conditioned to respond to the eighteenth century philosophy of natural rights.

This response found expression in the Declaration of Independence wherein "self-evident" truths, "created equal," "unalienable rights," "Life, Liberty and the pursuit of happiness" and other magic phrases were marshalled to impress the "opinions of mankind." That the opinions of mankind were profoundly affected by this revolutionary challenge to the existing political order is the uncontroverted conclusion of history. This vital document ushered in a new era of expanding personal liberty.

The outbreak of the World War, however, marked the end of this era in which more peoples had achieved some decent measure of individual freedom than in any other period that has been recorded. Since that time the world has been subject to political and economic distractions of an unprecedented nature. Much that had been gained seems definitely lost. The prospect that the pendulum of liberty will continue on the back-swing appears increasingly likely. In an interrelated world it is difficult for a particular country to run counter to the orbital course of events. The purpose of this study is to examine the attitude of the Supreme Court in handling the delicate problem of freedom of individual opinion during this post-war period of social, economic and political upheaval. It is hoped that the examination will accurately reflect the extent to which the First and Fourteenth Amend-

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ments create a zone of constitutional immunity for the protection of this fundamental right from governmental invasion.

**War-Time Espionage Act**

Freedom of discussion and privilege of debate are indispensable requisites to the orderly functioning of democratic institutions. Without them there could be no crystallization of opinion to chart the course of responsible government. The first provision of the Federal Bill of Rights was designed to safeguard freedom of speech, press and assembly from restrictions by the National Government.¹ In 1917 Congress passed the Espionage Act, making it criminal to obstruct or conspire to obstruct the recruiting and enlistment service of the United States. During the war numerous convictions were procured under this Act and several of them were reviewed by the Supreme Court in cases disposed of by that tribunal soon after the cessation of hostilities.

In March, 1919, the Court decided the *Schenck,*² *Frohwerk,*³ and *Debs*⁴ cases, upholding convictions under the Espionage Act. All three decisions were by a unanimous Court and the opinion in each case was written by Mr. Justice Holmes. In the *Schenck* case the Secretary of the Socialist party and other defendants had been convicted for circulating leaflets attacking the Conscription Act. The leaflets stated that conscription was the worst form of despotism and that a conscript was little better than a convict. While advising people not to submit to intimidation, the documents merely advocated peaceful agitation for the repeal of the Conscription Act. In the opinion of Mr. Justice Holmes it was said:

“We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger⁵ that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men

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¹ Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Amend., Art. I, Const. U. S.
⁵ Italics supplied.
fight and that no Court could regard them as protected by any constitutional right."  

In the Frohwerk case Mr. Justice Holmes disposed of the free-speech defense by observing that

"... so far as the language of the articles goes there is not much to choose between expressions to be found in them and those before us in Schenck v. United States."  

He followed this by the "little breath enough to kindle a flame" argument that appears quite judicial under circumstances of excitement but which seems less convincing when considered in the light of more settled conditions.

The conviction of Eugene Debs was upheld on the basis of the evidence contained in a speech delivered by him in Canton, Ohio on June 16, 1918. Debs admitted the obstruction of war effort but contended that the Espionage Act was unconstitutional as being in conflict with the First Amendment. In his trial Debs had addressed the jury in his own behalf in these words:

"I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone."  

To the argument that the Act was unconstitutional as being an invasion of the right of free speech, Mr. Justice Holmes bluntly responded:

"Without going into further particulars we are of opinion that the verdict on the fourth count, for obstructing and attempting to obstruct the recruiting service of the United States, must be sustained."  

These, and other cases, 10 upholding the application of the Espionage Act make it clear that the Supreme Court offers little protection to

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8As quoted in 249 U. S. 211, 214, 39 S. Ct. 252, 253 (1919).  
10See Sugarman v. United States, 249 U. S. 182, 39 S. Ct. 191 (1919) where Mr. Justice Brandeis, speaking for a unanimous Court, was of the opinion that the assertion of the free-speech defense in the case did not present any substantial constitutional question. See, also, Abrams v. United States, 250 U. S. 616, 40 S. Ct. 17 (1919) in which Mr. Justice Holmes and Mr. Justice Brandeis dissented on the ground that the case departed from the clear and present danger test of the Schenck case. For an interesting discussion of the Abrams case, see Chafee, A Contemporary State Trial (1920) 33 Harv. L. Rev. 747 and see (1921) 35 Harv. L. Rev. 9 for a further treatment of the case by the same author. Two other cases upholding the Espionage Act, Schaefer v. United States, 251 U. S. 466, 40 S. Ct. 259 (1920) and Pierce v. United.
the free expression of critical opinion in time of war. Even as qualified by the clear and present danger test laid down by Mr. Justice Holmes in the Schenck case, it is quite obvious that the decisions sanction the virtual extinguishment of free discussion. To remonstrate against war and decry bloodshed must be regarded as peace-time privileges rather than war-time rights. When the whole energy of a people is directed to the accomplishment of a vital purpose, the customary protection of individual opinion is promptly and decisively interned. There is no zone of immunity for the protection of minority opinion under the abnormal conditions of war.

**Peace-Time Subversive Activities**

Whatever may be the justification for war-time suppression of opinion, it would seem that the peace-time approach should evidence greater toleration. It is to be recalled, however, that the “Red scare” which followed the war was of unparalleled dimensions. Under older Anarchy statutes or more recent Syndicalism statutes, many States made a concerted effort to stamp out subversive movements regarded as dangerous to the existing political order. One of the most significant cases decided by the Supreme Court was that of *Gitlow v. New York*, in which the defendant had been convicted in New York for the crime of criminal anarchy under a statute which penalized language advocating or advising the overthrow of organized government. The defendant had circulated “The Left Wing Manifesto” which proclaimed that

“Revolutionary Socialism does not propose to ‘capture’ the bourgeois parliamentary state, but to conquer and destroy it.”

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States, 252 U. S. 239, 40 S. Ct. 205 (1920) elicited dissents by Mr. Justice Holmes and Mr. Justice Brandeis because it was felt that the majority had, again, departed from the clear and present danger test of the Schenck case. In the case of *Gilbert v. State of Minnesota*, 254 U. S. 325, 41 S. Ct. 125 (1920), upholding a conviction under a State statute which made it unlawful to interfere with the enlistment in the military forces of the United States, Mr. Justice Holmes concurred in the result, Mr. Chief Justice White dissented on the ground that Congress had occupied the whole field by statute, and Mr. Justice Brandeis dissented on the basis of the clear and present danger test. In *Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407, 41 S. Ct. 352 (1921) the Supreme Court upheld the exclusion from the second class mailing privileges of a newspaper published in violation of the Espionage Act. The decision in the latter case has been generally criticized. See (1921) 21 Col. L. Rev. 715: “... the relator, if entitled to the use of the mails at all, was entitled to the second class privilege. ...” Note, also, the dissenting opinions of Mr. Justice Brandeis and Mr. Justice Holmes in the case.
In upholding the conviction the Supreme Court, speaking through Mr. Justice Sanford, admitted that

"There was no evidence of any effect resulting from the publication and circulation of the Manifesto."\(^2\)

The Court distinguished the *Schenck* case on the basis that the Espionage cases dealt with *acts*, the punishment for which necessitated a judicial appraisal of the danger to be apprehended from the commission of the acts. The *Gitlow* case, it was said, involved *words* with respect to the use of which the legislature had already found the existence of danger. In this connection Mr. Justice Holmes registered a dissent, in which Mr. Justice Brandeis concurred, which relied upon the *clear and present danger* test of the *Schenck* case.

The Supreme Court in the *Gitlow* case reached one conclusion, however, that served to clarify a point that had been, theretofore, obscure—the relationship between the First and Fourteenth Amendments. The majority opinion declared:

“For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”\(^3\)

The Court dismissed a statement to the contrary in *Prudential Ins. Co. v. Cheek*,\(^4\) as not determinative of the question. While one may fail to be impressed by the narrow distinction\(^5\) drawn between the prohibited *acts* of the *Schenck* case and the proscribed *words* of the *Gitlow* case as a means of avoiding judicial determination of *clear and present danger*, the dictum in the latter case that unwarranted restriction of opinion by a State violates the Fourteenth Amendment represents an unqualified advance.\(^6\) The long-range protection inherent in the latter position embodies the prospect of ultimate good.

The *Gitlow* case was followed by that of *Whitney v. California*\(^7\) in

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\(^{2}\) 268 U. S. 652, 656, 45 S. Ct. 625, 626 (1925).
\(^{3}\) 268 U. S. 652, 666, 45 S. Ct. 625, 690 (1925).
\(^{4}\) 259 U. S. 530, 543, 42 S. Ct. 516, 522 (1922).
\(^{5}\) See (1928) 41 Harv. L. Rev. 525, 527 expressing the view that the *Gitlow* case seriously modified the *clear and present danger* test of the *Schenck* case.
\(^{6}\) But see Warren, The New Liberty Under the 14th Amendment (1926) 39 Harv. L. Rev. 431, 464: “Is it, or is it not, a good thing that the legislation enacted by each State to meet local conditions and to regulate local relations should be standardized, by being forced to comply to a new definition of ‘liberty’ applied to every State by the judicial branch of the National Government?”
\(^{7}\) 274 U. S. 387, 47 S. Ct. 641 (1927).
1927 in which the Court upheld a conviction under the California Criminal Syndicalism Act for participation in the organization of the Communist Labor Party in that state. The organization was found to be one which advocated force and violence in the attainment of its objectives. In upholding the constitutionality of the statute, the majority, through Mr. Justice Sanford, declared:

"The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals is clear."\(^8\)

Mr. Justice Brandeis, with whom Mr. Justice Holmes joined, concurred in the result only because the defendant had not properly raised the issue of "present danger." On the merits, Mr. Justice Brandeis broke through the crust of judicial calm to proclaim:

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. . . . Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution."\(^9\)

On the same day that the Whitney case was decided the Court, in the case of Fiske v. Kansas,\(^20\) unanimously reversed a conviction under the Kansas Syndicalism statute. The only evidence of the violation of the Act was that the defendant had circulated the preamble to the Constitution of the I. W. W. which advocated the abolition of the "wage system" but in which no reference to force or violence was discovered. The Syndicalism Act was not held unconstitutional but the application of the statute to a defendant, against whom the evidence was unconvincing, was held to be in violation of the Fourteenth Amendment. The dictum in the Gitlow case that freedom of speech was a right protected by the Fourteenth Amendment against infringement by a State had now become the basis of actual decision.

Again, in Stromberg v. California,\(^21\) the Court reversed a conviction based upon the violation of a statute, one section of which made it a crime to display the red flag as an emblem of opposition to or-

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\(^{18}\) 274 U. S. 357, 371, 47 S. Ct. 641, 647 (1927).
\(^{19}\) 274 U. S. 357, 377, 47 S. Ct. 641, 648 (1927).
\(^{20}\) 274 U. S. 380, 47 S. Ct. 655 (1927).
\(^{21}\) 283 U. S. 359, 51 S. Ct. 432 (1931).
ganized government. In the trial of the defendant, a nineteen year old girl, the California court had instructed the jury that any one section of the statute was enough to sustain the conviction. While not condemning the statute as a whole, the Supreme Court held the "red flag" section to be unconstitutional in that it was vague and indefinite. Mr. Justice McReynolds and Mr. Justice Butler dissented on the ground that the conviction should be upheld under the other sections of the statute. It would appear that the Court, in the early thirties, was beginning to adopt a more tolerant outlook in the handling of such cases. The *Stromberg* decision prompted the remark in one of the law reviews of California that

"The case is of interest in showing the more liberal attitude recently developed in the United States Supreme Court."

In 1937 the Supreme Court decided the case of *De Jonge v. Oregon*. In that case the accused had been convicted under the Oregon Syndicalism statute and sentenced to seven years imprisonment for assisting in the conduct of a public meeting, otherwise lawful, which was held under the auspices of the Communist Party. The Court (Mr. Justice Stone not participating) unanimously concluded that the conviction should be set aside. In the opinion of Mr. Chief Justice Hughes it was pointed out that

"Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the 14th Amendment of the Federal Constitution. The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."

The Court was of opinion that a meeting was not unlawful merely because it was held under the auspices of the Communist Party. It is to be noted that freedom of assembly, for the first time, was brought within the protection of the Fourteenth Amendment. In this connection it has been observed that

"Extension of the due process clause to include the right of peaceable assembly practically completes the Supreme Court's transcription of the personal liberties of the First Amendment into the Fourteenth."

In *Herndon v. Lowry* the defendant, Angelo Herndon, a negro,
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had been sent from Kentucky to Atlanta, Georgia to persuade negroes to join the Communist Party. He held three meetings and was arrested. In his room was found a great bulk of radical Communist literature, but there was no proof he had circulated any of the material. He was convicted of an attempt to incite to insurrection under a statute, the pertinent section of which, defined the offense in these words:

"Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection."

The conviction of the defendant was affirmed by the State court which held that the statute applied whether or not immediate violence was threatened.

In a habeas corpus proceeding which reached the Supreme Court it was decided that the Georgia statute, as construed and applied, was so vague and uncertain as to violate the Fourteenth Amendment. Speaking for the majority, Mr. Justice Roberts declared:

"The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment."

On the issue of the statute's vagueness, Mr. Justice Van Devanter voiced a dissent which was joined in by Justices McReynolds, Sutherland and Butler. In view of the Court's five-to-four division on the issue of vagueness, the decision all the more demonstrates the willingness of the Court's majority to bring conduct involving freedom of speech within the protection of the constitutional guarantees. The case would seem to be but another manifestation of that growing liberality of attitude to which previous reference has been made.

In Hague v. Committee for Industrial Organization the longstanding dispute between Mayor Hague of Jersey City and the C. I. O. was finally passed on by the Supreme Court in reviewing an injunction

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restraining the continuance of interference by the city officials with the constitutional rights of the protesting parties. The bill alleged that under ordinances of Jersey City these parties had been denied the right to use public buildings, streets and parks for lawful assemblies and had been prevented from circulating leaflets and pamphlets in public places. It was claimed that the conduct of the city officials had been discriminatory and amounted to unconstitutional interference with freedom of speech and assembly.

In upholding the rights of speech and assembly the majority could find no common ground of reason to sustain the decision. The opinion of Mr. Justice Roberts, in which Mr. Justice Black concurred, stated:

"... it is clear that the right peaceably to assemble and to discuss these topics [National legislation], and to communicate respecting them, whether orally or in writing, is a privilege inherent in the citizenship of the United States which the [Fourteenth] Amendment protects."

In resorting to the privileges and immunities clause of the Fourteenth Amendment, as a source of constitutional right, Mr. Justice Roberts put the protection on an exceedingly narrow basis. This clause is a protection to citizens only and with respect to those rights which grow out of Federal citizenship. Does the opinion imply that an assembly to discuss State legislation would not be protected? Does the opinion lead to the inference that non-citizens have no right to assemble to discuss anything? If such conceivable doctrine be not unsound, it is at least unfortunate.

In a separate opinion, concurred in by Mr. Justice Reed, it was stated by Mr. Justice Stone:

"It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment. ... It has never been held that either is a privilege or immunity peculiar to citizenship of the United States, to which alone the privileges and immunities clause refers. . . ."\(^3\)

The logic of this position commends itself more than does that employed by Mr. Justice Roberts. The due process clause is a living, growing and vital source of protection. The privileges and immunities clause is restrictive in application and all but judicially decadent. Its


\(^{3b}\) 307 U. S. 496, 519, 59 S. Ct. 954, 965 (1939).
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resurrection for this purpose is of dubious value. One is constrained to agree with the comment that

"... it is regrettable that in a case of such public notoriety the Court did not invoke squarely the established doctrines for the defense of civil liberties."\textsuperscript{33}

The Court's handling of this highly controversial case is, to say the least, both disappointing and confusing. The positions taken by the individual members of the Court may be summarized as follows:

Mr. Justice Roberts (Mr. Justice Black concurring) held that the rights were protected by the privileges and immunities clause of the Fourteenth Amendment.

Mr. Justice Stone (Mr. Justice Reed concurring) held that the rights were protected by the due process clause of the Fourteenth Amendment.

Mr. Chief Justice Hughes concurred with Mr. Justice Roberts "on the merits."

Mr. Justice Frankfurter and Mr. Justice Douglas did not participate in the hearing or the determination of the case.

Mr. Justice McReynolds and Mr. Justice Butler wrote dissenting opinions.

It is to be noted that the maximum strength mustered for any one of the positions assumed does not represent more than one-third of the Court's membership. One naturally regrets that in a case of this importance the reasoning was so indecisive. It is difficult to deduce any settled principle from this discordant medley of concurrence and dissent. In result, only, can the case be regarded as satisfactory.

Freedom of the Press

Within two weeks of the 1931 decision of the Stromberg case,\textsuperscript{34} in which the Supreme Court had given evidence of a new liberality of opinion in reversing a conviction under the California "red flag" statute, the case of Near v. Minnesota\textsuperscript{35} was disposed of by the Court. This decision, involving the freedom of the press, provided still more striking evidence of a judicial intent to safeguard the free expression of opinion. A Minnesota statute\textsuperscript{36} of 1925 provided for the abatement of malicious, scandalous and defamatory newspapers and periodicals as public nuisances. The defendant, whose past conduct had been decidedly unsavory, made an unprincipled and defamatory attack upon

\textsuperscript{33} (1939) 39 Col. L. Rev. 1237, 1244.
\textsuperscript{34} Supra. n. 21.
\textsuperscript{35} 283 U. S. 697, 51 S. Ct. 625 (1931).
\textsuperscript{36} Chap. 285, Session Laws of Minn., 1925.
public officials in the Saturday Press. He was enjoined under the statute from continuing the publication of the newspaper because of its scurrilous and defamatory content. The Supreme Court pronounced the statute unconstitutional because its application and enforcement embodied "the essence of censorship."37

In the majority opinion, written by Mr. Chief Justice Hughes, it was stated:

"The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication."38

The belief that the proper remedy was to be found in the application of the libel laws was thus expressed:

"The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals."39

That the decision was, in no sense, predicated upon the justifiable quality of the defendant's conduct appeared obvious from the following excerpt from the opinion:

"We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication."40

Mr. Justice Butler (speaking also for Justices Van Devanter, McReynolds and Sutherland) gave expression to this pointed dissent:

"It is well known, as found by the state Supreme Court, that..."
existing libel laws are inadequate effectively to suppress evils resulting from the kind of business and publications that are shown in this case. The doctrine that measures such as the one before us are invalid because they operate as previous restraints to infringe freedom of the press exposes the peace and good order of every community and the business and private affairs of every individual to the constant and protracted false and malicious assaults of any insolvent publisher who may have purpose and sufficient capacity to contrive and put into effect a scheme or program for oppression, blackmail or extortion.”

Without detracting from the force of the dissenting argument it would appear nevertheless true that “previous restraint” embraces the prospect of great abuse. The balance of social interest would seem to favor the majority position. That the laws of libel are not wholly efficacious in dealing with a “program for oppression, blackmail or extortion” may be admitted. The appraisal of doctrine, however, must proceed with a view to ultimate advantage. This advantage seems furthered by absence of “previous restraint.” That a less-favored position is an unconstitutional one requires explanation. In view of our constitutional history, the specific restrictions of the First Amendment and the expanding protection accorded to freedom of speech and of the press under the due process clause of the Fourteenth Amendment, might it not be suggested that legislation impinging upon these basic immunities should be stripped of its presumptive validity? Such suggestion would afford a justification for the Near decision that would otherwise require more extended reasoning.

The decision in Grosjean v. American Press Co. in 1936 was by a unanimous Court. Suit had been brought by nine publishers of Louisiana newspapers to enjoin the enforcement of a Louisiana statute of 1934 levying a two per cent license tax on the gross receipts from advertising in papers with a circulation of more than twenty thousand copies per week. In holding the statute unconstitutional as in conflict with the due process clause of the Fourteenth Amendment, the Court, speaking through Mr. Justice Sutherland, said:

“The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in vir-

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42 U. S. 697, 737, 52 St. Ct. 625, 638 (1931).
tue of the constitutional guarantees. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.”

The Court pointed out that by placing the decision on the due process clause it was unnecessary to determine whether the statute denied the equal protection of the laws.

In this case the Court quite obviously looked behind the scenes to discover in the Louisiana political situation a ruthless attempt to throttle freedom of expression in opposition to the controlling political regime of the State. The unanimous quality of the declaration served notice to political machines that devious attacks upon the freedom of the press would meet with judicial resistance. The decision fortified the “no censorship” position which had been taken in the Near case.

In Associated Press v. Labor Board, the Court in 1937 rendered another five-to-four decision on the issue of freedom of the press. The four dissenting Justices were the same who dissented in the Near case. This time, however, the dissenters came to the defense of the press whereas in the Near case they were found on the other side. The issue in the case was whether the National Labor Relations Board could compel the Associated Press to reinstate a discharged editorial writer with back pay. After holding that Congress had the power to regulate the business of the Associated Press under its control of interstate commerce, the majority held that the application of the National Labor Relations Act was not in violation of the constitutional rights protected by the First Amendment and that the reinstatement order of the Labor Board was valid.

The majority opinion, written by Mr. Justice Roberts, called attention to the fact that

“The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.”

The Court indicated that the right to discharge such employee was unlimited except for his labor union activities.

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Mr. Justice Sutherland, with whom Justices Van Devanter, McReynolds and Butler agreed, entered a stirring dissent. He said:

"No one can read the long history which records the stern and often bloody struggles by which these cardinal rights were secured, without realizing how necessary it is to preserve them against any infringement, however slight." 46

One wonders why this solicitude for the press might not have found expression in the Near case. The dissent remarked on the difference of status between an editorial writer and one employed in the mechanical and purely clerical work of the press. The "halt at the threshold" argument was effectively employed against incipient invasion of constitutional right.

The dissenting opinion ended on a note of high emotional quality:

"Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment: liberty of religious worship, freedom of speech and of the press, and the right as freemen peaceably to assemble and petition their government for a redress of grievances? If so, let them withstand all beginnings of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time." 47

Would there be those uncharitable enough to harbor the suspicion that this lyrical passage from the pen of the gifted Justice was inspired not only by love of the press but also by a lack of regard for the practices of the Labor Board? Valid arguments may, of course, be advanced in behalf of both majority and minority positions. The protection of the Labor Board might better have been directed to the safeguarding of the rights of the more ordinary group of employees without being extended to members of the staff who might occupy positions more intimately connected with possible matters of policy and management. When one considers the extent to which the press, in many lands, has been subject to governmental interference, no suggestion of debatable encroachment by administrative boards should merit judicial indulgence. For an administrative ruling to invade the editorial room and directly affect its personnel may offer prospect of mischief that will outweigh the meager gain to labor which the case represents.

In 1938 the Supreme Court announced its decision in the case of

Lovell v. City of Griffin.\textsuperscript{48} A city ordinance forbade as a nuisance the
distribution, by hand or otherwise, of literature of any kind without
first obtaining written permission from the City Manager. The defend-
ant was convicted of violation of the ordinance in distributing reli-
gious tracts. The Court was of the unanimous opinion, Mr. Justice Car-
dozo not participating, that the ordinance violated due process by in-
vading freedom of the press.

In the opinion of Mr. Chief Justice Hughes it was again pointed
out that

"Freedom of speech and freedom of the press, which are pro-
tected by the First Amendment from infringement by Congress,
are among the fundamental personal rights and liberties which
are protected by the Fourteenth Amendment from invasion by
state action."\textsuperscript{49}

This position, dating from the Gitlow pronouncement\textsuperscript{50} in 1925, has
become a judicial commonplace. Not so commonplace, however, is the
idea that such handbill regulations impinge upon freedom of the press.

The opinion explained that

"The liberty of the press is not confined to newspapers and
periodicals. It necessarily embraces pamphlets and leaflets. These
indeed have been historic weapons in the defense of liberty, as
the pamphlets of Thomas Paine and others in our own history
abundantly attest. The press in its historic connotation com-
prehends every sort of publication which affords a vehicle of in-
formation and opinion."\textsuperscript{51}

It is doubtful whether the legal profession anticipated this ruling.
The case provides evidence of an intent on the part of the Court to
keep open the channels of information. In the light of such purpose
the decision is highly significant. One practical aspect of the holding
is indicated in this comment:

"The instant case holding that handbills merit the same pro-
tection as newspapers is of practical importance to minority
groups which might otherwise be materially hampered in advo-
cating their doctrines. The language of many municipal ordi-
nances will no doubt need revision in the light of this opinion."\textsuperscript{52}

That there is need for revising the language of existing handbill

\textsuperscript{48} 303 U. S. 444, 58 S. Ct. 666 (1938).
\textsuperscript{49} 303 U. S. 444, 450, 58 S. Ct. 666, 668 (1938).
\textsuperscript{50} Supra, n. 13.
\textsuperscript{51} 303 U. S. 444, 452, 58 S. Ct. 666, 669 (1938).
\textsuperscript{52} (1938) 5 U. of Chi. L. Rev. 675, 676.
ordinances is evidenced by the opinion\(^5\) handed down by the Supreme Court in November of the past year. Convictions under four different handbill ordinances were reversed in this one opinion. The ordinances held to be invalid were those of Irvington, New Jersey; Los Angeles, California; Milwaukee, Wisconsin; and Worcester, Massachusetts. Mr. Justice Roberts, speaking for a unanimous Court, stated in his opinion:

"Four cases are here, each of which presents the question whether regulations embodied in a municipal ordinance abridge the freedom of speech and of the press secured against state invasion by the Fourteenth Amendment of the Constitution."\(^5\)

He concluded that

"Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion."\(^5\)

The Court, in protecting the rights of pamphleteers, in viewing the problem in a realistic way. It is concerned with the circulation of "information and opinion." It is not to be supposed that the Court is throwing the cloak of immunity around advertising dodgers or commercial solicitation.\(^5\) Ordinances designed to prevent the littering of streets and the annoyance of householders, however, must not be employed to curtail the constitutional right of religious, political and economic groups to disseminate information and opinion favorable to their cause. Democratic institutions thrive on liberty and languish from its restraint. Events may prove that the typewriter is mightier than the tank and that the mimeograph will become the symbol of a changing order. The Supreme Court gives them judicial blessing and safeguards them from the doctrine of "previous restraint."

**Pursuit of Learning**

No examination of freedom of opinion should fail to take into account the freedom of teaching and learning identified with educational practice. For the State to maintain a system of public education is a commendable effort of government and one of its recognized responsi-

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\(^5\)60 S. Ct. 146, 147 (1939).

\(^5\)60 S. Ct. 146, 150 (1939).

\(^5\)See 60 S. Ct. 146, 152 (1939).
bilities. For designing agencies to undermine freedom of instruction, however, is little better than contributing to the delinquency of the young. The whole character of a people can be changed in a relatively short time by any government that is accorded full and unrestricted control over the developing mind of youth. No weapon for standardized mass-thinking and the elimination of individualized opinion is so powerful as a unified, State-dominated system of instruction. When the brain is saturated with the compulsory doctrines of State, a whole population may be made the unsuspecting victims of seduced opinion. In the interest of avoiding the prospect of standardization that is inherent in State-provided education, the integrity of private schools should be scrupulously respected. This is a matter that should be accorded unrelaxed attention.

The Supreme Court has, on occasion, exercised restraint upon legislative efforts designed to curtail the independence of private instruction. In 1923 the Court decided the case of *Meyer v. Nebraska,* pronouncing unconstitutional a Nebraska statute, one section of which prohibited the teaching of any language, other than English, to a child who had not passed the eighth grade. The statute, by its terms, applied to private, denominational, parochial or public schools. The defendant, a teacher in a parochial school, was convicted for teaching German to a child of ten who had not passed the required grade. In condemning the application of the statute to private schools, Mr. Justice McReynolds stated in the majority opinion:

"That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue. . . . We are constrained to conclude that the statute is arbitrary and without reasonable relation to any end within the competency of the State."8

Mr. Justice Holmes, with whom Mr. Justice Sutherland agreed, expressed the opinion in *Bartels v. Iowa,* disposing of a similar statute, that

"Youth is the time when familiarity with a language is established. . . . I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school."80

87262 U. S. 390, 43 S. Ct. 625 (1923).
8262 U. S. 390, 401, 403, 43 S. Ct. 625, 627, 628 (1923).
83262 U. S. 404, 43 S. Ct. 628 (1923).
80262 U. S. 404, 412, 43 S. Ct. 628, 630 (1923).
FREEDOM OF OPINION

This rivulet of argument, happily, found its way into the sea of dissent. In view of the fact that nearly one-half of the States had adopted statutes of this type, it is evident that a concerted effort had been made to bring private instruction within the ambit of public control. For the Supreme Court to declare such statutes an arbitrary invasion of the freedom of instruction came as a shock to the groups that had instigated the legislative crusade. Mr. Justice Holmes' penchant for upholding legislation placed him in the dubious company of professional patriots. Mr. Justice Sutherland's position does not merit the charity of this explanation.

In the case of Pierce v. Society of Sisters, in 1925, the Court passed upon the validity of an Oregon statute that made compulsory the attendance in public schools of all children between ages eight to sixteen. Private schools had secured temporary restraining orders preventing the enforcement of the statute. Attorneys representing the State of Oregon advanced this argument to sustain the validity of the legislation:

"At present, the vast majority of the private schools in the country are conducted by members of some particular religious belief. They may be followed, however, by those organized and controlled by believers in certain economic doctrines entirely destructive of the fundamentals of our government. Can it be contended that there is no way in which a State can prevent the entire education of a considerable portion of its future citizens being controlled and conducted by bolshevists, syndicalists and communists?"

It is to be noted that what counsel feared was the economic "isms" likely to be propagated by the sinister "ists." The Court, however, unanimously rejected this attenuated method of forestalling objectionable doctrine. In an opinion by Mr. Justice McReynolds it was pointedly remarked:

"The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." The statute was held to be in violation of the due process clause of

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the Fourteenth Amendment. No one should ignore the significant character of this decision. The *Pierce* case, coupled with the *Meyer* holding, effectively checked the drive to control the freedom of private instruction. That the State may establish certain standards of curriculum and qualification for teachers in private schools admitting children of compulsory school age, is readily conceded. The theory, however, that private education may be changed into education that is virtually public, or that school-age children may be withdrawn from private schools by State decree, has been decisively repudiated. Had the Supreme Court resolved this issue to the contrary, it is difficult to determine where the zeal for uniformity would have stopped.

This judicial determination to safeguard the freedom of private instruction was reaffirmed in the later case of *Farrington v. Tokushige* in which the Court concluded that Hawaiian legislation, which attempted the minute regulation of the numerous foreign language schools of that territory, was unconstitutional. Reliance was placed upon the *Meyer* and *Pierce* cases as authority for the conclusion. Since the issue arose in Federal territory, the decision was based upon the restraint of the Fifth rather than the Fourteenth Amendment. It is obvious, therefore, that both State and Federal agencies of government are subject to pronounced constitutional limitations in the attempted interference with the operation of private schools.

It is not without significance that the Supreme Court has found occasion to say a word about the conduct of State-supported instruction. In the case of *Missouri v. Canada* the Court gave warning against discriminations by the States in the management of public institutions of learning. In that case it was declared that the denial of admission to a negro citizen who wished to enroll in the law department of the State university denied the equal protection of the laws. While segregation of the white from other races is permitted, the State is under the constitutional obligation to provide separate facilities to the excluded race. In the absence of separate facilities, the Court concluded that all qualified citizens had equal right of admission to the instruction provided by the State. This indicates an intention to keep open the channels of public instruction to the extent that a qualified citizen may have that equal access to learning which will contribute to the cultivation of enlightened opinion.

In view of these cases it must be said that the Supreme Court has

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627 U. S. 284, 47 S. Ct. 466 (1927).
exercised its judicial power to safeguard fundamental rights incident to the pursuit of learning. It is reasonable to suppose that the Court has not exhausted the scope of protection in this regard. What the Court has already done constitutes a genuine contribution to the safeguarding of instructional freedom.

Summary and Conclusion

It is hoped that this examination has served to indicate the post-war attitude of the Supreme Court toward freedom of opinion. It appears that this attitude has been, on the whole, one of surprising liberality. It is to be admitted that the handling of the Espionage cases, growing out of the war, provided little evidence of impending liberalism in this particular. It is likewise true that the "Red scare" led to unfortunate decisions in the Gitlow and Whitney cases in 1925 and 1927 respectively. It is to be observed, however, that these two cases marked the end of the Supreme Court's willingness to sustain legislation designed to restrict the free expression of opinion.

For almost fifteen years the Court has pursued an unbroken course of extending judicial protection to freedom of speech, press and assembly. In the Fiske case a member of the I.W.W. was protected against the application of the Kansas Syndicalism Act. The "red flag" statute of California was held invalid in the Stromberg decision. In the case of De Jonge v. Oregon the right of peaceable assembly was vindicated. The court granted habeas corpus in the Herndon case to safeguard the freedom of speech of a negro communist. Though the reasoning seems unsatisfactory, the Hague controversy resulted in an injunction to prevent interference with the constitutional rights of members of the C. I. O.

For the past decade the Supreme Court has been unquestionably diligent in preserving the freedom of the press. In the Near case the doctrine of "previous restraint" was condemned. A tax, designed to limit newspaper circulation, was held unconstitutional in the Grosjean appeal. The five-to-four decision, disallowing the free-press defense in the Associated Press case, was complicated by protection-to-labor considerations and is generally defended by professed liberals. The handbill cases unqualifiedly extended freedom of the press to embrace pamphlets and circulars disseminating matters of opinion.

Since 1923 the integrity of private instruction has received repeated judicial support. The Meyer case struck down the Nebraska language law as applied to private schools. Compulsory attendance upon public
schools was denied validity in the *Pierce* case. Legislation interfering with the management of private schools in Hawaii was declared unconstitutional in the *Farrington* case, while *Missouri v. Canada* prohibited discrimination in the treatment of citizens qualified to attend State-supported institutions.

It is submitted that these cases reflect a settled determination on the part of the Court to safeguard freedom of opinion. The Fourteenth Amendment, in particular, has been given an ever-widening application. This steady advance holds the promise of still more extended protection. The social implications of the present judicial attitude are apparent. Minority groups are freed from many restrictive practices previously common. Those who subscribe to the paradox of restraint as a means to freedom are naturally disappointed. Those who believe that the last word is never said in the everlasting search for social betterment may take heart.

Unless the right of free speech and press protects unpopular opinion the constitutional safeguard is a delusion. One does not need the protection of the Constitution to endorse the Ten Commandments or to advocate the Golden Rule. When a group program goes beyond the expression of opinion and takes the form of overt acts directed to the immediate purpose of force and violence, the right of government to protect itself from threatened danger cannot be denied. The enjoyment of all rights is subject to the rule of reason. The advantages inherent in social stability are obvious but the dangers inherent in social stagnation are equally apparent. Only a warped philosophy could regard an imprisoned mind and a silenced tongue as societal assets.

The history of American political development reveals the fear of oppressive government at every step. The specific safeguards embodied in both Federal and State Bills of Rights reflect the purpose of the American people to be free from arbitrary restraints upon freedom of opinion. The safeguarding of this purpose is a high judicial task, in the performance of which the Supreme Court is no longer faltering. The course which is being pursued by the Court merits the support of those who have faith in the ultimate value of truth.

Impressed with the necessity of keeping open the channels of free opinion, the writer takes occasion to reiterate the thought he expressed in connection with the *Near* case—that, in the vindication of these basic rights specifically safeguarded from governmental interference, the customary presumption of validity be withheld from encroaching legislation. The burden of explanation should be placed upon government
to justify the necessity for any direct invasion of this zone of constitutional immunity. In practice, the Court seems to be drifting in this direction. Indeed, the very latest decisions by the Court in the *Thornhill v. Alabama*\(^6\) and *Carlson v. California*\(^7\) cases, handed down on April 22, 1940, indicate that no real presumption of validity is accorded to legislative limitations upon freedom of discussion. In both cases, anti-picketing legislation was declared to be an unconstitutional interference with the free expression of opinion. Speaking through Mr. Justice Murphy, with only Mr. Justice McReynolds dissenting, the Court declared in the former case:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."\(^8\)

The fact that picketing involves the prospect of personal violence and public disturbance provoked no comment concerning presumptive validity. In most of the cases dealing with the safeguarding of free opinion one finds judicial silence in this respect. An outright declaration that such presumptions no longer obtain where legislation attempts to restrict the area of free discussion would serve to clarify the judicial attitude.

The final place to be occupied by the Supreme Court in our constitutional system is not certain. Grave social and economic problems press for solution. The limit to legitimate governmental activity and regulation has perhaps not been reached. Suggested remedies for economic ills are subject to an understandable difference of opinion and provide the occasion for justifiable debate. Experimentation should be permitted a wide latitude, unhampered by judicial restraint. Restrictive decisions by the Supreme Court in this field no longer merit the support of the American people. After all, the Supreme Court is not a negative Congress, to debate the wisdom of method.

In safeguarding the more basic rights of free speech, press and opinion, however, the Court is charged with a responsibility which it should not shirk. This is not a field for reasonable debate. The democratic way of life calls for the unrestricted interplay of individual thought. To place legislative restrictions upon free discussion is to jeopardize the orderly processes of social change. The attitude of the Court for

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\(^6\)60 S. Ct. 736 (1940).
\(^7\)60 S. Ct. 746 (1940).
\(^8\)60 S. Ct. 736, 744 (1940).
the past several years leads to the belief that judicial protection will continue. To fortify that protection by putting the burden on government to justify an impinging course should be the next step in the defense of the constitutional right to freedom of opinion.
CLARIFYING THE AMENDING PROCESS

NOEL T. DOWLING*

In a decision\(^1\) accompanied by a series of opinions last Term, the Supreme Court put a new complexion on the legal features of the process of amending the Constitution. Hitherto the question whether an amendment had been properly and seasonably adopted was, by assumption if not by actual decision, cognizable in and determinable by the Court, though the principles governing the determination were by no means clear or settled. Today the question is one for Congress. It has ceased to be justiciable. It has become political.

This bit of transmutation was not accomplished with the greatest of ease. Two cases were argued together\(^2\) in October, 1938, but, while other cases submitted then and thereafter were readily disposed of in the normal period of six weeks to two months, nothing was heard of these. At that time the Court had only eight members, no successor to Mr. Justice Cardozo having been appointed, and it was believed that they were equally divided on the question of jurisdiction. After the appointment of Mr. Frankfurter it was expected that the cases would be set down for re-argument, but the retirement of Mr. Justice Brandeis again reduced the Court to eight. Finally, on April 17, the day on which Mr. Justice Douglas took his seat to make a full bench of nine, the re-argument was begun. Seven weeks later, June 5, the decision came down. Four opinions were delivered, the prevailing one by Mr. Chief Justice Hughes (joined by Justices Stone and Reed), a concurring one by Mr. Justice Black (joined by Justices Roberts, Frankfurter and Douglas), a separate one by Mr. Justice Frankfurter (joined by Justices Roberts, Black and Douglas), and a dissenting one by Mr. Justice Butler (joined by Mr. Justice McReynolds).

The case which called forth this bevy of opinions presented a single issue, namely, whether or not the ratification of the Child Labor Amendment by Kansas was valid. In the period which had elapsed since the submission of the amendment in 1924 the State had first (1925) rejected the proposal and thereafter (1937) accepted it. A suit was begun to test the legality of such action and two separate questions were developed in the litigation; first, was a State bound by its first vote, so that

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\(^2\)Chandler v. Wise, 307 U. S. 474, 59 S. Ct. 992 (1939), was the other, but as will appear later, it was dismissed without consideration of the merits.
after having voted No it could not vote Yes, and, second, was the proposed amendment "dead" by reason of the passage of so many years since its submission, notwithstanding the absence of any time limit in the proposing resolution. The highest court of Kansas had answered both questions in the negative, and sustained the ratification. This judgment was affirmed by the Supreme Court of the United States.

On the first question, the effect of the previous rejection of the amendment, the Court deemed the matter settled by "historic precedent." This precedent was created by the action of Congress and the Secretary of State in proclaiming the ratification of the Fourteenth Amendment. The legislatures of some of the States, including North Carolina and South Carolina, had first rejected and then ratified the Amendment, while in at least two other States, Ohio and New Jersey, the legislatures first ratified and then passed resolutions withdrawing their consent. Congress, informed of these facts by a report from the Secretary of State, adopted a Concurrent Resolution which declared the Fourteenth Amendment to be a part of the Constitution, all four of the above named States being included in the list of those which had ratified. Thereupon the Secretary of State issued his proclamation which also included those States.

Thus, as the Court points out, the "political departments of the Government" had dealt not only with the first question here involved but also with the related one whether prior ratification could be revoked, and had determined that both previous rejection and attempted withdrawal "were ineffectual in the presence of an actual ratification."

Declaring that this decision by the political departments as to the validity of the Fourteenth Amendment "has been accepted," the Court added:

"We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the

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*In the Chandler case similar questions were involved concerning ratification by Kentucky. The Court of Appeals of that State answered both questions in the affirmative, and overturned the ratification.

*Thus the judgments in both cases were left standing, that of Kansas (for ratification) because the Supreme Court thought it was right, and that of Kentucky (against ratification) because the Court, there being no justiciable question, could not say whether it was right or wrong.

*The Court noted that there were "special circumstances" because of the action of Congress in relation to the governments of the rejecting States but said that these circumstances "were not recited in proclaiming ratification."
exercise of its control over the promulgation of the adoption of the amendment.”

The Court then stated the “precise question” in the case to be “whether, when the legislature of the State, as we have found, has actually ratified the proposed amendment, the Court should restrain the State officers from certifying the ratification to the Secretary of State, because of an earlier rejection, and thus prevent the question from coming before the political departments”; and answered it: “We find no basis in either Constitution or statute for such judicial action.”

The second question, as to whether the proposal by Congress had lost its vitality through lapse of time, was found by the Court to be “more serious” than the first. Dillon v. Gloss brought on the difficulty. In that case, as the Court now re-affirms, it was held that Congress in proposing an amendment may fix a reasonable time for ratification. But much more was said in the opinion. Thus it was suggested that amendments would not remain open to ratification for all time, that ratification must be sufficiently contemporaneous in the required number of States to reflect the will of the people in all sections at relatively the same period, and that ratification must be within some reasonable time after the proposal.

These considerations, and others not necessary to be recited here, were “cogent reasons,” said the Court, for sustaining the power of Congress to fix a reasonable time, but they must not be taken as indicating that, when Congress does not exercise that power, the Court should take upon itself the responsibility of deciding what constitutes a reasonable time. No such question was presented in Dillon v. Gloss and the Court did not consider itself foreclosed from examining the matter on the merits.

The question of a reasonable time, said the Court, would involve an appraisal of “a great variety of relevant conditions, political, social, and economic,” which are appropriate for the consideration of the political departments of Government. Indeed the Chief Justice suggests that these conditions “can hardly be said to be within the appropriate range of evidence receivable in a court of justice” and as to them “it would be an extravagant extension of judicial authority to assert judicial notice”

6256 U. S. 368, 41 S. Ct. 510 (1921).
7Actually, as Professor Freund pointed out at the time, Legislative Problems and Solutions (1921) 7 A. B. A. J. 656, that was not the holding. The seven year limit in that case had been inserted by Congress in the text of the amendment itself (it was the Eighteenth); it was not a part of the proposing Resolution. Mr. Chief Justice Hughes calls attention to the fact that no limitation of time in respect of the Child Labor Amendment appears “either in the proposed amendment or in the resolution of submission.”
as the basis of deciding the controversy. The questions they involve are "essentially political and not justiciable."

“Our decision that the Congress has the power under Article V to fix a reasonable limit of time for ratification in proposing an amendment proceeds upon the assumption that the question, what is a reasonable time, lies within the congressional province. If it be deemed that such a question is an open one when the limit has not been fixed in advance, we think that it should also be regarded as an open one for the consideration of the Congress when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment. The decision by the Congress, in its control of the action of the Secretary of State, of the question whether the amendment had been adopted within a reasonable time would not be subject to review by the courts.”

On both points, then, the Chief Justice concluded that the determining power rested in Congress rather than in the courts. But either he was not categorical enough or else he said too much to satisfy Mr. Justice Black and the three associates who joined with him. In their view control of the amending process has been given by the Constitution “exclusively and completely” to Congress. They considered the process as “political” in its entirety, from the submission of an amendment to its adoption, and they denied that it is “subject to judicial guidance, control or interference at any point.” Consequently they looked on any judicial expression which amounted to “more than mere acknowledgment of exclusive Congressional power” as a “mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority.”

The bare fact that the Court discussed the matter at all, as against dismissing the cause forthwith and completely as a political question, evidently gave them some concern. In fact they insisted that the Court “treats the amending process of the Constitution in some respects as subject to judicial construction.” They wanted an express disapproval of the “conclusion arrived at in Dillon v. Gloss that the Constitution impliedly requires that a properly submitted amendment must die unless ratified within a ‘reasonable time’,” together with a disapproval of the Court’s “prior assumption of power to make such a pronouncement.”

In the separate opinion by Mr. Justice Frankfurter the position was taken that the parties had “no standing in this Court” and that the cause should be dismissed.

Mr. Justice Butler, dissenting, stood squarely on the conclusion which he quoted from Dillon v. Gloss, namely, that “the fair inference
or implication from Article V is that ratification must be within some reasonable time after the proposal.” In his judgment, upon the reasoning of the opinion in that case, “more than a reasonable time had elapsed.” Also, declaring that the non-justiciable character of the question had not been raised or argued at the bar, he urged that no decision should be rendered on the point that the Court lacks power to determine what is a reasonable time for ratification.

In the companion case of Chandler v. Wise, already referred to, which brought up on certiorari similar questions concerning the validity of Kentucky’s ratification and which had held the ratification invalid, the writ was dismissed on the ground that after the Governor “had forwarded the certification of the ratification of the amendment to the Secretary of State of the United States there was no longer a controversy susceptible of judicial determination.” Mr. Justice Black and Mr. Justice Douglas, concurring, referred to the opinion by the former in the Kansas case and added: “We do not believe that state or federal courts have any jurisdiction to interfere with the amending process.” Mr. Justice McReynolds and Mr. Justice Butler thought that the Kentucky judgment should be affirmed on the authority of Dillon v. Gloss.

The result of it all seems to be: first, that the Court considers the law already settled by “historic precedent” to the effect that a state can change its vote from No to Yes (the same precedent refused a change from Yes to No), and, second, that the Court will have nothing to do with determining what is a reasonable time for ratification.

The first of these results itself involves something akin to a decision on the merits. That is to say, when the Court declared that the historic precedent of the Fourteenth Amendment “has been accepted” it was in that very declaration making a pronouncement on the law. And it will be recalled that the Court retained jurisdiction of the Kansas case and affirmed the judgment, “but upon,” as it added, “the grounds stated in this opinion.”

Whether the Child Labor Amendment is now to be listed among the quick or the dead, we do not know. That puzzle still survives notwithstanding the elaborate discussion of the general problem in the present case. But the opinions do point the way for those who would

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8 It will be noticed that while Mr. Justice Roberts and Mr. Justice Frankfurter concurred in Mr. Justice Black’s opinion in the Kansas case concerning the political character of the question they did not join in the present declaration of no jurisdiction.

9 Four other amendments have been proposed, two in 1789, one in 1810, and one in 1861, and are “outstanding” in the sense that they have not been ratified.
like to know what rules shall govern the game of amending the Constitution. The rules must be made by Congress, unless peradventure Congress, eschewing rules, prefers to leave all questions open for decision if and whenever they may arise in connection with the ratification of any given amendment. But surely the law on such a basic matter as amending the Constitution ought to be known in advance; and the judicial branch has here passed full responsibility over to the legislative.

Congress has done singularly little on the subject. Today the total statutory content consists of one provision to the effect that it is the duty of the Secretary of State to proclaim the adoption of an amendment whenever he has received official notice that the requisite number of States have ratified it. Even that provision was not thought heretofore to have any striking legal significance, for the Secretary's proclamation was treated, not as necessary to ratification, but as a means of giving publicity to a result already accomplished. Dillon v. Gloss was decided on the theory that ratification is complete as soon as the last State required to make up the three-fourths has accepted the amendment; furthermore, the Court will take judicial notice of such state action. The episode of December, 1933, may be recalled when, with ratification of the Twenty-first Amendment already completed in 35 States, the thirty-sixth staged a performance not far from theatrical in putting an end to prohibition.

But perhaps that feature of Dillon v. Gloss must also be taken with reservation in the light of the new views of the Court. And one wonders whether the same must be said of Hawke v. Smith, National Prohibition Cases, and United States v. Sprague, where the Court dealt

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10 The text of the provision is as follows: "Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States." 5 U. S. C. 160, from an Act of April 20, 1818.

11 Thus, with regard to the Eighteenth Amendment whose effective date was involved in the case, the Court said: "Its ratification, of which we take judicial notice, was consummated January 16, 1919. That the Secretary of State did not proclaim its ratification until January 29, 1919, is not material, for the date of its consummation, and not that on which it is proclaimed, controls." (256 U. S. at 376.) To the same effect, United States v. Chambers, 291 U. S. 217, 222 (1934), concerning the effective date of the Twenty-first as repealing the Eighteenth.
with the validity of the Eighteenth Amendment; and of *Leser v. Gar-
nett*, involving the validity of the Nineteenth. In all these cases the
Court passed on questions of procedure or substance, though it must
be said that they were decided in the absence of any explicit congres-
sional legislation on the points involved.\(^{16}\)

The way is open, and the responsibility clear, for clarifying the
amending process by a comprehensive statute. Could Congress, not-
withstanding the historic precedent, now prescribe that a State's first
vote on a proposed amendment shall be final, whether No or Yes,

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\(^{15}\)282 U. S. 716, 51 S. Ct. 220 (1930).

\(^{16}\)These cases covered features of the Eighteenth Amendment other than the time
factor discussed in *Dillon v. Gloss*. Thus in *Hawke v. Smith* it was held that when
Congress submits an amendment for ratification by legislatures a State has no au-
thority to require the submission of ratification to a referendum under the State
Constitution; consequently, as sought in the case, an injunction should issue against
the spending of public money for that purpose. Here the Court passed on the mean-
ing of the term "Legislatures" in Article V. In the National Prohibition Cases, which
comprised seven suits each seeking an injunction against the execution of the Na-
tional Prohibition Act to enforce the Eighteenth Amendment, the Court, in the face
of elaborate argument to the contrary, concluded, *inter alia*, that the substance of
the Amendment "is within the power to amend reserved by Article V" and that the
"Amendment, by lawful proposal and ratification, has become a part of the Con-
stitution." *United States v. Sprague* was an appeal by the Government from an order
of the federal court in New Jersey quashing an indictment for violation of the Na-
tional Prohibition Act. That court, entertaining the view that the convention method
was requisite for such an amendment, held that the amendment (ratified by legis-
latures) had not been validly adopted. In reversing this judgment the Supreme
Court, reiterating what was said in the National Prohibition Cases, declared that it
rests solely in the discretion of Congress to make the choice of method of ratifica-
tion. In *Leser v. Garnett* the Supreme Court affirmed the judgment of a Maryland
court dismissing a petition to require election officers to strike the names of specified
women voters from the registration list. The contention was made that the extension
of suffrage to women was so great an addition to the electorate that, absent the
State's consent (Maryland had refused to ratify), it would destroy the State's au-
tonomy as a political body, and hence did not lie within the amending power. Other
contentions were that limitations either in state constitutions or in legislative pro-
cedure had not been complied with and that noncompliance made the ratifications
ineffective. All these contentions were considered and rejected.

Prior to these cases, Professor Orfield writes, the only instance in which the Su-
preme Court had passed on the validity of an amendment was *Hollingsworth v.
Virginia*, 3 Dall. 378 (1798), concerning the Eleventh. Even there, however, he says,
the question had to do with the procedure by which the Amendment was adopted,
not with its content; and no point was made or discussed that the question was a
political one. In a later case, *Luther v. Borden*, 7 How. 1 (1849), Professor Orfield
adds, the Court declared in dictum that it was political. As far as state courts are
concerned he finds that the decisions have been "virtually unanimous to the effect
that the question is judicial." He concludes that "it is not peculiar" that the Su-
preme Court "when it came to passing on the Eighteenth and Nineteenth Amend-
ments was prepared to view the issue as judicial." The Federal Amending Power:
Genesis and Justiciability (1930) 14 Minn. L. Rev. 369, 374, 379.
thus preventing a shift in either direction? Presumably such action lies within the competency of Congress under the view expressed by the Chief Justice that the "question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question." Certainly full Congressional freedom would be acceptable to Mr. Justice Black. Doubtless Congress could authorize the Secretary of State to make the determination, on grounds fixed by the statute, whether an amendment has been adopted or rejected, and to proclaim the result. That would give potency and dignity to the Secretary's proclamation. And much can be said for making proclamations operate on a two-way street: ratification when three-fourths of the States signify their acceptance; rejection when more than one-fourth signify the contrary.

Congress might strike out on other lines for the purpose of making the adoption or rejection of amendments depend upon a nation-wide and substantially direct vote of the people. Thus, it might declare a national policy that all amendments hereafter proposed shall be submitted for ratification or rejection by state conventions instead of legislatures, and provide that delegates to such conventions be chosen at elections, general or special, held throughout the country on a given date; that the election of delegates be accompanied by a state-wide referendum on the adoption of the amendment, the result thereof to bind the delegates; and that the conventions assemble and vote within a specified time after the election.

To a considerable extent that method was tried and found satisfactory in the ratification of the Twenty-first Amendment, the only amendment so far ratified by conventions. There, however, the individual States, not Congress, enacted legislation embodying one or more of the above noted provisions concerning the election of delegates and the procedure of the conventions. The question whether Congress had power to legislate along those lines was debated in the House when the resolution submitting the amendment was under consideration, and the House was divided in opinion.

Large questions of power and policy are involved in any assertion

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1See A New Experiment in Ratification (1933) 19 A. B. A. J. 383.
2Such legislation has been urged by publicists from time to time, and at least one Bill has been introduced in Congress to that end. The Bill was introduced by Mr. Wadsworth of New York in the 74th Congress. H. R. 900, and again in the 75th Congress, H. R. 299. Remarks of Mr. Wadsworth on the subject of the Bill will be found in 79 Cong. Rec. 1264-68, January 30, 1935, and 81 Cong. Rec. 1873-1876, March 4, 1937.
of congressional authority touching elections in the States. Manifestly it is a matter of great delicacy in federal relationships. But within the limited area of the election of convention delegates the question of power, whatever may be said for or against the propriety of its exercise, wears a different aspect since the Child Labor Amendment decision was rendered.\textsuperscript{10}

Even if Congress should resolve the issues of power and policy favorably and enact a law calling for the convention method and making general provision for the conventions, the legislative program would still be incomplete. Further legislation would be necessary in the States themselves, complementary to the Congressional, to provide the local machinery for the election of the delegates and to set it in motion upon the submission of an amendment.

Legislation of that character in the States is needed whether Congress passes such a law as the above or not. It is needed, that is, if the States are to be equipped to proceed without delay in the event that Congress should submit an amendment and, as it did in the case of the Twenty-first, specify merely that it be ratified by conventions instead of by legislatures. Up to that time no laws had been passed under which such a constitutional convention could be assembled. And if it had not been for the efforts of individuals and private organizations it is likely that the formulation of the necessary statutes would have been considerably retarded. Even so, only sixteen States made their statutes general in character, that is, designed to become operative whenever Congress submits an amendment for ratification by conventions. The remainder shaped their laws solely with regard to the proposed Twenty-first Amendment; and those laws, their function in the ratification of that Amendment having been performed, are dead letters now. They of course furnish guides for legislative action if further proposals should be submitted, but the point is that new state legislation would be necessary. At the present time not more than one-third of the States are ready to proceed by the convention method for the consideration of proposed amendments.

\textsuperscript{10}A surprisingly sympathetic attitude towards national power was taken by the States when they enacted statutes to provide for conventions to deal with repeal of prohibition. About half of those statutes contained a provision to the effect that if Congress should prescribe the manner in which the conventions shall be constituted and should not make an exception of States which had enacted their own plans, then the state statute “shall be ineffective” and state officers shall be authorized and directed to act in obedience to the federal statute “as if acting under a statute of this State.” See the article cited in footnote 17.
EQUITABLE EXCEPTIONS TO PRICE v. NEAL:  
The Virginia Solution in a Case of Double Forgery

CHARLES R. McDowell

The case of Central National Bank of Richmond v. First and Merchants National Bank of Richmond presents such an unusual factual situation as to be unique. Certain fraudulent parties, desiring to get possession of money standing to the credit of one Justin Moore in the Central Bank, forge Moore's name as drawer of a check on the original depository bank (Central Bank) and deposit it in the second bank (Merchants Bank) to the credit of the same man, Moore. They then forge checks on Moore's account in the Merchants Bank in order to withdraw the funds for their own use. It is not at all unusual for a forger to put money fraudulently withdrawn from the first bank into a second bank and allow it to remain there for a short time before withdrawing it from the second bank. The device is apparently thought to lull the first bank into security, the theory being that the original bank will be less suspicious of a transaction which simply transfers funds to another solvent bank than it is of a transaction involving direct payment of cash. In the ordinary case, however, the money fraudulently checked out of the first bank is placed to the forger's own credit in the second bank and later withdrawn from the second bank by checks drawn in his own name. In the ordinary case of this type, therefore, the first check is a forged check but the second is not. While strange factual situations are likely to arouse a certain amount of human interest among members of the legal profession, such cases are not always important as far as the legal problems are concerned. The unusual device employed by this forger, however, has obliged the Court of Appeals of Virginia to review the whole problem of Price v. Neal and to take a position as to the true meaning of Section 62 of the Negotiable Instruments Law.

1 171 Va. 289, 198 S. E. 883 (1938).
2 The opinion states that exhaustive briefs by able counsel fail to disclose a case closely in point.
4 Va. Code Ann. (Michie, 1936) § 5624: "The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance, and admits—1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument, and 2. The existence of the payee and his then capacity to indorse."
COMMENTS

The problem is: Since Section 62 of the N. I. L. is simply a direct copy of Section 54 of the English Bills of Exchange Act, which in turn is a legislative declaration of Price v. Neal, and since the English Courts had declined to recognize certain equitable exceptions to the Price v. Neal doctrine which had grown up in the various jurisdictions in the United States, did the passage of Section 62 of the N. I. L. constitute a statutory abolition of the equitable exceptions to the Price v. Neal doctrine? The significant point in the case, therefore, is that Virginia has added itself to that list of jurisdictions which take the view that the passage of Section 62 of the N. I. L. has not abolished the so-called equitable exceptions to the Price v. Neal doctrine.

So far as necessary to the main point involved, the facts may be given as follows: A fraudulent party, who called himself Clancy, learned that one Justin Moore had a substantial checking account with the Central Bank. He forged Moore's name as drawer of a check for $8500 on the Central Bank and deposited it in the Merchants Bank to the credit of Moore. Previous to the time of this transaction, Moore already had a substantial checking account with the Merchants Bank. Central Bank paid the full amount of the original check through the clearing house to Merchants Bank. Clancy later withdrew $8149, or all except $351 of the $8500, from the Merchants Bank by checks to which Moore's name was forged. Moore discovered the forgery of the $8500 check and demanded that the Central Bank recredit his account for that amount. Central did recredit Moore's account and demanded of Merchants that they return the $8500. Merchants refused and Central brought suit against Merchants for money had and received under mistake. Merchants' main defense is that under the rule of Price v. Neal and Section 62 of the N. I. L., Central is not entitled to recover because of its legal responsibility for recognizing its own depositor's signature. The case was tried under a stipulation that neither party was guilty of any factual negligence, the forgeries in both instances being clever forgeries upon Moore's own blank checks stolen from Moore's office. The trial court gave judgment for the plaintiff bank for so much of the $8500 as

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7 For recent cases see Brannon, Negotiable Instruments Law (6th ed., Beutel, 1938). For earlier cases see Note (1907) 10 L. R. A. (N. S.) 29.
8 Except for this fact it might be argued that the method employed in withdrawing the money from the second bank did not constitute a forgery.
9 At the time Central recredited the account, Central took an assignment of Moore's claim against the defendant. A considerable portion of the opinion relates to the assignment but is unnecessary to the point herein discussed.
had not been checked out of the Merchants Bank, or $351. The Court of Appeals reversed the trial court and gave the plaintiff Central Bank judgment for the full amount of the original check, or $8500.

In his opinion, Justice Spratley takes the following position: Where the original bank pays to the second bank money on checks drawn on the first bank to which the drawer's name has been forged, and the second bank has paid out all of the money on authentic checks, the so-called rule of *Price v. Neal* or the rule of Section 62 of the N. I. L. prevents the original bank from recovering; but where the money paid by the original bank is still in the second bank, the original bank may recover. Next, since the $8149 paid out by Merchants were mispayments on forged orders, the court must treat the case as if the $8500 was in fact still in the Merchants Bank. Ergo, the court says that the plaintiff Central Bank can recover the full amount of $8500.

The opinion, upon analysis, is syllogistic. It amounts to this: If the money is still in the second bank, the original bank may recover it. The $8500 is in legal effect still in the second bank, the second bank having paid out its own money on forged orders. Therefore, the first bank can recover.

A generation of lawyers taught to look at a syllogism out of the corners of their eyes may react to the opinion with suspicion. They may ask themselves: Was the money still in the Merchants Bank; had not Clancy taken most of it and spent it? Was not the whole case decided when the meaning was put into the minor premise? Was the court justified in treating the case as if the money were still in the Merchants Bank when it was irrecoverably gone?

It is believed that the decision would have been more palatable if the court had simply said that Virginia is hereby deciding, as a matter of policy, to take its position among those states which hold that the established American equitable exceptions to the *Price v. Neal* doctrine have not been abolished by Section 62 of the N. I. L.; that before the N. I. L. there was respectable authority to the effect that a negligent defendant was ineligible to invoke *Price v. Neal* as a defense in a suit for money had and received under mistake of fact, and that the legal

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negligence of the Merchants Bank in allowing the money to be withdrawn on forged orders prevented it from invoking the rule of Section 62 as a defense to this suit for money had and received under mistake.

Section 62 is a rather vague section of the N. I. L. So far as the problem of this case is concerned, Section 62 simply says that an acceptor by accepting "admits" the genuineness of the drawer's signature. Since payment of a check is held to have the same effect as a certification for future payment, our problem is: Since Central Bank "admitted" to Merchants Bank that the signature to the original $8500 check was the authentic check of Justin Moore, what was the legal effect of such "admission"? Did Central by admitting the signature make such an irrevocable guaranty of the authenticity of Moore's signature that Central would be absolutely barred from bringing the matter up, regardless of the negligence of the Merchants Bank; or, on the other hand, did Central simply make a representation implied-in-law or a holding out implied-in-law which would be the basis of an equitable estoppel in the event that Merchants was injured by reasonably and non-negligently relying upon such representation? If Central's admission means nothing more than a legal representation, then it may be reasonably contended that Merchants did not reasonably and non-negligently rely upon such holding out, because it was itself guilty of legal negligence in allowing the money to be checked out on forged signatures of the drawer.

In Louisa National Bank v. Kentucky National Bank, decided by the Kentucky Court of Appeals in 1931, where the drawee (Catletts-


In First National Bank of Portland v. U. S. National Bank of Portland, 100 Ore. 264, 197 Pac. 547, 552, 14 A. L. R. 479, 488 (1921) the following words appear: "It will be observed that in § 7854, Or. L., [Sec. 62 N. I. L.] the word 'accepting' and not the word 'paying' is employed in the statute; and yet in all the states where the question has been presented, except the state of Pennsylvania, where a different course of legislation has produced a different result, and except in South Dakota . . . , the courts have ruled that Section 62 is merely a legislative affirmation of the rule announced in Price v. Neal, and that this section includes the payment as well as the acceptance of a negotiable instrument on the theory that the section was intended as a legislative adoption of the entire doctrine of Price v. Neal." Also see case in Brannon, Negotiable Instruments Law (6th ed., Beutel, 1936) 761.

It is noteworthy that the courts in cases like the Louisa Bank case require a higher standard for eligibility to plead Price v. Neal as a defense than is required of a purchaser to qualify as a holder in due course. The purchaser of bearer paper may qualify as an h.d.c. without having the transferor identified. Goodman v. Simonds,
burg Bank) had paid a check to the Louisa Bank under a forged drawer signature, and the Catlettsburg Bank sued for money had and received under mistake, the court allowed a recovery because the defendant Louisa Bank had negligently cashed the check without having the fraudulent transferor identified. The Kentucky court said:

"Some... [courts] hold that the provisions of the Negotiable Instruments Law adopt the rule in Price v. Neal, free from the exceptions which the courts have grafted onto it. . . . Others hold that the Uniform Negotiable Instruments Law is merely a legislative affirmation of the rule of Price v. Neal with the equitable exception. . . . The exception is not expressly included. . . . Nor is it abrogated."13

It will be noticed that while the Kentucky court used the terminology of equitable exception, the result is the same as if the Kentucky court had talked the language of estoppel. The drawee-payor bank would have recovered if the Kentucky court had simply said that Section 62 provided that the drawee's paying a check constitutes an implied-in-law representation that the signature was genuine and that the defendant's negligence prevented it from establishing reasonable reliance. The only real difference between the Kentucky case and the principal case is that in the Kentucky case factual negligence on the part of the defendant bank was found in its cashing the check without identifying the fraudulent transferor, whereas, in the principal case, the court found legal negligence in the defendant's allowing the money to be withdrawn on forged signatures.

Several different theories concerning the reason for the original rule of Price v. Neal are discussed and analyzed by Mr. Woodward in his textbook on the law of quasi-contract.14 Among them appears the so-called "Change of Position Theory" which is in effect the same as the estoppel theory. Mr. Woodward rejects this theory in favor of the view that the reason for the rule lies in a general rule of policy—a broad policy of promoting security by regarding payment as final and irrevocable so far as possible. But whatever may have been the original reason for the rule, an examination of the cases in Beutel's recent re-

20 How. 343, 15 L. ed. 934 (U. S. 1857). The apparent inconsistency is perhaps explained by the fact that the law of negotiable instruments is seeking to promote free transfer as far as possible, whereas the law of quasi-contracts is based upon broad equitable doctrines. While the problem of the Louisa Bank case involves an N. I. L. section it is ambiguous and is interpreted in the light of quasi-contract law.


vision of Brannon on *Negotiable Instruments* indicates that there is a definite tendency for the courts to hedge about the doctrine with equitable limitations and to arrive at the same result as if they actually said: "Payment by the drawee bank amounts to a representation implied-in-law to the effect that the drawer's signature is genuine, which, if reasonably and non-negligently relied upon by the bank receiving payment, may estop the plaintiff bank to show that the money was paid under mistake to the extent of the reasonable reliance, but not in case of negligent reliance, nor beyond the extent of detriment actually suffered."

That there is a trend toward reliance as a necessary element of the defendant's right to invoke *Price v. Neal* or Section 62 as a defense to a suit for money had and received, is indicated by the following cases. In *American Surety Company of New York v. Industrial Savings Bank*, where the collecting bank had been paid by the drawee bank on a drawer's forged signature and had given the fraudulent party credit which had not been drawn out, the defendant collecting bank was held ineligible to invoke Section 62 as a defense. There was no reliance upon the representation. Again, in *First State Bank & Trust Company v. First National Bank of Canton*, the court protected the collecting bank to the extent of its reliance before notice. The Illinois court permitted a recovery for so much of the money as had not been withdrawn, and no more.

It is well to remember that these cases are to be decided under the broad equitable principles of quasi-contract law so far as they are not clearly modified by the statutory enactment found in Section 62 of the N. I. L., the general rule of quasi-contracts being that money paid under a mistake of fact may be recovered by the payor from the recipient. It is well to remember also that the so-called rule of *Price v. Neal* is not really an affirmative rule but a statutory exception to the general rule. Therefore, to say that there are exceptions to the rule of *Price v. Neal* amounts to saying that there are exceptions to the exception. By creating exceptions to the exception, we bring ourselves by circuitous and

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32See Brannon, *Negotiable Instruments Law* (6th ed., Beutel, 1938) 769 for collection of cases decided under N. I. L. Mr. Beutel says: "Only two cases, however, have been found, namely, National Bank of Commerce v. Mechanics American Nat. Bank, 87 Neb. 841, 128 N. W. 552, and State Bank v. Cumberland Savings, etc., Co., 168 N. C. 605, 85 S. E. 5, L. R. A. 1915D, 1138, not citing the N. I. L. which seem to hold that the drawee can not recover, even though the holder was negligent."


34114 Ill. 269, 145 N. E. 982 (1924).
awkward thinking back into the original affirmative rule. It would seem simpler to think of *Price v. Neal* as merely a statutory exception to the broad rule that money paid under mistake may be recovered and to regard the so-called equitable exceptions to the so-called *Price v. Neal* doctrine as mere qualifications of the statutory exception. The question then becomes understandable and free from confusion. Shall we say that the statutory exception to the general rule found in Section 62 is limited to cases in which the defendant collecting bank has reasonably and non-negligently relied upon the implied-in-law representation found in Section 62; or, should the exception be broadened to amount to an absolute guaranty of the drawer's signature irrespective of freedom from negligence or reliance? Virginia in deciding the *Central Bank* case has limited the *Price v. Neal* exception to cases which show a meritoriousness on the part of the receiving bank justifying what amounts to an estoppel. Thus far, the writer approves the case. Whether the court has made a proper application of the rule is more questionable. The present writer leaves the case with the feeling that a man on a log would have thought that the Merchants Bank never would have been subjected to any responsibility for determining the authenticity of Moore's signature if Central had not gotten them mixed up with the "crooks." If that is a straddle, the only answer is that a system of law which never divides losses between equally innocent parties is likely in such a case to make straddlers or "rationalizers" of us all.
NOTES

EMPLOYMENT RELATIONSHIPS WITHIN THE SCOPE OF STATE
UNEMPLOYMENT COMPENSATION STATUTES

One answer of the Federal Government to the acute unemployment problem which had confronted the nation during the depression years was the Social Security Act of 1935.1 Two titles of the Act relate directly to unemployment benefits. Title III authorizes the essential federal appropriations, while Title IX imposes a federal tax upon those employers who do not fall within the enumerated exceptions. The proceeds of this tax are paid like other internal revenue collections. However, should the taxpayer make contributions to an unemployment fund under a state law, he is allowed a credit of not more than ninety per cent of the federal tax. General control of the Act is administered by the Social Security Board which is given power to establish standards of operation, and to approve the state laws under which the government will make credit allowances to employers contributing to a state fund.2 Thus it may be seen that the Act contemplates a coordinated state and federal plan, directed toward alleviating the effects of wide-spread unemployment.3

2 Section 903 provides that the Social Security Board shall approve any state law which it finds provides that:
   (1) All compensation is paid through such agencies as the Board may approve;
   (2) No compensation is payable within two years of the first period with respect to which contributions are required.
   (3) All money received is payable to the Secretary of the Treasury to the credit of the Unemployment Trust Fund;
   (4) All money withdrawn shall be used solely in the payment of compensation;
   (5) Compensation shall not be denied an individual for refusing to accept new work under an enumerated list of conditions;
   (6) The rights, privileges, and immunities conferred by the Act exist subject to the power of legislative repeal or amendment.
3 Prior to the passage of the Act, few states had imposed taxes for unemployment insurance (Wisconsin, 1931, California, Massachusetts, New Hampshire, and New York, 1935) because of the economic disadvantage to their commerce in competition with that of states which did not have this type of tax.

Douglas, J., in Buckstaff Bath House Co. v. McKinley, 60 S. Ct. 279, 282 (1939): "... under the coordinated scheme which the act visualizes, when Congress brought within its scope various classes of employers it in practical effect invited the states to tax the same classes. Hence, if there were any doubt as to the jurisdiction of the states to tax any of those classes it might well be removed by that invitation, for, in the absence of a declaration to the contrary, it would seem to be a fair presump-
Influenced by the provision for a federal tax credit to employers coming within the provision of the National Act, the legislatures of the several states quickly adopted corollary Acts complying with the requirements of the Social Security Board.

Employers who were opposed to payments thereunder first attacked the whole plan as unconstitutional, but the Supreme Court of the United States upheld the constitutionality, both of the Federal Act and of the complementary state laws. The opponents of the plan then sought to avoid payments by a showing that they did not fall within the scope of the employment relationships adopted by the state laws. It is to this latter phase of litigation that the present inquiry is directed.

At the outset it must be borne in mind that the common law relationships of master and servant, principal and agent, and hirer and independent contractor have different connotations and that the terms employer and employee may be given diverse interpretations. Confusion in distinguishing between them has arisen because of a tendency on the part of some courts and writers to use the terms "servant" and "agent" interchangeably, and because of the lack of a definite standard by which to define the scope of the term "independent contractor." In a strict sense "agent" denotes a commercial relationship while "servant" refers to the manual or "service proper" relations, the distinction being chiefly in the degree of control exercised by the "master." Many tests have been resorted to in an effort to define an independent contractor relationship, but the most realistic approach to the prob-
lem is taken by the Restatement of Agency which enumerates a list of factors to be considered in determining whether one is a servant or an independent contractor.\textsuperscript{11}

The unemployment compensation statutes under which questions of an employer's tax liability have arisen may be classified broadly into two major types. Under the first type, which the courts have interpreted as affording a maximum coverage, decisions increase the tax burden by extending the benefits of unemployment compensation to a class of employees who under the tests applied at common law might be termed "independent contractors." Statutes of the second type have been interpreted as having a more limited scope, thus restricting the benefits to that group of employees qualifying as common law "servants." This diversity of interpretations, as will be subsequently shown, is due to a fundamental difference in the various statutes, and to a tendency on the part of the courts to define the employer and employee relationships for tax purposes by recourse to inapt decisions in unrelated fields.\textsuperscript{12}

\textsuperscript{11}Restatement, Agency (1933) § 220 (2): "In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; and (i) whether or not the parties believe they are creating the relationship of master and servant."

\textsuperscript{12}As precedents for their decisions the courts have relied upon cases arising in the field of tort liability and those arising under the workmen's compensation acts. It should be noticed, however, that in these cases the employment relationships involved are defined in common law terminology. In Singer Mfg. Co. v. Rahn, 132 U. S. 518, 10 S. Ct. 175, 33 L. ed. 440 (1899), a salesman was held to be a servant and not an independent contractor, hence the employer was held liable for torts committed in the course of the salesman's employment.

In Gulf Refining Co. v. Brown, 93 F. (2d) 870 (C. C. A. 4th, 1988), an oil com-
Illustrative of the broad type of statute is the unemployment compensation act which was passed by the legislature of the State of Washington\textsuperscript{13} pursuant to the provisions of the National Social Security Act.\textsuperscript{14} The employment upon which the excise is levied is defined as:

"... service ... performed for wages or under any contract of hire, written or oral, express or implied. ... Services performed by an individual for remuneration shall be deemed to be employment subject to this act unless it is shown to the satisfaction of the director that:

"(i) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of services and in fact; and\textsuperscript{15}

"(ii) Such service is either outside the usual course of the business for which such service is performed, or that such service

company was held liable for the negligence of its distributing agent. The distributor owned all the equipment and paid all of the expenses of conducting his business, but was held to be a servant because an examination of the contract with the oil company showed that a substantial degree of control over his activities was exercised by the company. Contra: (minority) Greaser v. Appaline Oil Co., 109 W. Va. 396, 155 S. E. 170 (1930).

In Bohanon v. James McClatchy Pub. Co., 16 Cal. App. (2d) 188, 60 P. (2d) 510 (1936), a publisher was held not liable for the tort of a distributor who bought newspapers from the publisher and sold them to subscribers along a prescribed route even though the publisher had the right to take over the management of the route at any time the distributor might prove unsatisfactory. The court held that this restriction merely assured a satisfactory quality of work, and that complete, unqualified control determines the master-servant relationship. Contra: Schmitt v. American Press, 42 S. W. (2d) 969 (Mo. App. 1931).

In Mountain Meadow Creameries v. Industrial Accident Comm., 25 Cal. App. (2d) 123, 76 P. (2d) 724 (1938), the widow of a dairy distributor was held not entitled to workmen's compensation insurance. It was shown that deceased was assigned an exclusive territory, required to sell only the company's products therein from trucks of an approved body and color design. The contract between the parties was terminable immediately for an enumerated list of causes. The court held that these restrictions merely assured a satisfactory performance of the contract and that they were not so detailed as to indicate a master-servant relationship. Contra: Press Pub. Co. v. Industrial Acc. Comm. of California, 190 Cal. 114, 210 Pac. 820 (1922), wherein a newspaper distributor was held entitled to workmen's compensation insurance; McDermott's Case, 283 Mass. 4, 186 N. E. 251 (1933), in which a journeyman steam fitter was held entitled to workmen's compensation insurance. Glielmi v. Netherland Dairy Co., 254 N. Y. 60, 171 N. E. 906 (1930), where a dairy salesman was held entitled to workmen's compensation insurance upon a showing that he bought milk products from the company and resold to customers along a prescribed route. He was required to hire the company's wagons, and to permit the company's representative to ride with him at any time to supervise the handling of the route. The contract was terminable at the pleasure of the company. The court held that he was a servant even though the contract was framed to suggest a different relation.

\textsuperscript{13}Washington, Laws of 1937, Ch. 162, p. 574.

\textsuperscript{14}Supra, note 1.

\textsuperscript{15}Italics supplied.
is performed outside of all of the places of business of the enter-
prises for which such service is performed; and16

"(iii) Such individual is customarily engaged in an independ-
ently established trade, occupation, profession or business, of
the same nature as that involved in the contract of service."17

By establishing this statutory test which requires the concurrence
of these three essential items in order to entitle the employer to an ex-
emption from the social security tax, it is apparent that the legislature
intended the concept of employment to be more inclusive than a mere
master and servant relationship. The Supreme Court of the State of
Washington adopted such an interpretation in the case of McDermott
v. State18 when it held that barbers employed under oral lease agree-
ments19 were "employees" within the meaning of the Act. The court
argued that it was unnecessary to decide whether or not the barbers
were "servants" "... because the parties are brought within the purview
of the unemployment compensation act by a definition more inclusive
than that of master and servant."20

Construing similar statutes, the courts of other jurisdictions have
been equally astute in making this differentiation between the statutory
definition of employment and the common law concepts designated by
the same words. Thus it has been held in Colorado21 and North Caro-

15Italics supplied.
16Washington, Laws of 1937, Ch. 162, § 19(g), p. 609.
17196 Wash. 261, 82 P. (2d) 568 (1938), hereafter referred to as the McDermott
case.
18It was shown that at the time the National Industrial Recovery Act became ef-
fective the plaintiff, who held himself out as owner of the shop, entered into oral
lease agreements with his barbers. Under these agreements each was "leased" a chair
and the necessary barbering equipment in consideration of a percentage of the
gross receipts from the services performed on the chair. When any chair was tem-
porarily vacated by the original "lessee" the lease was suspended. A barber working
at a less advantageously located chair might move to the vacant one thus making
effective a new lease between himself and the plaintiff. These arrangements were
terminable by either party upon a week's notice, and under certain conditions by
the plaintiff without notice.
19196 Wash. 261, 82 P. (2d) 568, 570 (1938): "We are clear that the so-called oral
lease agreements are, in fact, contracts of service within the meaning of the act. To
hold otherwise would be to ignore the realities of the case as disclosed by the ... [plaintiff's] ... own testimony." It is of interest to note that no cases were cited in
the opinion.
560 (Colo. 1939). In this case it appeared that the company assigned its general agents
to exclusive territories. These agents in turn contracted with district or special agents
who subsequently contracted with the various soliciting agents. A general control
was exercised over these agents by requiring them to observe certain "Rules and In-
lina\textsuperscript{22} that insurance agents were "employees" and entitled to unemployment compensation. And the Utah Supreme Court has held that a commission agent was within the purview of the Utah Act.\textsuperscript{23} Although the New York Act\textsuperscript{24} does not establish a list of requirements which must be met in order to exempt an employer from tax payments, its operation was extended to common law "independent contractors" when the

\textsuperscript{22}Unemployment Compensation Commission of N. C. v. Jefferson Standard Life Insurance Co., 215 N. C. 479, 2 S. E. (2d) 584 (1939). Therein an insurance company, which required its agents to devote their full time to their duties, and to issue policies in accordance with the company's instruction, was held not to be able to qualify under the three requirements for an exemption. "The clear and unequivocal meanings of those [statutory] definitions are strongly indicative of legislative intent . . . to disregard a number of the neat categories of the common law . . . Although the extent of the area encompassed by some of the definitions may cause surprise, the duty of this Court is to expound and to interpret the law as it is given to us, not to redraft it along lines which may seem to us more conservative and more desirable." 2 S. E. (2d) 584, 590. (Italics supplied.)

\textsuperscript{23}Globe Grain and Milling Co. v. Industrial Commission, 91 P. (2d) 512 (Utah 1939). In this case the company for which the agent sold products furnished him with stationery, order books, and samples. It also made advances when the agent sold to customers with good credit, and at times collected overdue accounts. The agent furnished his own display room and kept his own hours. The contract was terminable at the will of either party. In holding that this company had not qualified for exemption under the statutory test, the court declared that it was not bound by a strict common law definition of "independent contractors." "The most independent of independent contractors . . . are not included in the class of individuals entitled to benefits, but a class of individuals, who under strict common law concept of independent contractorship were other than employees, are entitled. We need not draw the line. It is drawn for us by the act." 91 P. (2d) 512, 514 (Utah 1939). Upon petition for rehearing, 97 P. (2d) 582 (Utah 1939) the court said of the quotation just given: "The language was merely illustrative, but we delete it so as to avoid confusion . . . Since the act applies to a new field of law which has its own glossary and defines the relationships to which it applies, the introduction of old concepts which fitted into the conceptual pattern of tort liability carried over into this field may only be confusing." (Italics supplied.)

\textsuperscript{24}Ch. 32, Labor Law (Ch. 31 of the Consolidated Laws), Art. 18, § 502, as amended June 1939. Ch. 662 § 1: "'Employment,' except where the context shows otherwise, means any employment under any contract of hire, express or implied, written or oral, including all contracts entered into by helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge actual or constructive of the employer, in which all or the greater part of the work is to be performed within this state."
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The court held that industrial home workers and news carriers were employees within its terms. Surprisingly, the Washington State Supreme Court has not considered that it was bound by its prior decision in the McDermott case. That decision was not only in effect overruled in the case of Washington Recorder Publishing Co. v. Ernest, but the court went further and substituted a wholly different test to be used in establishing the existence of an employer and employee relationship. In deciding that news carriers were "independent contractors" and not "employees" within the meaning of the act, the majority of the court argued that the statute merely established a guide and that the legislature really intended to include only common law "servants" within its scope. In support of its decision the court quoted verbatim that com-

25Andrews v. Commodore Knitting Mills, 257 App. Div. 515, 13 N. Y. S. (2d) 577 (1939). In this case the company sent raw materials to various home workers together with a statement of the price which would be paid for the finished garments. The other equipment was furnished by the workers. Finished garments which met the company's inspection were bought from the workers at the predetermined prices. The court held that these workers were employees within the meaning of the act since a sufficient control was exercised by the company to establish an employer-employee relationship.

26Matter of Scatola v. Bronx Home News Pub. Co., 257 App. Div. 471, 14 N. Y. S. (2d) 55 (1939). Therein a route carrier who delivered papers to subscribers of the publishing company was held to be an employee and not an independent contractor. It was shown that his deliveries were made over a prescribed route to subscribers whose names were furnished by the company. The carrier made an initial deposit for his papers and at the end of each week paid the company's inspector for the papers which he had delivered. His compensation was the difference between the price of the papers to him, and the sale price to the customers. The contract was terminable at the will of the company. "The relation between this carrier and publisher differs from that of a newsboy who purchases papers and sells them on the street corner through crying his wares. While this carrier paid the...[company's]...inspector for the papers which he had delivered, his ownership was qualified, as they could be used only in fulfilling the publisher's contract with its subscribers and in furthering the effort of the publisher to obtain new subscribers. In determining whether a person is an independent contractor or an employee, the authorities deem the right to 'hire' and 'fire' of great importance." 257 App. Div. 471, 472.

27199 Wash. 176, 91 P. (2d) 718 (1939). Of the four justices who comprised the majority only two had been on the bench when the decision in the McDermott case had been rendered. Simpson, J. concurred in the decisions of both cases. Geraghty, J. who had written the opinion in the McDermott case, concurred in the result in the second case. The only mention made of the McDermott case in the majority opinion concerns the right to bring this action under the declaratory judgments act.

28The contract involved was the familiar "carrier contract" whereby the publisher "sold" the papers to the newsboy who in turn "resold" them to the publisher's subscribers. The publisher assigned exclusive routes and supervised the handling of accounts. The contract was terminable at the will of the publisher.

29The opinion states that the items in the statutory test do "...not differ from the test employed at the common law and by this court in determination of the question whether the relationship is that of employee or independent contractor.
ment of the Restatement of Agency which was favorable to its position. Had the court read a paragraph further it would have found that "... The context and purpose of the particular statute controls the meaning [of the term "servant"] which is frequently not that which the same word bears in the Restatement of this subject." By this process of judicial legislation the court, violating the well-established rule of statutory interpretation that the legislative definition must prevail, held that a concurrence of the three items in the statutory definition of "employment" was not essential for exemption under the Act. Since the purpose of this broad statutory definition was to prevent the evasions which arise from the refined distinctions attendant upon common law concepts, it would appear that the decision merely raised additional problems of tax avoidance.

In contrast to the broad statutes of the Washington type are those which correspond to the unemployment compensation acts of Connecticut and Kentucky. The employment upon which the Connecticut excise is based is defined as "... any service... performed under any express or implied contract of hire creating the relationship of master and servant." The Connecticut court in Northwestern Mutual Life Insurance Co. v. Tone held that insurance agents hired under a con-

... In the enactment of the Unemployment Compensation Statute the legislature selected or picked out three elements to be considered. The legislature did not say, nor is the language capable of that interpretation, that each of those elements must exist one hundred percent in order to establish the relationship of independent contractor. Surely, the legislature did not intend to establish a different rule than that which has heretofore been employed by this court. To hold otherwise would be to, in effect, eliminate the relationship of independent contractor." 199 Wash. 176, 91 P. (2d) 718, 724 (1939).

20Restatement, Agency (1933) § 220, comment a, b, c.
21Restatement, Agency (1933) § 220, comment d. (Italics supplied.)
22Fox v. Standard Oil Co. of N. J., 294 U. S. 87, 55 S. Ct. 333, 79 L. ed. 780 (1934); Emery Bird Thayer Dry Goods Co. v. Williams, 98 F. (2d) 166, 170 (C. C. A. 8th, 1938), "It is a general rule that where a statute defines the meaning of words used therein, the statutory definition must prevail, regardless of what other meaning may be attributable to it by other authorities, or even by common understanding"; Taran v. United States, 88 F. (2d) 54 (C. C. A. 8th, 1937); State v. City of Des Moines, 266 N. W. 41, 42 (Iowa 1936), "In defining terms as applied to any given act, the legislature is its own lexicographer"; Unemployment Compensation Commission v. City Ice and Coal Co., 216 N. C. 6, § S. E. (2d) 550 (1939).
23This point was argued by Blake, C. J. in his vigorous dissenting opinion in which he urged the court to adhere to its decision in the McDermott case.
25Kentucky Statutes, 1939 Supp., § 47482-1 et seq.; Acts of 1936, 4th Extraordinary session, Ch. 7, as continued and replaced by Acts of 1938, Ch. 50.
26Connecticut, General Statutes, Supp. 1937, Ch. 280a, § 809d. (Italics supplied.)
27125 Conn. 189, 4 A. (2d) 640, 121 A. L. R. 993 (1939).
tract which subjected them to a substantial degree of control were not "servants" within the statutory meaning. It has been thought, however, that because of the company regulations which govern the issuance of policies and the division of territories, and the company prohibition forbidding agents to engage in other business activities except with express permission, the agents qualified as "servants" within the restrictive language of the act. A subsequent decision by the same Connecticut court in Jack and Jill, Inc. v. Tone would indicate that where the contract of employment merely creates the appearance of an independent contractor relationship, the "master" will not be exempt from tax liability. That case presented a situation in which an ice cream company sought to avoid payment of the tax by "selling" its products to its truck drivers who in turn "resold" to customers along a prescribed route. It was shown that at the end of each day's deliveries the "unsold" ice cream was returned to the company for full credit, that the drivers were required to "borrow" the company's trucks, and that they were required to permit the company's inspectors to supervise the management of the routes. In reaching its decision the court rightly held that since the drivers had no substantial discretion as to manner of performance of their services, they were mere "servants." It seems unfortunate, however, that the court, in defining the relationships which arose in an entirely unrelated field of law, sought recourse to the common law concepts of "servant" and "independent contractor."

The Unemployment Compensation Law of Kentucky differs from the restrictive Connecticut Act in several important particulars. In the first place, the law specifically provides that "This Act shall be liberally construed to accomplish the purposes thereof." Secondly, "Covered employment" means service performed for wages or under contract of hire in which the relationship of the individual performing such services and the employing unit for which such services are rendered is, as to those services, the legal relationship of employer and employee." For a fuller discussion of the contract see Industrial Commission v. Northwestern Mutual Life Insurance Co., 88 P. (2d) 560 (Colo. 1939), supra note 21.

Commenting upon this decision, in the case of Industrial Commission v. Northwestern Mutual Life Insurance Co., 88 P. (2d) 560, 567 (Colo. 1939), supra, note 21, the court said: "... a reading of the opinion in the Connecticut case will disclose that the Supreme Court there placed a rather strained construction on the relationship of master and servant as applied to its Unemployment Compensation Act."

See Globe Grain and Milling Co. v. Industrial Commission (on rehearing) 97 P. (2d) 582 (Utah 1939), supra note 23.

Kentucky Statutes, 1939 Supp., §§ 4748g-21.

Barnes v. Indian Refining Co., 280 Ky. 811, 134 S. W. (2d) 620, 622. (Italics supplied.)
The Kentucky court in construing this statute apparently has adopted a construction as narrow as that of the Connecticut decisions.

In the Kentucky case, the Indian Refining Company asked for a declaration of its rights under the above act, and that it be adjudged that a distributing agent was not an employee within the statutory definition. The Kentucky court in *Barnes v. Indian Refining Co.* held that this agent was an "independent contractor" and not within the class of persons benefited by the Act. In reaching such a conclusion the court seemed to be influenced by these considerations: first, the control exercised by the oil company was directed merely towards results and not details; second, even though the legislature said that the act was to be liberally construed it did not mean that its operation was to be extended to persons not within its letter; third, the act is a taxing statute and should be construed most strongly against the taxing power; fourth, one of the company's agents was a corporation and it is clearly apparent that the legislature did not intend to include within the scope of the Act services rendered by corporations.

It seems unfortunate that this erroneous decision was considered as controlling in another jurisdiction. In the first place, it was shown, and it has often been held, that the oil company exercised a substantial degree of control over the distributing agent. Secondly, it is difficult to see how a statute of this nature can be "liberally construed to accomplish the purposes thereof" without extending its benefits to a larger class of persons than is embraced within the common law concept of "servant." Thirdly, this legislative declaration for liberality of construction should take precedence over the canon of interpretation that excuses should be construed in favor of the taxpayer. And lastly, while the

480 Ky. 811, 134 S. W. (2d) 620 (1939).
4In *Texas Co. v. Wheless*, 187 So. 880 (Miss. 1939) construing a similar contract under a similar statute, the court held that a consignment agent was without the provisions of the act. Apparently the court was influenced by the facts that: (1) this was an excise tax and hence should be construed most strongly against the taxing power, (2) many of the consignment agents were corporations, and (3) "employment" should be interpreted in its ordinary sense. Accord: *American Oil Co. v. Wheless*, 187 So. 889 (Miss. 1939).
legislature admittedly did not intend to bring the services rendered by a corporation within the Act, such a reason has no bearing upon the present case. The question to be determined here is whether or not consignment agents in their individual capacities are to be considered employees of the company. Moreover, it might well be shown that it was the intention of the legislature, even though the consignment agent was a corporation, to consider the employees of the corporate agent employees of the oil company within the meaning of the Act.

At the present time a prediction regarding the trend of decisions under either type of statute would be mere conjecture. A brief summary of the past decisions might, however, serve as a guide. Where an admitted control has been exercised by the “employer” over the details of the services sought to be included within the ambit of an unemployment compensation statute, the courts have held that the person performing such services was entitled to the benefits of unemployment compensation under either type of statute. Where it has been shown that a substantial degree of control has been exercised by the employer, but under a common law test an independent contractor relation can be made out, cases arising under the narrow type of statute have held that the individual performing the services under the contract was not an “employee.” On the other hand, courts construing a broad statute have held that an employment relationship subject to the Act has been established. Where no substantial degree of control could be shown, the “employer” has been held not liable for tax payments under either type of statute.

It is argued that the primary cause of these inconsistent decisions is

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48Jack and Jill, Inc. v. Tone, 9 A. (2d) 497 (Conn. 1930); McDermott v. State, 196 Wash. 261, 82 P. (2d) 568 (1939).
49Northwestern Mutual Life Insurance Co. v. Tone, 125 Conn. 183, 4 A. (2d) 640, 121 A. L. R. 993 (1939); Barnes v. Indian Refining Co., 280 Ky. 811, 134 S. W. (2d) 620 (1939); American Oil Co. v. Wheeless, 187 So. 889 (Miss. 1939); Texas Co. v. Wheeless, 187 So. 880 (Miss. 1939).
51Probably the court which has been most liberal in its decision on this particular point was the Utah court in Globe Grain and Milling Co. v. Industrial Commission, 91 P. (2d) 512 (Utah 1939). It will be noticed, however, that even there the attempt was made to establish the control element in order to hold that the commission agent was an employee within the meaning of the Utah Act.
the failure of the various legislatures to define clearly the employment relationships which they intended to include within the scope of the Acts. This failure, coupled with the economic predilections of the several courts, and their apparent inability to distinguish satisfactorily between the relationships of master and servant, principal and agent, and hirer and independent contractor, has unduly restricted the coverage of many of the statutes. In view of the purpose for which the Social Security Act was passed, the fact that the older concepts of master and servant arose in entirely different and unrelated fields, and the ease with which evasions can be effected under an interpretation based upon common law principles, it would seem that a liberal construction would offer the better approach under either a broad or a narrow unemployment compensation statute.

Emery Cox, Jr.

THE CORPORATE PRACTICE OF LAW

The problem of the corporate practice of law, though not a new one in the courts, has in recent years been receiving widespread attention due to the increased activities of trust companies and collection agencies. The rapid increase in the number of trusts being administered by banks and trust companies in the United States, each maintaining a separate legal department with its own attorney-employee officers drafting various types of instruments which the lawyer has been accustomed to designate as legal instruments, and the drafting of which to the mind of the average attorney constitutes the "practice of law,"

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1As early as Lord Coke's day it was the recognized doctrine that a corporation could not appear "in person" by its officers or agents, who were not attorneys, in an action against itself. 1 Coke On Litt. 66b.

2Otterbourg, Collection Agency Activities: The Problem From the Standpoint of the Bar (1938) 5 Law and Contemp. Prob. 35. "There are now functioning in the United States approximately four hundred twenty-nine committees on unauthorized practice of law in addition to the National Committee of the American Bar Association."

3Encyc. of the Social Sciences (1935) 125. "In the year ending June 30, 1933, it was reported by the comptroller of the currency that national banks were administering over 100,000 individual trusts with assets aggregating over $6,000,000,000 and were handling corporate trusts . . . aggregating over $10,000,000,000." See also 1 Powell, Cases and Materials on Trusts and Estates (1932) 41-47.
has furnished a major source of the litigation. Collection agencies have likewise fallen under the ban against the corporate practice of the law because, even though attorneys are hired by the agencies to collect debts, such attorneys are answerable to the agencies rather than to the creditor members upon whose claims suits are being brought.

A corporation, being an artificial entity which exists only in contemplation of law, has neither the right nor the power to practice law. The reasons assigned for excluding corporations from the practice of law have regard to the special nature of the attorney's calling. The practice of the legal profession calls for skill and knowledge, necessarily involves the intimate and confidential relationship of trust and confidence which exists between attorney and client, and is subject to the power of the courts to use summary proceedings by disbarment or otherwise, if necessary, to enforce on the part of the attorney observance of obligations and duties growing out of this relationship. The courts hold that a corporation cannot adequately satisfy these considerations. It is conceded that a corporation could comply with the prerequisite of skill and knowledge by hiring licensed attorneys to act for it, but the cases uniformly hold that the practice of law by corporations would be destructive of the relationship of trust and confidence between attorney and client should the corporation intervene as an employer of attorneys.

The exclusion of corporations from the practice of law has been effected in various ways and upon differing theories. Courts in some


5People v. Merchants' Protective Corp., 189 Cal. 531, 209 Pac. 369 (1922); In re Shoe Manufacturers' Protective Ass'n, 3 N. E. (2d) 746 (Mass. 1936); People v. Title Guarantee & Trust Co., 227 N. Y. 366, 125 N. E. 666 (1919), rev'g 180 App. Div. 648, 168 N. Y. S. 278 (1917); Richmond Ass'n of Credit Men v. Bar Ass'n of City of Richmond, 167 Va. 327, 189 S. E. 153 (1937); State ex rel. Lundin v. Merchants' Protective Corp., 105 Wash. 12, 177 Pac. 694 (1919).


7See Jackson, The Establishment of Cordial Relations Between the Bar and the Corporate Fiduciary (1938) 5 Law and Contemp. Prob. 80.
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8 In re Opinion of the Justices, 289 Mass. 607, 194 N. E. 213 (1935); Compare: Boykin v. Hopkins, 174 Ga. 513, 162 S. E. 796 (1932); In re Cannon, 206 Wis. 574, 240 N. W. 441 (1932); Ex parte Stackler, 179 La. 410, 154 So. 41 (1934), where the same principle was applied to individual persons rather than to corporations.

9 People v. Merchants' Protective Corporation, 189 Cal. 531, 209 Pac. 363 (1922); Creditors National Clearing House v. Bannwart, 227 Mass. 579, 116 N. E. 886, Ann. Cas. 1918C, 130 (1907); State ex rel. v. Retail Credit Men's Ass'n of Chattanooga, 163 Tenn. 459, 43 S. W. (2d) 918 (1931).

10 See People ex rel. Committee on Grievances of Colorado Bar Ass'n v. Denver Clearing House Banks Performing Trust Functions, 99 Colo. 50, 59 P. (2d) 468 (1936), where corporations were excluded from the practice of law by special rule of the Supreme Court.

11 In re Opinion of the Justices, 279 Mass. 607, 180 N. E. 725, 727 (1932): "Statutes of that nature are valid provided they do not infringe on the right of the judicial department to determine who shall exercise the privilege of practicing in the courts. . . . Where and so far as statutes specify qualifications and accomplishments, they
When sued, corporations cannot appear "in person" by their own officers who are not attorneys.\(^1\) Nor may they engage in the practice of law for other persons by hiring attorneys to act for them;\(^3\) and if they do render the services in violation of this rule, they will not be allowed to recover compensation.\(^4\) Even if all the officers and directors of the corporation are attorneys, still the corporation will not be permitted to represent a client through its lawyer-officials.\(^5\)

In the latter situation the courts point out that as the interest of such officers is subject to transfer by sale, what was formerly a corporation composed entirely of lawyers may later become one composed only of lay directors and officers, with the corporation still retaining the same rights, powers and duties.

Whether trust companies should be forbidden to draw instruments which are normally incident to their business, has proved to be a difficult question: will be regarded as fixing the minimum and not as setting bounds beyond which the judicial department cannot go." Ex parte Stackler, 179 La. 410, 154 So. 41 (1934); In re Cannon, 206 Wis. 974, 240 N. W. 441 (1932).

\(^2\)Nightingale v. Oregon Central R. Co., 18 Fed. Cas. 239, No. 10, 264 (C. C. D. Ore. 1873); Bennie v. Triangle Ranch Co., 73 Colo. 586, 216 Pac. 718 (1922); Nispel v. Western Union R. Co., 64 Ill. 311 (1872); Clark v. Austin, 240 Mo. 467, 101 S. W. (2d) 977, 982 (1937): "A corporation is not a natural person. It is an artificial entity created by law. Being an artificial entity it cannot appear or act in person. . . . In legal matters, it must act, if at all, through licensed attorneys"; Culpeper National Bank Inc. v. Tidewater Imp. Co., 119 Va. 73, 89 S. E. 118 (1916). Contra: Sellent-Repent Corp. v. Queens Borough Gas and Electric Co., 160 Misc. 920, 921, 290 N. Y. S. 887 (1936), Brower, J., holding that a corporation may appear in person by its officers who are not attorneys when the complaint was subscribed in the corporate name said: "When a corporation does not go outside its own corporate machinery in the performance of a corporate act, it is acting in person and upon an equal footing with a natural person, including the right to sue in person."


\(^4\)Midland Credit Adjustment Co. v. Donally, 219 Ill. App. 271 (1926); Collacott Realty Inc. v. Homuth (Ohio Municipal Ct. Clevelent 1939), 6 U. S. L. Week 761; Crawford v. McConnell, 173 Okla. 530, 49 P. (2d) 551 (1935). But see United States Title and Guaranty Co. v. Brown, 166 App. Div. 688, 158 N. Y. S. 470 (1915), where a corporation which had made a contract with a third person to undertake legal proceedings in violation of § 280 of the Penal Laws of New York, was permitted to compel an attorney to account for money in his possession belonging to the corporation. The court held that public policy would not permit the attorney to profit by his own wrongful act though the corporation earned the money in the unauthorized practice of law.

\(^5\)People ex rel. Los Angeles Bar Ass'n v. California Protective Corp., 76 Cal. App. 354, 244 Pac. 1089 (1926).
cult problem for the courts. The cases are uniform, however, in holding
that a trust company may not engage in the supervision and drafting
of complicated legal instruments, such as wills, and trust agreements
of a testamentary nature.16

Some courts have taken a rather liberal approach which permits
both corporations by their attorneys, and individuals who are not law-
yers, to draft simple, stereotyped, non-testamentary instruments, pro-
viding no consideration has been charged for such services.17 Opposed
to this view, however, there is substantial authority holding that neither
the simplicity of the instrument,18 nor the fact that a consideration may
or may not have been charged19 is the controlling factor. Most of these
cases look to see whether legal skill and knowledge have been employed
in the preparation of instruments which secure legal rights.20 Trust
agreements, as such, have been held to be complicated instruments the
drafting of which requires legal skill and knowledge.21 If this view be
followed, then even jurisdictions that permit corporations by their at-
torneys and unlicensed individuals to draft simple, stereotyped instru-
ments would forbid the drawing of trust agreements by corporations.

16People ex rel. Committee on Grievances of Colorado Bar Ass’n v. Denver Clear-
ing House Bank, 99 Colo. 50, 59 P. (2d) 468 (1936); In re Eastern Idaho Loan and
Trust Co., 49 Idaho 280, 288 Pac. 157 (1930), 73 A. L. R. 1223 (1931); In re Shoe
Manufacturers’ Protective Ass’n, 3 N. E. (2d) 746 (Mass. 1935); State ex inf. Miller v.
St. Louis Union Trust Co., 335 Mo. 845, 74 S. W. (2d) 348 (1934); People v. Peoples’

17In re Eastern Idaho Loan and Trust Co., 49 Idaho 280, 288 Pac. 157 (1930), 73
McConnell, 173 Okla. 520, 49 P. (2d) 551 (1935). See People v. Title Guarantee and
Trust Co., 277 N. Y. 326, 125 N. E. 666, 671 (1919) (concurring opinion); Cain v.

18Clark v. Reardon, 104 S. W. (2d) 407 (Mo. App. 1937). See People v. Title
Guarantee & Trust Co., 277 N. Y. 326, 125 N. E. 666, 670 (1919) (concurring opinion).

19In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 Pac. 157 (1930) (court
was concerned with whether the work required the application of a legally trained
mind); People v. Association of Real Estate Tax-Payers, 354 Ill. 102, 187 N. E. 823
(1933); Clark v. Reardon, 104 S. W. (2d) 407 (Mo. App. 1937); People v. People’s

20Boykin v. Hopkins, 174 Ga. 511, 162 S. E. 796 (1932); In re Eastern Idaho Loan
& Trust Co., 49 Idaho 280, 288 Pac. 157 (1930), 73 A. L. R. 1223 (1931); Ely v. Miller,
7 Ind. App. 529, 34 N. E. 836 (1893); Matter of Pace, 170 App. Div. 818, 156 N. Y. S.
641 (1915); In re Duncan, 83 S. C. 186, 65 S. E. 210 (1909), 24 L. R. A. (N. S.) 750
(1910), 18 Ann. Cas. 667 (1911).

21Cain et al. v. Merchants Nat. Bank & Trust Co. of Fargo, 66 N. D. 746, 268
N. W. 719, 723, 724 (1936): “The drawing of complicated legal instruments such as
wills or trust agreements require more legal knowledge than is possessed by the
average layman... One who draws such instruments for others practices law even
though such instruments might, to some extent, be incident to a business such as
that usually conducted by trust companies.”
In the case of *Merrick v. American Security and Trust Company*, the United States Court of Appeals for the District of Columbia, by a two to one decision, recently held that a trust company organized to carry on a fiduciary business as "executor, administrator, trustee, guardian, agent, custodian, and manager," was not engaged in the practice of law by drafting simple, nontestamentary trust agreements, where the corporation was named a party in the instrument. The court's position was that the company should be permitted to draw such instruments as are "incidental to the authorized business" of a trust company. This decision represents a definite departure from the usual holding that a trust company may not draft trust agreements. Cases taking the more restrictive position hold that a trust company cannot participate in the drafting of trust agreements by its own attorney-employees, although the trust company may take all necessary steps, legal or otherwise, in the execution of such trust agreements once the instrument has been drawn and the company made a party thereto.

Besides being contrary to the weight of authority, the holding in the *American Security* case, is questionable because of the nature of the case authority relied upon by the prevailing justices. Two of the cases cited as supporting the rule there adopted did so only by way of dicta.

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24Where statutes authorize trust companies to act as executors and administrators, the companies may, after being so appointed, take such action by their own attorneys as is necessary to probate the will, or carry out the trust agreement. Detroit Bar Ass'n v. Union Guardian Trust Co., 282 Mich. 216, 276 N. W. 365 (1937); Judd v. City Trust and Savings Bank, 133 Ohio St. 81, 12 N. E. (2d) 288 (1937). Contra: In re Otterness, 181 Minn. 254, 252 N. W. 318, 320 (1930), 73 A. L. R. 1319, 1322 (1931), 15 Minn. L. Rev. 107: "An executor, administrator, or guardian, as such, has no right to conduct probate proceedings, except in matters where his personal rights as representative are concerned, as, for instance, where his account as representative is in question, or misconduct is charged against him as representative."

25People v. Title Guarantee & Trust Co., 227 N. Y. 366, 125 N. E. 666 (1919) was cited by the majority as holding that a trust company might draft such instruments as are "incidental to the authorized business of the corporation." All the case actually held, however, was that a corporation might draw such simple instruments as laymen in the state were permitted to draw, if there was no pretense or simulation to the character of an attorney by such corporation, as the giving of legal advice. Childs v. Smeltzer, 315 Pa. 9, 171 Atl. 889 (1934), cited as authority that real estate brokers
while another hinged on the peculiar construction of a local statute which was not involved in the *American Security* case. Three other cases relied upon are equally weak as authority on the point for which they were cited.

The position taken by Mr. Justice Stephens in his dissenting opinion in *Merrick v. American Security and Trust Company*, that the drafting of trust agreements by trust companies did constitute the corporate practice of the law, unquestionably represents the majority view on the question in this country. The view of the dissent was that the

may draw such instruments as are incidental to their business, did not contain such a holding by that court. The actual holding of the case found a stenographer guilty of the practice of law by drawing legal instruments for hire. The dictum of the court on the point dealing with real estate brokers was in response to briefs filed amici curiae by such brokers, but did not constitute a holding by the court.

^4*Detroit Bar Ass'n v. Union Guardian Trust Co.*, 282 Mich. 216, 276 N. W. 365 (1937) permitted the drafting of revocable trust agreements by a trust company; but it should be noted that as the legislature had granted certain specific exemptions from its prohibition of the corporate practice of law, the court felt it had no power to intervene unless the practice of law by such corporations took place in one of the courts of the state. Even this is not a majority view on the point involved. Other states having similar statutes have held that it is a judicial function, not a legislative power, to determine what amounts to the practice of law; and in so far as the legislature attempts to grant trust companies the right to practice law, such a law is unconstitutional. *People ex rel. v. People's Stock Yard Bank*, 344 Ill. 459, 176 N. E. 91 (1931); *People ex rel. Motorists Ass'n*, 354 Ill. 595, 188 N. E. 827 (1933); *In re Opinion of the Justices*, 180 N. E. 725 (1932); *Rhode Island Bar Ass'n v. Automobile Service Ass'n*, 55 R. I. 122, 179 Atl. 139 (1935), 100 A. L. R. 226 (1936).

^27*Liberty Mutual Insurance Co. v. Jones*, 130 S. W. (2d) 945 (Mo. 1939), was relied upon for the holding that an insurance company could have its lay adjusters fill out and obtain releases on claims by third parties against their insured; yet the court pointed out that what the adjuster did in the settlement of claims bore no relation to the practice of law since the adjuster did not purport to advise any claimant on his legal rights but merely made a statement of the amount the company would settle the claim for; that the interests of the claimant and the adjuster instead of being confidential (as in attorney-client relation) were actually adverse. Cain et al. v. *Merchants National Bank & Trust Co. of Fargo*, 66 N. D. 746, 268 N. W. 719 (1936) was cited to show that a trust company drafting simple instruments was not representing that it gave legal advice. The case actually held, however, that trust agreements were complicated instruments and one who drew them was engaged in the practice of law even though such instruments might, to some extent, be incidental to the business transacted, such as a trust business. *Judd v. City Trust & Savings Bank*, 133 Ohio St. 81, 12 N. E. (2d) 288 (1937) is not authority for the proposition for which it was cited, that in performing the legal phases of a trust business, attorney-employees of a trust company are acting for their employer. For this case also holds that the drafting of trust agreements requires the exercise of legal skill and knowledge for the customers of the bank who want such instruments drawn. Drawing such instruments by trust companies is the unauthorized practice of law even though the trust company is named trustee in the instrument drawn.

^26107 F. (2d) 271, 278 (D. C. App. 1936).
criterion for judging whether a trust company’s activities constitute the practice of law should be: “Does the legal service rendered (whether advice, or the determination whether to use an instrument and if so what should be the nature and contents thereof) require in a substantial sense the knowledge and judgment of a lawyer; and is it rendered in whole or in part to a customer of the corporation rather than solely to the corporation.”

Collecting agencies which solicit claims for collection for a fixed fee, where no resort to the courts is had in the enforcement of such claims, are held not to be engaged in the corporate practice of the law. They may not, however, employ the services of an attorney in putting the claim through the courts without falling into the prohibited field of corporate law practice. The courts point out that if an incorporated collection agency engages an attorney to sue on a claim placed with it for collection, its inability as a corporation to practice law requires that the relation of attorney and client be established between the attorney employed and the creditor, rather than between agency and creditor with the attorney acting as a mere employee of the agency. It makes no difference that the charter of incorporation authorizes the collecting agency to employ attorneys in order to collect the claims of third parties. Attempts by collection agencies to evade the rule against corporate practice of law by having the creditor make

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State ex rel. Retail Credit Men’s Ass’n of Chattanooga, 163 Tenn. 450, 43 S. W. (2d) 918 (1931); Richmond Ass’n of Credit Men v. Bar Ass’n of the City of Richmond, 167 Va. 327, 189 S. E. 153 (1937).

People v. California Protective Corp., 76 Cal. App. 354, 244 Pac. 1089 (1926); People v. Merchants’ Protective Corp., 189 Cal. 531, 209 Pac. 363 (1922); In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 Pac. 175 (1930), 73 A. L. R. 1323 (1931); Creditors’ National Clearing House v. Bannwart, 227 Mass. 579, 116 N. E. 886 (1917), Ann. Cas. 1918C 130; State ex rel. v. Retail Credit Men’s Ass’n of Chattanooga, 163 Tenn. 450, 43 S. W. (2d) 918 (1931).
an assignment of the claim to the agency for collection, where no consideration is paid for the assignment and the agency merely retains its fee after collection and sends the balance to the creditor, have been equally unavailing. 35 The proper course open to the agency after its demands for payment from the debtor have failed, has been pointed out in the case of State ex rel. McKittrick v. C. S. Dudley & Co. Inc. 36 The court there said:

“If collections cannot be made without the services of an attorney, the respondent [collection agency] should return the claim to the creditor who should be free to select and employ his own attorney. The respondent should not engage directly or indirectly, in the business of employing an attorney for others to collect claims or to prosecute suits therefor, nor have any interest in the fee earned by the attorney for his work.”

The case authority which exists on the subject of the corporate practice of the law still clearly denies a corporation the right to practice law. Only when the corporation is the real party in interest to the litigation may its own attorney-employees handle the case in the courts for the corporation. Some writers suggest that the reason for the rule denying the corporation the right to practice law no longer exists, because a court could very well subject corporations to the same requirements as are now imposed upon attorneys, thereby eliminating any possibility of an unfair advantage being taken of the client. 37 Others, however, feel that the advent of the corporation into the field of the practice of law would be utterly destructive of the essential personal element. 38

It would seem that if corporations practicing law could be held to the same rigid requirements as are now imposed upon attorneys, the possibility of public sentiment demanding that they be permitted to practice may ultimately prevail. And this for the reason that a cor-

37 (1931) 44 Harv. L. Rev. 1114, 1118: “The fear that the entrance of corporations into the field of law will cause a lowering of the standards of the bar is derived largely from the impersonal nature of such organizations. But it would not be impracticable to impose the same requirements on corporations that are now imposed on private attorneys.”
38 Jackson, The Establishment of Cordial Relations Between the Bar and the Corporate Fiduciary (1938) 5 Law and Contemp. Prob. 80.
porate law organization would be able to render a specialized form of service at a reduced fee, due to the volume of business transacted. The allowance of corporate practice could not be accomplished by statutory enactment alone, in view of the present holdings of the courts that theirs is the inherent power to say who may practice law.39 Indicative of the care with which courts guard their authority is the holding in *Ex parte Stackler*.40 There an act of the state legislature which gave the graduate of a state university law school the right to practice law automatically on receiving his degree was incorporated into the state constitution by amendment. The court held, however, that this amendment did not deprive the supreme court of the state of the right to demand further proof of qualifications by requiring such applicant to take the state bar examination. The court purported to obviate the constitutional problem by saying it could have required higher standards than those set by the legislature, and the mere putting of such a statute into the form of a constitutional amendment gave it no greater efficacy than a legislative enactment. It would seem, however, that since courts may be created or abolished by constitutional amendment, so may their powers be curtailed by the amending process.41

Leslie D. Price

40 179 La. 410, 154 So. 41 (1934).
41 In re Cannon, 206 Wis. 374, 240 N. W. 441 (1932).
RECENT CASES

ADMINISTRATIVE LAW—POWER OF FEDERAL COURT UPON REMAND TO DETERMINE PROCEDURE OF ADMINISTRATIVE AGENCY. [United States Supreme Court]

A significant decision in the field of administrative law and procedure has recently been rendered by the United States Supreme Court. This case, Federal Communications Commission v. Pottsville Broadcasting Co.,\(^1\) defines the scope of a remand from the United States Court of Appeals for the District of Columbia to the Federal Communications Commission after an appeal from the Commission's finding. The opinion, written by Mr. Justice Frankfurter, was for a unanimous court.\(^2\)

The proceedings began in 1936 when the Pottsville Broadcasting Company sought a permit to build a station at Pottsville, Pennsylvania. The permit was refused by the Commission at that time, due to findings that the applicant company lacked financial responsibility and did not sufficiently represent local Pottsville interests. The applicant appealed to the Court of Appeals for the District of Columbia. That court reversed the decision of the Commission as to the financial qualification\(^3\)—that finding being clearly based on an error in construing Pennsylvania law—and remanded the case to the Commission "for reconsideration in accordance with the views expressed."\(^4\)

Prior to this decision of the Court of Appeals two other applications were made to the Commission for the facilities sought by the Pottsville Company, and hearings were held, but no disposition of the question was made. After the remand the Commission declared that all three applications should be considered together and "on a comparative basis." The Pottsville Company then sought and was granted a writ of mandamus from the same Court of Appeals ordering the Commission to consider and decide the application of the Pottsville Company "on the basis of the record as originally made" and not "on a comparative

\(^{1}\) 60 S. Ct. 437, 8 U. S. L. Week 198 (1940).

\(^{2}\) Mr. Justice McReynolds concurred in the result.


\(^{4}\) The court was composed of Groner, C. J., Miller and Edgerton, JJ.

The court felt that the Commission's decision was based on the financial responsibility point rather than on the ground of insufficient local representation. But the decision of the Court of Appeals did not foreclose a finding by the Commission that this second ground alone was sufficient to disqualify the applicant. See 69 App. D. C. 7, 98 F. (2d) 288, 291 (1938).
basis" with the later applicants. The Supreme Court granted certiorari "because important issues of administrative law are involved." When the case was heard on the merits, the Court held that after a remand from the Court of Appeals, although the Commission is bound to act upon the court's correction of errors of law, it is not impliedly foreclosed by the court's mandate "from enforcing the legislative policy committed to its charge." Since the policy in question was to judge the applications in the light of "public convenience, interest, or necessity," consideration of the three applications on a comparative basis is permissible after the remand and regardless of the priority of the Pottsville Company's application.

The Federal Communications Commission was created by the Communications Act of 1934. Among its duties are the granting and the renewal of licenses to applicants who desire to operate broadcasting stations, if "public convenience, interest, or necessity" will thereby be served. In making its decision on these and other matters the Commission was granted by Congress a wide range of discretionary powers to formulate its own rules of procedure in investigations and hearings. An appeal from a decision of the Commission by an applicant for a construction permit for a radio station is allowed to the United States Court of Appeals for the District of Columbia. The court's review is limited to "questions of law"; and "findings of fact by the Commission, if supported by substantial evidence, are conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious." When the Commission's finding is reversed, the cause is remanded to the Commission to carry out the court's judgment.

When the principal case was before the Court of Appeals for the District of Columbia, Mr. Chief Justice Groner was of the opinion that

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the remand was one which was conclusive of all questions, excepting only that of the possible insufficient representation of Pottsville interests by the applicant company. His position was that "the order of the court entered on an appeal from the Commission ought to have the same effect and be governed by the same rules as apply in appeals from a lower federal court to an appellate federal court in an equity proceeding." In such a case, matters determined by the appellate court cannot after the remand be again raised and retried in the lower federal court. But the decision of the appellate court is only binding as to matters actually decided. The lower court is free to act on all other matters not mentioned in the remand. Mr. Justice Frankfurter, in his opinion in the principal case, pointed out that even if the view be adopted that the remand to the Commission is governed by the same rules as a remand from upper to lower court, the present controversy is not solved. This was so, apparently, because the Supreme Court found that the Court of Appeals' remand to the Commission did not contain any specific direction as to whether the further proceedings should be on an individual or on a comparative basis. But the actual ground of the Court's decision is found in broader considerations, for Mr. Justice Frankfurter denies that the analogy of the relation between court and court applies where court and administrative body are concerned. For here is in issue the interplay of authority granted to the Commission by Congress under its power to control commerce, as opposed to the reviewing power as granted to the federal courts by Congress under Article III of the Constitution. The Federal Communications Act, in the sections granting licensing powers to the Commission, does not include any express provision on the question of whether the Commission in any case is to pass upon applications on an individual or a comparative basis, nor does the judicial review section expressly provide

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22Mr. Chief Justice Groner, it may be of interest to note, is one of the members of the Attorney General's Committee on Administrative Procedure, mentioned in note 9, supra.


26See Federal Communications Commission v. Pottsville Broadcasting Co., 60 S. Ct. 437, 440 (1940): "The Court of Appeals invoked against the Commission the familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot consider questions which the mandate has laid at rest . . . That proposition is indisputable, but it does not tell us what issues were laid at rest."


that the Court of Appeals may upon remand instruct the Commission as to how it shall proceed in this respect. Consequently, the Supreme Court was compelled to determine the congressional intent upon implications drawn from the Act. And the Court found in the Commission's authority to pass on license applications on public convenience standards, the implication that the Commission should determine its methods of proceeding, preferring this conclusion to the contrary solution of broadening judicial control over the Commission's actions. 19

The desirability of such a conclusion is demonstrated by the very case here under consideration. To have granted the application of the Pottsville Company without a consideration of the merits of the other applications would not have satisfied the requirements that the public convenience, interest, or necessity be the controlling factor. That the Commission made an error of law while refusing the application, could not tend to mean that after the correction of the error, the application must necessarily be granted without any further consideration.

The issue of the principal case does not fit neatly into the usual pattern of the problems of administrative law cases. It cannot be classified simply as involving a determination with respect to the proper scope of "judicial review", since that term is used to denote the power of a court to review administrative decisions upon the merits of the questions at issue. 20 Nor can the instant case be viewed merely as a determination relative to the internal procedure to be followed by a commission, since the recent cases dealing with that problem concerned "the procedure in the first instance of administrative agencies themselves." 21 Rather, the case defines the scope of judicial control over administrative procedure after remand from court to commission: whether

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19See Morgan v. United States, 304 U. S. 1, 26, 58 S. Ct. 999, 1001, 82 L. ed. 1129 (1938). There after a remand to the Secretary of Agriculture, the court said: "What further proceedings the Secretary may see fit to take in the light of our decision . . . are not matters which we should attempt to forecast or hypothetically to decide." See also F. R. C. v. Nelson Bros. Bond and M. Co., 289 U. S. 266, 277, 53 S. Ct. 627, 693, 77 L. ed. 1166 (1933).

20Thus in Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 S. Ct. 527, 64 L. ed. 908 (1920), it was held that where the constitutional question of a confiscatory rate was being considered "the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts."

21See Morgan v. United States, 304 U. S. 1, 58 S. Ct. 773, 82 L. ed. 1129 (1938) where the court spoke of the basic requirements of fair play in administrative procedure generally. For a general review of the problems confronting students and workers in the field of administrative law and procedure see Fuchs, Introductory Comment to a Symposium on Administrative Law (1919) 9 Am. L. School Rev. 139, 140.
the court could "write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors." In answering, that "Only Congress could confer such a priority," the Supreme Court, although on a narrow point, seems definitely to have departed from its former attitude of mistrust and to have adopted a viewpoint sympathetic toward the administrative process. This is not too surprising in the light of the earlier opinions of Mr. Justice Brandeis while a member of the Court and of the presence of Mr. Justice Frankfurter on the reconstituted Bench.

JOHN E. PERRY

CHARITABLE INSTITUTIONS—LIABILITY IN TORT OF HOSPITAL TO PATIENT. [Colorado]

In O'Connor v. Boulder Colorado Sanitarium Association, plaintiff brought an action against defendant for negligence in the care and medical treatment furnished her while a paying patient in defendant's sanitarium. To defendant's answer, alleging nonliability by reason of its being a charitable institution, plaintiff replied that a judgment would in no way affect the funds of the association used for charitable purposes, because it had secured a contract of insurance indemnifying it against all liability for the torts of its agents or servants in the conduct of the hospital business. To this replication demurrers were sustained in the trial court and judgment was entered dismissing the action. The Colorado Supreme Court reversed the judgment and remanded the case.

4This mistrust of administrative bodies by the courts was dramatically shown by the case of Jones v. Securities and Exchange Commission, 298 U. S. 1, 25, 56 S. Ct. 654, 661, 80 L. ed. 1015 (1936).
5Such an attitude of friendliness toward the administrative is to be noted in the lectures of Dean James M. Landis. See Landis, The Administrative Process (1938) 135.
6See the dissent of Mr. Justice Brandeis in Crowell v. Benson, 285 U. S. 22, 65, 88-89, 52 S. Ct. 285, 298, 307, 75 L. ed. 598 (1932). That the function of courts toward administrative bodies was one of control rather than of review is the main thesis of the dissent. For other cases by Mr. Justice Brandeis see Frankfurter, Mr. Justice Brandeis and the Constitution (1931) 45 Harv. L. Rev. 33, 110.
7Mr. Justice Frankfurter's position during his years as teacher and authority on administrative law is shown in his article, The Task of Administrative Law (1927) 75 U. of Pa. L. Rev. 614. The author says at page 617: "It is idle to feel either blind resentment against 'government by Commission' or sterile longing for a golden past that never was."

196 P. (2d) 835 (Colo. 1939).
The court was of the opinion that where the charitable institution has insured itself against liability for negligence the public policy requiring that such association be immune from tort liability is not transgressed. The court said that while it was committed to the trust fund doctrine to protect the funds of the charitable association from being dissipated by judgments in tort actions, that doctrine did not bar a suit against a charitable institution based on the tort of its servant or agent, but only prevented the levying of execution on any property which was part of the charitable trust. It was held, therefore, that an action against such a defendant would be denied only where the testimony affirmatively disclosed that a charitable trust existed, and that a judgment against such trust, if satisfied, would deplete the trust fund.

American courts have quite consistently held that charitable institutions are not liable to beneficiaries for the torts of their agents or servants so long as they have not been negligent in selecting or retaining such agents or servants. The leading case, establishing this rule in England, turned on the so-called trust fund doctrine. In that case an orphan alleged that he had been refused admittance to an orphanage contrary to the terms of its charter. The court held that to make the orphanage liable in damages would be a direct violation of the purposes of the trust under which it operated. It was said that the trust fund could not be made liable and that even though the action was in form against the trustee, if it appeared that it was in fact against the fund, it could not be sustained.

The leading exponent in America of this rule of immunity has been the Supreme Judicial Court of Massachusetts. In a comparatively early decision by that court, McDonald v. Massachusetts General Hospital,

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2Following the language of most court opinions, the words "immunity" and "exemption" are used interchangeably in this discussion.

3Brown v. St. Luke's Hosp. Ass'n, 85 Colo. 167, 274 Pac. 740 (1929). See also St. Mary's Academy v. Solomon, 77 Colo. 463, 238 Pac. 22, 24 (1925): "The presumption is that they [charitable institutions] have power to hold other property. If they have there is no more reason to say that they are not liable for torts than to say that a natural person is not because he has no property not exempt from execution. We think that the judgment against these corporations is valid, but that no property which they hold in charitable trust can be taken under execution. . . ."

4Fletcher, Cyc. Corp. (Perm. Ed. 1931) § 4923.


6120 Mass. 432, 436, 21 Am. Rep. 529, 533 (1876): "The funds entrusted . . . are not to be diminished by such casualties, if those immediately controlling them have done their whole duty in reference to those who have sought to obtain the benefit of them." The court here relies to a certain extent on Holliday v. St. Leonard's Vestry, S. C. 30 L. J. C. P. 361, 142 Eng. Rep. 769 (1861) (the Vestry gratuitously dis-
it was held that if there had been no neglect on the part of those administering the trust and if due care had been used by them in the selection of their inferior agents, there could be no liability. This case also adopted the trust fund doctrine.

Another basis for disallowing an action by a beneficiary against a charitable institution which has been adopted in various American jurisdictions from time to time is the "waiver theory."7 In Schloendorff v. Society of New York Hospital,8 Judge Cardozo, while denying liability on the ground that the tort was that of a physician acting in the capacity of an independent contractor, expressly approved a previous New York decision,9 no longer followed in the state,10 that one becoming a patient in a charitable institution impliedly waived his right to recover for the negligence of the servants or agents of the institution by accepting the charity, even though he might pay to help defray the expenses.

Other cases hold that there can be no liability in the type of case under consideration, because the doctrine of respondeat superior will not apply when the master is receiving no pecuniary profit or other benefit from the employment of the servant or agent.11

Finally, the most common basis for the rule of exemption is said to be the public policy which fosters such charities and will not allow anything to be done to hinder their creation, maintenance, or efficient operation.12 Essentially this is the real reason in all of the cases upholding

charged the duty of surveying the public highways and was held not responsible for the negligence of its employees in the performance of a public function); accord, Schumacher v. Evangelical Deaconess Society, 218 Wis. 169, 260 N. W. 476 (1935). But see Cohen v. General Hospital Society of Connecticut, 113 Conn. 188, 154 Atl. 485, 436 (1931): "A charitable institution is not a state institution acting as an agency of the sovereign. It is not immune because of the public character of the charity."

8211 N. Y. 125, 105 N. E. 92 (1914).
12Ettlinger v. Trustees of Randolph-Macon College, 31 F. (2d) 889 (C. C. A. 4th,
the nonliability rule—a reason which embraces all of the others. Whether the courts admit it or not, it is this public policy which has led to the formulation of the other principles.13

All of these reasons for nonliability have been severely criticised on occasion, many of the criticisms coming from courts repudiating one basis in favor of another, and others from courts repudiating the rule altogether. The result has been mass of confused and conflicting opinions. And further, the extent of the immunity—whether it exists in actions brought by servants or strangers as well as by patients—has varied considerably in different jurisdictions, depending upon which theory the particular case has turned.14

Perhaps the earliest complete repudiation of the rule was in Glavin v. Rhode Island Hospital.15 Plaintiff sued for damages for personal injuries suffered while a paying patient in defendant's hospital, the injuries being due to the negligence of defendant's servant. The court stated that the corporation owed patients the duty of due care in the selection of competent agents and servants; that when such agents or servants acted negligently, their negligence was that of the corporation
itself, inasmuch as they were the representatives of the corporation. It was expressly denied that there is any logical foundation for the doctrine of generally immunity from tort liability on the ground of a public policy against the diversion of trust funds from the purposes of the trust. For, where a charitable corporation has funds available for general purposes it may apply such funds to pay damages for which it is held liable, inasmuch as this liability is incurred in carrying out the trust and is incident to it. In short, a charitable institution is liable in tort on the same basis as any other corporation.\textsuperscript{16}

The Rhode Island decision was followed in Alabama in 1915 in \textit{Tucker v. Mobile Infirmary Association}.\textsuperscript{17} The court in the latter case noted that the trust fund doctrine had been abandoned in England\textsuperscript{18} and in Canada.\textsuperscript{19} It was pointed out that to follow the trust fund theory to its logical conclusion, it would be necessary to grant absolute non-liability to charitable institutions in tort, when in fact the majority rule in America is definitely opposed to nonliability as to strangers and servants.\textsuperscript{20} The court delivered a sound and compelling criticism of the trust fund doctrine.\textsuperscript{21} On the question of the application of the rule of respondeat superior, it was said that it is entirely immaterial to its operation whether the master receives any pecuniary profit or other benefit from the employment of the servant or agent.\textsuperscript{22} It was further said

\textsuperscript{16}This case is no longer controlling in Rhode Island, a statute having been passed exempting charitable hospitals from liability for the torts of any "of its officers, agents or employees in the management of, or for the care of treatment of, any of the patients or inmates of such hospital." Public Laws 1930, c. 1612, amending General Laws 1909, c. 213.

\textsuperscript{17}Ala. 572, 68 So. 4 (1915).


\textsuperscript{20}Regarding liability to servants and strangers, see 10 Fletcher, Cyc. Corp. (Perm. Ed. 1931) § 4924.

\textsuperscript{21}Ala. 572, 68 So. 4, 8 (1915): "The doctrine that the will of an individual shall exempt either persons or property from the operation of general laws is inconsistent with the fundamental idea of government. Nor can I conceive any ground upon which a court can hold that effect can be given to that will when it relates to property devised or conveyed for the purpose of a charitable trust."

\textsuperscript{22}But see Southern Methodist Hosp. v. Wilson, 45 Ariz. 507, 46 P. (2d) 118, 125 (1935): "The rule of respondeat superior . . . was originally founded solely on reasons of public policy. . . . We think there are circumstances under which the application of that rule should, for the reasons of public policy also, be limited, and we are of the opinion that while it may do an injustice in individual cases, yet upon the whole, it is for the best interests of the public to encourage the establishment and maintenance of charitable institutions by advising the donors thereto that their funds will not be diverted from their original purpose of charity to pay for the negligence of the employees of such an institution. . . ."
that the soundness of the rule of exemption on the ground of public policy should be determined by the legislature and not by the judiciary. The court did not decide whether a non-paying patient could be held to have waived any right of action against the association, but refused to apply the waiver theory in the case of a paying patient. Nonliability on the waiver theory, said the court "if held to be sound, must rest upon the fact that it is the giving and receiving of charity that creates the exemption, and not the nature of the institution administering it."23

An increasing number of American jurisdictions have adopted the rule of the Glavin and Tucker cases.24 However, the great weight of authority holds to the rule of the Massachusetts General Hospital case,25 that a charitable institution is not liable for the torts of its agents or servants if due care has been used in their selection and maintenance.26 A smaller number of jurisdictions grant absolute immunity in tort to charitable institutions, whether the action be brought by beneficiary, servant, or stranger.27

In comparatively recent years, the courts of some jurisdictions have apparently begun to recognize the harshness of the majority rule and have made more or less successful attempts to limit without definitely

23191 Ala. 572, 68 So. 4, 11 (1915).
24Geiger v. Simpson Methodist Episcopal Church, 174 Minn. 389, 219 N. W. 463 (1928); Bruce v. Y. M. C. A., 51 Nev. 372, 277 Pac. 798 (1929); Hewett v. Woman's Hosp. Aid Ass'n, 73 N. H. 556, 64 Atl. 190 (1906); City of Shawnee v. Roush, 101 Okla. 60, 223 Pac. 354 (1923); O'Neill v. Odd Fellows Home, 89 Ore. 382, 174 Pac. 148 (1918).
27Most of these cases follow the example of Massachusetts. Although the Massachusetts General Hospital case seemed to make it a requisite of exemption that the officers or management be without negligence, it was later stated by the court in Roosen v. Peter Bent Brigham Hosp., 235 Mass. 66, 126 N. E. 392, 394 (1920) that the phrase "provided due case has been used in their selection" was "merely precautionary" and should not be "seized upon as a basis for the argument that such a charitable corporation as a hospital should be held liable for the negligence of its managing officers in selecting incompetent subordinate agents." Thus the Massachusetts rule has been extended so that at the present time in that jurisdiction a charitable institution is absolutely exempt from all tort liability. Enman v. Trustees of Boston Univ., 170 N. E. 43 (Mass. 1930).
28As to liability to strangers and servants, see 10 Fletcher, Cyc. Corp. (Perm. Ed. 1931) §§ 4922, 4924.
abolishing it. The method of the Colorado court is commendable, although not entirely satisfactory. There, under the rule of qualified immunity, no exemption from liability will be recognized unless the entire assets of the institution are held for the benefit of the charity. Thus, the court allows the action to be prosecuted to judgment and execution to be levied on all property other than that held for the charitable purposes. The disadvantage of this rule is that it is only applicable in those jurisdictions which grant immunity on either public policy or the trust fund doctrine. Obviously, the decision includes no answer to the implied waiver theory, nor to those cases refusing to

28England v. Hosp. of Good Samaritan, 88 P. (2d) 227 (Cal. App. 1939) (patient paid $25 per week, this amount being less than the average cost; court held for plaintiff because no charity was extended to plaintiff, and further plaintiff had no knowledge of alleged charitable nature of institution); Morton v. Savannah Hosp., 148 Ga. 438, 96 S. E. 887 (1918) (if a charitable hospital treats patients for pay it is liable to the extent of the income derived from the treatment of the paying patients); Medical College v. Rushing, 1 Ga. App. 475, 57 S. E. 1083 (1907) (liable for the mutilation of the corpse of a charity patient); Sessions v. Thomas Dee Memorial Hosp., 51 P. (2d) 229 (Utah 1935) (a charity receiving patient for pay owes the duty of due care and is liable for the failure to exercise that care).

Some of the later cases, especially in England, have determined the question of liability upon the principle of what the hospital actually undertakes to do. Under this principle the question in each case would be (1) whether or not there is an express contract which can furnish the measure of duty and liability; (2) if not, what the hospital holds itself out as undertaking to perform. In the latter event liability will depend on whether or not the medical staff are paid attendants furnished by the hospital, or whether they are merely attached to the hospital as consultants. Hillyer v. St. Bartholomew's Hosp., [1909] 2 K. B. 820, 829, 9 B. R. C. 1, 10: "The governors of a public hospital, by their admission of the patient to enjoy gratuitous benefit ... undertake that the patient shall be treated only by experts ... and further, that those experts shall have at their disposal fit and proper apparatus and appliances. ..." Hamburger v. Cornell Univ., 240 N. Y. 328, 148 N. E. 539, 542 (1923): "With us a hospital or university owes to patients or to students whatever duty of care and diligence is attached to the relation as reasonably implicit in the nature of the undertaking and the purpose of the charity."

29St. Mary's Academy v. Solomon, 77 Colo. 463, 238 Pac. 22 (1925). The Supreme Court of Tennessee has also adopted the rule of the Colorado courts. McLeod v. St. Thomas Hosp., 170 Tenn. 423, 95 S. W. (2d) 917, 919 (1936): "The exemption and protection afforded to a charitable institution is not immunity from suit, but non-liability for a tort, but that the protection actually given is to the trust funds themselves. It is a recognition that such funds cannot be seized upon by execution, nor appropriated to the satisfaction of a tort liability. And certainly it is no defense to a tort action, that the defendant has no property subject to execution." This case was followed by Vanderbilt Univ. v. Henderson, 127 S. W. (2d) 284, 287 (Tenn. App. 1938): "... this [McLeod case] ... is a recognition that a charitable institution is liable for a tort of its agent and may be pursued to judgment; but that the institution's trust property cannot be taken to satisfy such judgment; and that where such institution has liability insurance, such insurance is not trust property of the institution and may be appropriated to the satisfaction of such judgment."
apply respondeat superior to charitable institutions. Furthermore, in most cases all of the property of the institution is used for the purposes of the charity. Only in a rare instance will property exist which a court can hold to be free from an imposition in the nature of a trust.\(^{20}\)

The one form of property that would be free from such an imposition is liability insurance. Unfortunately, under the rule of the majority of jurisdictions such insurance is ineffectual. The ordinary liability insurance policy is an indemnity policy limiting payment by the insurer to those instances in which there has been a judgment against the insured. Therefore, if the institution is not liable in tort to a beneficiary, the mere fact that it is the owner of a policy of liability insurance will not make it so.\(^{31}\) This is an entirely reasonable and logical conclusion in those jurisdictions which hold to the rule of absolute nonliability to beneficiaries. It is entirely unreasonable in those jurisdictions which hold to the rule of qualified liability, and has been so recognized.\(^{32}\) Thus, if the rule of the Colorado case is adopted, that a charitable institution is liable in tort as any other institution or corporation, but that the liability may not be satisfied from the trust property, there is no reason why the judgment may not be satisfied from the liability insurance policy. Under such a rule the injured beneficiary is recompensed, the trust property is saved harmless, and the insurer is not escaping the risk which it has been paid to bear.

Of course the Colorado rule is of temporary value only. It is a simple matter to write insurance policies excluding beneficiaries of the insured charities. Nevertheless, it is a step in what is submitted to be the proper direction—the complete abolition of the rule of nonliability. The rule was established for reasons of policy which no longer exist. In an earlier day, benevolence of this type was administered almost entirely by private individuals and institutions. They were few and they were poor, and it was entirely just that they be given such an exemption

\(^{20}\)In Gamble v. Vanderbilt Univ., 138 Tenn. 616, 200 S. W. 510 (1918), where a building owned by defendant was operated at a profit, the profits being used for the charitable purpose, plaintiff was allowed to recover from the rents and profits, such liability being incident to the operation of the building.


as an aid and an encouragement. But today, a quickened moral and social sense and an increased national wealth have led to a tremendous expansion of endowed charitable institutions, to government subsidies to such institutions, and to outright government operation and maintenance of such institutions. Furthermore, the steadily advancing trend has been to spread the normal risks present in every activity among as great a number of people as possible, the most obvious manifestation of this trend being the growth of the large insurance companies. In view of these facts the exemption of charitable institutions from tort liability stands as an anachronism in Anglo-American law, peculiarly vicious in that it thrusts the entire risk of harm on those persons least able to bear it—those forced to accept charity.  

BRYCE REA, JR.

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT "PRIVILEGES OR IMMUNITIES" CLAUSE AS A LIMITATION UPON STATE TAXING POWER.

[United States Supreme Court]

The protection afforded a federal citizen by the Fourteenth Amendment "privileges or immunities" clause, extended by the 1935 decision of Colgate v. Harvey, has again been restricted by the Supreme Court in the case of Madden v. Kentucky to accord with the interpretation first given that clause in 1873 by the Slaughter-House Cases.

Harper, Law of Torts (1933) § 294: "The policy of the law requiring individuals to be just before generous seems equally applicable to charitable corporations. To require an injured individual to forego compensation for harm when he is otherwise entitled thereto, because the injury was committed by the servants of the charity, is to require him to make an unreasonable contribution to the charity against his will, and a rule of law imposing such burdens cannot be regarded as socially desirable nor consistent with sound policy." The recent trend to liability is shown by Sheehan v. North Country Community Hosp., 273 N. Y. 63, 7 N. E. (2d) 28, 29 (1937). After rejecting the waiver theory as a fiction the court says: "To impose liability is to beget careful management.... No conception of justice demands that an exception to the rule of respondeat superior be made." And see Note, Tort Liability of Charitable Institutions in New York (1939) 9 Brooklyn L. Rev. 78.

1 U. S. Const. Amend. 14, § 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...." It is to be noted that Art. 4, § 2 of the original Constitution reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." (Italics supplied.)


3 60 S. Ct. 406, 8 U. S. L. Week 201 (1940). The case has been discussed in (1940) 53 Harv. L. Rev. 874; (1940) 38 Mich. L. Rev. 720; (1940) 24 Minn. L. Rev. 691; (1940) 88 U. of Pa. L. Rev. 621.

4 16 Wall. 36 (U. S. 1873).
A Kentucky statute imposed on its citizens an annual ad valorem tax on deposits in banks outside of the state at the rate of fifty cents per hundred dollars and at the same time imposed on deposits in banks located within the state a similar ad valorem tax at the rate of ten cents per hundred dollars. A Kentucky citizen and resident maintained deposits in New York banks, but had not reported these deposits on several prior assessment dates for the purposes of taxation. At his death and when the estate was settled, the state brought suit to have these deposits assessed as omitted property and to recover the tax. The taxpayer (estate) attacked the constitutionality of the tax on the grounds that it violated the due process, equal protection, and privileges or immunities clauses of the Fourteenth Amendment. The Court of Appeals of Kentucky sustained the legislation, and on appeal, the United States Supreme Court, speaking through Mr. Justice Reed, affirmed the decision. The due process and equal protection objections were dismissed on the grounds that the classification for the imposition of the tax was not hostile to or oppressively discriminating against particular persons and classes. On the privileges and immunities objection, the Court held that the right to carry on business beyond the lines of the state of residence was not a federal privilege or immunity protected by the Fourteenth Amendment.

The decision in the Madden case will probably put an end to the controversy provoked by Colgate v. Harvey. In that case a Vermont statute, imposing income taxes on interest bearing securities, exempted from the tax, income from money loaned within the state at less than 5% interest. In an action attacking the constitutionality of the statute brought by a citizen of Vermont, the Supreme Court held the tax invalid seemingly on two grounds: first, that the exemption of money loaned within the state was a denial of equal protection because the classification had no reasonable relation to the purpose of the tax—the raising of revenue; and secondly, that aside from this, the discrimination against loans made outside the state was an infringement of the

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5Carroll's Kentucky Statutes, Baldwin's Revision (1930) § 4019a-10.
6As stated by the Court, a state tax statute is presumed constitutional unless it is proved that there is no conceivable basis to support it. Here the classification "may have been founded in the purposes and policy of taxation . . . may have resulted from the differences in the difficulties and expenses of tax collection." 60 S. Ct. 406, 409, 8 U. S. L. Week 201, 202 (1940).
8Pub. Laws of Vt. (1933) § 872 et seq.
federal privileges or immunities clause of the Fourteenth Amendment.\(^9\) Mr. Justice Sutherland, speaking for the majority, held as falling among federal privileges or immunities, “the right of a citizen to engage in business... or to make a lawful loan of money in any state other than that in which the citizen... resides.”\(^10\) To this opinion Mr. Justice Reed in the principal case makes dynamic reply: “We think it quite clear that the right to carry out an incident to a trade, business or calling such as the deposit of money in banks is not a privilege of national citizenship.”\(^11\) The “right to carry on business beyond the lines of the State of... residence” is not a privilege or immunity appertaining to national citizenship. “In view of our conclusions, we look upon the decision in... [Colgate v. Harvey] as repugnant to the line of reasoning adopted here. As a consequence, Colgate v. Harvey must be and is overruled.”\(^12\)

It had been supposed, prior to the case of Colgate v. Harvey in 1935, that the federal privileges or immunities clause had lost significance as a method of federal control over state action.\(^3\) This was a

\(^9\)At least one writer felt that the case was not decided on the equal protection clause at all, but on the privileges or immunities clause alone. See Howard, The Privileges and Immunities of Federal Citizenship and Colgate v. Harvey (1939) 87 U. of Pa. L. Rev. 262, 273 note 56. The overruling of Colgate v. Harvey by Madden v. Kentucky, as the Court explained in the latter case, was to the extent that it was repugnant to the line of reasoning adopted in the Madden case. If the Colgate case was decided on the equal protection objection as well as the privileges and immunities objection, certainly the result on the equal protection point in the two cases differs. It seems apparent in both cases, however, that the Justices agree on the fundamental issue that a tax does not have to be imposed equally on all if the classification is one bearing a reasonable relation to the purpose for which the tax is imposed. See 296 U. S. 404, 423, 56 S. Ct. 252, 256, 102 A. L. R. 54, 61, and 60 S. Ct. 406, 408, 8 U. S. L. Week 201, 202. The deciding of this question is in a large degree subjective, and not too much significance can be given to the final determination in each case. (1936) 45 Yale L. J. 926, 927, 928; Sutherland, J.'s dissent in State Bd. of Tax Commissioners v. Jackson, 283 U. S. 527, 550, 51 S. Ct. 540, 548 (1931). The Court in the instant case, however, by emphasizing the “hands-off” policy of presuming the validity of the legislation, seems to arrive at the more desirable conclusion.

It is felt that the real significance of the Colgate v. Harvey-Madden v. Kentucky controversy lies in the disposition of the privileges or immunities clause. This aspect of the case alone is considered in the present discussion.


\(^11\)Madden v. Kentucky, 60 S. Ct. 406, 411, 8 U. S. L. Week 201, 203 (1940). Mr. Justice Roberts, joined by Mr. Justice McReynolds, dissented, adhering to the rule of Colgate v. Harvey. Mr. Justice Hughes concurred in the result on the ground that the classification was on a reasonable basis.

\(^12\)See dissent of Stone, J., in Colgate v. Harvey, 296 U. S. 404, 443, 56 S. Ct. 252, 265, 102 A. L. R. 54, 73 (1935); and in Hague v. CIO, 307 U. S. 496, 520, 59 S. Ct. 954, 966 (1939); Brannon. The Fourteenth Amendment (1901) 56 et seq.; Cooley, Gen-
direct result of its first interpretation in the *Slaughter-House Cases*. It was there held that the chief purpose of the Fourteenth Amendment was to give the negro national citizenship and to insure his rights as a national citizen, but not to vary "the delicate balance" between state and national powers. Mr. Justice Miller, speaking for the majority, observed that in spite of the "excited feeling growing out of the War" and the sentiment for a strong national government it was essential that the states should have "powers for domestic and local government, including the regulation of civil rights—the rights of person and of property," rights not inherent in national citizenship, but in state citizenship. As rights of state citizenship, they could not be given federal protection by the privileges or immunities clause of the Fourteenth Amendment.

This clause was subsequently held to protect only those privileges and


In this case white citizens in the slaughter-house industry were attacking a Louisiana statute which affected the place and manner of conducting their business.

It appears that the privileges or immunities clause is now understood as not having been intended to create new rights in federal citizens, but to secure existing federal citizenship rights to the newly-made citizens. See the language of Mr. Justice Roberts in _Hague v. CIO_, 397 U. S. 496, 512, 59 S. Ct. 954, 962 (1939); _Orr v. Gilman_, 189 U. S. 278, 286, 22 S. Ct. 213, 216 (1902); _In re Kemmler_, 136 U. S. 436, 10 S. Ct. 930, 934 (1890); _Ex parte Virginia_, 100 U. S. 339, 365 (1879); _Minor v. Happersett_, 21 Wall. 162, 171 (1874). The dissents in the _Slaughter-House Cases_ indicate a strong feeling that it was really this issue over which the War had been fought, and that it was the intent of the framers of the Amendment to create a much stronger national government with greater power of control over state governments. _Slaughter-House Cases_, 16 Wall. 36, 97, 100-101, 129 (U. S. 1873); _Burdick, Law of the American Constitution (1932) § 116_; _Corwin, The Constitution and What It Means Today_ (6th ed. 1938) 171; _1938_ 49 Harv. L. Rev. 935, 936. The rights, privileges and immunities held to be protected by the Fourteenth Amendment were, therefore, those considered "fundamental," those belonging "of right to every free citizen of a civilized government." _Slaughter-House Cases_ dissent, 16 Wall. 36, 97 (1873); _Willoughby, The Constitutional Law of the United States (2d ed. 1929) 239_; _Morris, What Are the Privileges and Immunities of Citizens of the United States? (1921) 28 W. Va. L. Q. 38_. This idea continued in the dissents of the privileges and immunities cases until the due process clause of the same Amendment began to take over the field of federal protection of fundamental substantive civil rights against abridgment by the state governments. For a description of this process, see _Warren, The New "Liberty" Under the Fourteenth Amendment (1926) 39 Harv. L. Rev. 431_. Also see _Willoughby, The Constitutional Law of the United States (2d ed. 1929) 243_; _Borchard, The Supreme Court and Private Rights (1938) 47 Yale L. J. 1051, 1057_; _Corwin, The Supreme Court and the Fourteenth Amendment (1909) 7 Mich. L. Rev. 643_; _Note (1938) 7 Brooklyn L. Rev. 490, 498._

_Quoted from the Slaughter-House Cases opinion: "Having shown that the privileges and immunities relied on in the argument are those which belong to citi_
immunities which "arise out of the nature and essential character of the national government, or are specifically granted or secured to all citizens or persons by the United States Constitution," 28 "or its laws and treaties made in pursuance thereof." 12 Until the case of Colgate v. Harvey, not one of forty-seven cases 20 reaching the Supreme Court on claim of violations of the clause was successful in establishing that federal privileges and immunities were infringed by state action. 21

zens of the States as such, and that they are left to the State Governments for security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no citizen can ari

12 Twining v. New Jersey, 211 U. S. 78, 97, 29 S. Ct. 14, 19 (1908); Orr v. Gilman, 183 U. S. 278, 286, 22 S. Ct. 213, 217 (1902); Duncan v. Missouri, 152 U. S. 377, 382, 14 S. Ct. 570, 571-572 (1894); In re Kemmner, 136 U. S. 435, 448, 10 S. Ct. 930, 934 (1890). Nor were the guarantees of the first eight amendments considered "privileges and immunities of United States citizenship" under the Fourteenth Amendment.


20 The cases are collected in Mr. Justice Stone's dissent in Colgate v. Harvey, 296 U. S. 404, 445, 56 S. Ct. 252, 266, 102 A. L. R. 54, 74 (1935), and additions are made in his specially concurring opinion in Hague v. CIO, 307 U. S. 496, 521, 59 S. Ct. 954, 967 (1939). Mr. Justice Stone listed forty-four cases in Colgate v. Harvey, and added three more in Hague v. CIO which had arisen before the Colgate decision. Also see McGovney, Privileges or Immunities Clause, Fourteenth Amendment (1918) 4 Iowa L. Bull. 219, 2 Selected Essays in Constitutional Law (1938) 402, 405. Some of the rights claimed were: to practice law in a state court, to vote, to sell or possess liquor, to use the American flag for advertising purposes, to obtain dower rights, to graze sheep on the public domain, or to attend a state university. An extensive listing is made by Howard, The Privileges and Immunities of Federal Citizenship and Colgate v. Harvey (1939) 87 U. of Pa. L. Rev. 262, 270-272.

21 There was little support for holding the making of investments in other states without deterrence by the state of origin a right so peculiar as to be a privilege or immunity of federal citizenship, and thereby to differ from rights protected under the interstate commerce, due process, and equal protection clauses. See Mr. Justice Stone's dissent to Colgate v. Harvey, 296 U. S. 494, 445, 56 S. Ct. 252, 266, 102 A. L. R. 54, 73-74 (1935); Howard, The Privileges and Immunities of Federal Citizen-
It was not made clear in the *Colgate* opinion whether the difference in the tax imposed on money loaned within the state and that imposed on money loaned without was considered an infringement of a federal privilege or immunity because merely discriminatory, or whether it was the arbitrary and unreasonable character of the discrimination that was considered an infringement. If mere discrimination was the basis of the decision, the clause was being used to extend federal protection over citizens beyond the protection afforded in the other clauses of the Constitution and, as Mr. Justice Stone saw, with the result of increas-
ing federal judicial control over state action "sufficient to cause serious apprehension for the rightful independence of local government." If it was the unreasonable and arbitrary feature of the discrimination that formed the basis for the application of the clause, it would seem to add nothing to the guarantee of the equal protection clause, which extends to "persons," as well as to "citizens." Because of the Court's further decision that the exemption of dividends derived from corporate business in the state and non-exemption of the same type of dividends from without the state was not an infringement of the clause, it appears that the majority's conception was that the clause was thought to prohibit only those inequalities in taxation considered arbitrary and unreasonable. If so, the same result could have been reached by the same judges through the equal protection clause alone.

Legal commentators were confused by the decision and explanations advanced were varied. Some writers suggested that, if the clause was being extended beyond the equal protection clause, emphasis was upon strengthening the concept of a unified national society by removal of state barriers to interstate activity; some thought it may have been an avoidance of the restricted construction of the interstate commerce clause, or to give to interstate business which is not commerce the same protection given interstate commerce by the commerce clause.

or arbitrary and unreasonable with respect to the purpose of the tax. Rotschaefer, Constitutional Law (1939) §§ 284-286 and cases there cited.


Since a corporation is a "person," but not a "citizen" within the meaning of the Fourteenth Amendment, Western Turf Association v. Greenberg, 204 U. S. 359, 363, 27 S. Ct. 384, 386 (1907); Orient Insurance Co. v. Daggs, 172 U. S. 557, 561, 19 S. Ct. 281, 282 (1899), the privileges or immunities clause ostensibly does not benefit corporate business.


Quoting from Mr. Justice Stone's specially concurring opinion in Hague v. CIO, 307 U. S. 496, 525, 59 S. Ct. 954, 968 (1939): "If it be the part of wisdom to avoid unnecessary decision of constitutional questions, it would seem to be equally so to avoid the unnecessary creation of novel constitutional doctrine, . . . in order to attain an end easily and certainly reached by following the beaten paths of constitutional decision." See Ashwander v. Tenn. Valley Authority, 297 U. S. 288, 346-347, 56 S. Ct. 466, 483 (1936), Mr. Justice Brandeis' second and third "canon of interpretation."


(1936) 3 U. of Chi. L. Rev. 506.

(1936) 20 Minn. L. Rev. 549.
While one saw in it a further protection of personal liberty against so-
cial control, another feared the imperiling of democratic institutions
by denying to the states the social control over economic enterprise for-
merly permitted them. Among other suggestions: an expression of a
laissez-faire desire to permit commercial endeavor to locate in the most
favorable economic site, the Court's revival and expansion of a third
device in the Federal Government's arsenal of methods to review and
censure state action, and the beginning of a reversion to the funda-
mental rights theory as argued in the *Slaughter-House Cases* dissents.
The general opinion among the writers was adversely critical and
in support of the dissent.

In spite of this controversy, *Colgate v. Harvey* did not seriously af-
fect federal court litigation. In one case only did the privileges and immu-
nities contention again appear to be upheld. In *Hague v. CIO* where unincorporated labor organizations and individuals were seek-
ing to restrain the mayor and government of Jersey City from inter-
ferring with their union functions, Mr. Justice Roberts, with Mr. Jus-
tice Black concurring, wrote the first of the majority opinions, in

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21(1936) 11 Ind. L. J. 390.
23(1936) 36 Col. L. Rev. 669.
25(1936) 24 Calif. L. Rev. 728.
26Among other discussions: (1936) 14 N. C. L. Rev. 282; (1936) 13 N. Y. U. L. Q. Rev. 496; (1936) 14 Tex. L. Rev. 548; (1936) 11 Wis. L. Rev. 434; (1936) 45 Yale L. J. 926.
28In one case, however, Asher v. Ingels, 13 F. Supp. 654, 658 (S. D. Cal. 1936), Colgate v. Harvey was hesitantly cited for its dictum that "The right to transact a lawful business is a privilege of national citizenship." The case was decided on the interstate commerce, due process, and equal protection of laws clauses, however, and no semblance of the privileges and immunities objection again appeared in the opinion. In *Whitfield v. Ohio*, 297 U. S. 491, 56 S. Ct. 732, 80 L. ed. 778 (1936), the federal privileges or immunities clause was rejected as without substance, since in that case its effect would have been the same as Article 4 § 2 of the Constitution which "is directed against discrimination by a state in favor of its own citizens and against the citizens of other states." Colgate v. Harvey was otherwise cited in various cases, but in the main for its equal protection dictum.
30For a discussion of the line-up of the Justices in this case and the implication
which it was considered a privilege or immunity of national citizenship to enjoy "freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it. . . ." It is perhaps significant that Mr. Justice Roberts did not call on *Colgate v. Harvey* to support his case. On the other hand he may have felt that the particular privileges infringed in the two cases were of too different a nature to afford an analogy. It does seem on principle that such a right as the one upheld in the *Hague* case could validly be a privilege of federal citizenship, even within the accepted interpretation of the privileges or immunities clause prior to *Colgate v. Harvey*. Nevertheless Mr. Justice Stone, in a specially concurring opinion, approved by Mr. Justice Reed, again delivered an attack on the extension of the privileges and immunities principle strikingly similar to the one delivered in *Colgate v. Harvey*. Again he pointed out the futility of using a historically dead clause, as was done in that case, to achieve a result which was completely capable of being reached by the due process clause alone. Quite evidently Mr. Justice Stone felt that this ex-

of the opinion with respect to "freedom of opinion" cases, see Johnson, Post-War Protection of Freedom of Opinion (1940) 1 Wash. & Lee L. Rev. 192, 199-201.


*Dissent of Brandeis, J., in Gilbert v. Minnesota*, 254 U. S. 325, 337-8, 41 S. Ct. 125, 129 (1920): "The right to speak freely concerning functions of the Federal Government is a privilege or immunity of every citizen of the United States which, even before the adoption of the Fourteenth Amendment a State was powerless to curtail. . . . The right of a citizen . . . to take part . . . in the making of federal laws . . ., necessarily includes the right to speak or write about them. . . . Were this not so "The right of the people peaceably to assemble for purpose of petitioning Congress for a redress of grievances, . . ." would be a right totally without substance." In the *Slaughter-House Cases*, 16 Wall. 36, 79 (U. S. 1873): "The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution." These rights were likewise considered under the privileges or immunities clause in *U. S. v. Cruickshank*, 92 U. S. 542, 552, 553 (1875). Mr. Justice Stone, however, felt that the step from the above statement to holding "the right to assemble and discuss the advantages of the National Labor Relations Act" a similar privilege, was a "long and by no means certain one." *Hague v. CIO*, 307 U. S. 496, 522, 59 S. Ct. 954, 967 (1939).

*Mr. Justice Roberts apparently held that because the rights infringed were privileges and immunities of national citizenship jurisdiction was conferred by Jud. Code § 24 (1) and (14), 28 U. S. C. A. § 41 (1) and (14) which require no averment or proof that the amount in controversy exceeds $3000. Mr. Justice Stone, citing the same provisions of the statute, held that the right to maintain an equity suit to restrain state officers, acting under a state law, from infringing the rights of freedom of speech and of assembly guaranteed by the due process clause, is given by Congress to all persons whether citizens or not. Mr. Justice Stone's reasons for preferring the use of the due process clause were: (a) the extension of the privileges or immunities clause, and reversion to the fundamental rights doctrine argued in the Slaughter-House dissents, is a danger to the
tension was along the same lines as that in Colgate v. Harvey. In spite of this fact, however, it cannot be said that the opinion of Mr. Justice Roberts in Hague v. CIO is in any way affected by the overruling of Colgate v. Harvey since the claimed privileges and immunities were of such different nature in the two cases. It is only in the interpretation propounded by Mr. Justice Stone that a conflict is found in the cases. Nevertheless it is not difficult to foresee that henceforth litigants will feel safer in considering the “privileges or immunities” clause of very dubious assistance even in freedom of opinion cases, and will base their arguments on the specially concurring opinion of Mr. Justice Stone in Hague v. CIO rather than on Mr. Justice Roberts’ opinion.

It seems evident that Madden v. Kentucky in no uncertain terms has again limited the privileges or immunities clause as a “device in the Federal Government’s arsenal of methods to review and censure state action.” Once more the clause will probably go into repose to be brought out, as in the days prior to Colgate v. Harvey, only by those litigants seeking protection for vague and uncertain privileges which find no specific protection in other clauses of the Constitution. If, as now seems likely, the clause is back where it was before the Colgate decision, its “panacea-like” language will again be held to afford little relief to such applicants. That the fate of the clause is settled gains weight with the consideration that the Colgate v. Harvey effort to vary the long-accepted doctrine of the Slaughter-House Cases was tolerated by the Supreme Court for less than five years.

Fred Bartenstein, Jr.

independence of local government; (b) an unnecessary creation of novel constitutional doctrine; (c) the record could not support the decree under the privileges or immunities clause since the plaintiff did not aver nor prove that he was a citizen; (d) a decree based on the privileges or immunities clause would have to be so narrow as to affect only the relation between the defendant and the national government, that is, it would have to be restricted to the dissemination of information concerning the National Labor Relations Act alone, rather than to the dissemination of any lawful information.

“Mr. Justice Stone: “I do not doubt that the decree . . . is rightly affirmed, but I am unable to follow the path by which some of my brethren have attained that end. . . .” 307 U. S. 496, 518, 59 S. Ct. 954, 965 (1939). It was evident that it was not solely precedent that prompted this position. Rather it seems that the mere use of this clause in the two cases represented to Justices Stone and Reed ‘the advent of a dangerous device. This is apparent from the further language: “ . . . resort to the privileges and immunities clause . . . would involve constitutional experimentation as gratuitous as it is unwarranted. We cannot be sure that its consequences would not be unfortunate.” 307 U. S. 496, 532, 59 S. Ct. 954, 971 (1939). For a possible method by which “federal privileges and immunities,” as so extended, could have eventually been used for the benefit of all persons as well as United States citizens, see (1936) 24 Calif. L. Rev. 728, 732.
RECENT CASES

CONSTITUTIONAL LAW—Effect of Judicial Determination of Unconstitutionality; Habeas Corpus—Use of Writ to Secure Release from Imprisonment After Conviction Under Unconstitutional Statute. [United States Supreme Court and New Jersey]

The problem of whether a judicial determination of constitutionality is to be given retrospective as well as prospective effect continues to confront state and federal courts. In Chicot County Drainage District v. Baxter State Bank the United States Supreme Court refused to allow collateral attack upon a judgment reached in a civil proceeding approving a municipal debt reorganization plan, where the statute under which the proceeding had been undertaken was later declared unconstitutional. In Ex parte Connellan the New Jersey Supreme Court permitted collateral attack, by way of habeas corpus, upon a judgment of conviction in a prosecution arising under an Act which subsequent to the prisoner's conviction had been held unconstitutional. Though the two cases at first glance appear to be in conflict, an examination of the two situations involved may well indicate that a complete reconciliation is possible on practical grounds.

In the Chicot County case the defendant was a drainage district organized under the laws of Arkansas, with power to issue bonds. In 1932 defendant defaulted on its obligation to pay the bonds and later, proceeding under the Municipal-Debt Readjustment Act, filed a petition for readjustment of its debts. The plaintiff, a bondholder, was given full notice of the proceedings but did not contest the reorganization. Money was left in the hands of the court for one year for those bondholders who did not immediately join in the reorganization, but the plaintiff did not redeem his bonds within that time. Subsequently, the Municipal-Debt Readjustment Act was held unconstitutional by the Supreme Court in Ashton v. Cameron County District. The plaintiff thereafter sued to recover on his old bonds, arguing that since the statute on which the reorganization was based had been invalidated, the reorganization itself was of no effect. The Supreme Court rejected the contention and held that the plaintiff, having failed to raise the question of the validity of the reorganization in the proceedings to which it was a party, and in which the issue could properly have been presented and decided, was now prevented by the bar of res judicata.
from raising it in a subsequent collateral attack on the judgment. Plaintiff had further contended that the district court, being one of limited jurisdiction conferred by the Act, was deprived of jurisdiction by virtue of the invalidation of the statute. In answer to this argument the Supreme Court declared that, though the district court's jurisdiction was limited, yet it had authority to determine whether it had jurisdiction when parties were properly before it; and, while the determination so made was open to direct review, it could not be attacked in a collateral action.

The decisions supporting the result of the Chicot County case are based on one of two general grounds: first, that the judgment rendered under the subsequently invalidated statute is voidable, not void, and thus not subject to collateral attack, or second, that the bar of res judicata applies to any subsequent action brought attacking the judgment, although the statute upon which the decision was based has been declared unconstitutional.

The first ground is set out in a dictum in Hanchett Bond Co. v. Morris.5 The court cited the general rule to the effect that a judgment on the merits under an unconstitutional statute was not void, but merely voidable, and was binding on the parties to the action when it became final, even though at a later date the statute upon which the proceedings were based was held unconstitutional. Although this pronouncement was dictum, it was later adopted by the court as proper reasoning in two cases,6 and practically the same reasoning was relied upon in a decision in another jurisdiction.7

The second ground is set out in State v. Trustees of Milwaukee County Orphans' Board.8 The statute involved provided that after certain debts were paid, all the personal property of persons in Milwaukee County dying intestate and without heirs should be turned over to the Orphans' Board as part of its trust fund instead of escheating to the state. The statute was held unconstitutional,9 and the state sued to recover the money that had been turned over to the Orphans' Board while the statute was in force. The Supreme Court of Wisconsin refused the state's claims, holding that the decisions of the county court in settling these estates were res judicata as to the state, since there had

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5143 Okla. 110, 287 Pac. 1025, 1026 (1930).
6Jones v. McGrath, 160 Okla. 211, 16 P. (2d) 853 (1933); Walker v. Stubblefield, 167 Okla. 50, 27 P. (2d) 1043 (1933).
8218 Wis. 518, 261 N. W. 676 (1935).
9In re Payne's Estate, 208 Wis. 142, 242 N. W. 553 (1932).
been sufficient notice given by the court to all parties interested when it published notices of the various administration proceedings in the newspapers.\footnote{A similar ruling was made in a California case, Los Angeles County v. Seaboard Security Corp. of America, 139 Cal. App. 497, 34 P. (2d) 191 (1934), where it was held that if no appeal has been taken from a judgment, and it has been satisfied by payment, it stands impregnable and will prevent any action to change it, though the statute under which it was decided has subsequently been declared unconstitutional. And compare Kansas City Life Ins. Co. v. Anthony et al., 142 Kan. 670, 52 P. (2d) 1208 (1935), in which the court said that a judgment rendered by a competent court of record is res judicata when no appeal is taken therefrom, and cannot be set aside or annulled by subsequent acts of the legislature even on the theory of an emergency.}

Turning to the New Jersey case of \textit{Ex parte Connellan},\textsuperscript{11} it appears that a judicial declaration of unconstitutionality is given a different effect. By this decision the court in habeas corpus proceedings ordered the release of a man who had been imprisoned upon a conviction under the New Jersey "Gangster Act"\textsuperscript{12} which after his conviction but prior to the filing of the petition for habeas corpus had been held unconstitutional by the Supreme Court of the United States.\textsuperscript{13} On the basis of New Jersey precedents\textsuperscript{14} the prisoner was held to be "illegally restrained of his liberty." A line of cases arising under the same circumstances had already been decided by the New Jersey court, \textit{Ex parte Rose}\textsuperscript{15} being the first decision. There the court had held that habeas corpus was the only remedy open to the petitioner Rose, inasmuch as time for appeal had passed.\textsuperscript{16} The further reasoning was advanced that since the statute had been declared unconstitutional there was no jurisdiction in the trial court, so that the proceedings in that court were wholly void.

In only one other jurisdiction have cases been found presenting the exact problem of the \textit{Connellan} case. \textit{Ex parte Safarik} is the principal
case of such a group of Oklahoma decisions arising in 1923. Safarik was convicted under a law which made it a felony to have in one's possession equipment for making whiskey, and was sentenced to one year in prison. When contested later by another party, the law was held unconstitutional, and the prisoner Safarik filed a petition for a writ of habeas corpus to obtain his release. The court granted the writ saying he was "illegally restrained of his liberty" and was entitled to be discharged.

It is believed that the federal courts have not yet acted on this type of case. Habeas corpus is only allowed in these courts to test jurisdictional errors, not those of procedure, and it is not clear which classification would include such questions as are raised in the Connellan case. However, in the case of Ex parte Baer, a federal district court, in habeas corpus proceedings, ordered the release of a prisoner who had been convicted in a judicial proceeding held pursuant to a Kentucky statute which entitled the judge trying the case to a portion of the fine imposed. Subsequently, a closely similar Ohio statute was declared unconstitutional on due process grounds by the Supreme Court of the United States in Tumey v. Ohio. At the hearing in the Baer case the Commonwealth admitted the invalidity of the Kentucky statute on the authority of the Tumey case, but argued that since the petitioner had challenged the statute by which the judge was given power to try him he had waived his right to rely on the invalidity of the law. The court decided that the petitioner was being held in custody without due process of law, and was entitled to his discharge. Any conclusion that the petitioner had waived his constitutional right to a trial according him due process of law, simply by failure to assert the right at

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Okla. Cr. 283, 220 Pac. 479 (1923); Ex parte Lockhart, 25 Okla. Cr. 429, 221 Pac. 119 (1923).

Chapter 1, Session Laws of Oklahoma, 1923.

25 Okla. Cr. 50, 218 Pac. 1112 (1923).

Dobie, Habeas Corpus in Federal Courts (1927) 13 Va. L. Rev. 433, 435: "The writ of habeas corpus in the federal courts tests solely the jurisdiction or power of the custodian to hold the petitioner in custody; it cannot be used as a writ of error to correct mere errors of procedure which are not jurisdictional." In Beard v. Sanford, 8 U. S. L. Week 503 (C. C. A. 5th, 1949), the court refused a writ of habeas corpus to a petitioner who had been convicted with evidence obtained by wire tapping, despite the fact that subsequent to the petitioner's conviction this practice had been held unlawful by the Supreme Court of the United States in Nardone v. United States, 60 S. Ct. 266 (1939), and Weiss v. United States, 60 S. Ct. 269 (1939).

20 F. (2d) 912 (E. D. Ky. 1927). This case is criticized in (1938) 14 Va. L. Rev. 488, as being unsound in principle and against the weight of authority.


the invalid proceedings was branded "arbitrary." It will be noticed
that in this case the petitioner himself first raised the question of the
constitutionality of the law, while in the Connellan case the law had
already been held unconstitutional as a result of an attack by another
party. But the difference is not great, for in the Baer case a similar Ohio
law had been struck down by the United States Supreme Court, lead-
ing the Attorney General representing the Commonwealth to admit
the invalidity of the law.

In spite of the apparent conflict in the conclusions in the civil and
criminal cases as to the validity of a prior adjudication based on a
statute which is subsequently held unconstitutional, it is believed that
there are sufficient reasons of policy to sustain each of these ostensibly
inconsistent holdings.

In civil cases it has long been the rule that uniformity of decisions
should be maintained and that uncertainty should be avoided when-
ever possible. The courts and general public feel that there should be
stability in transactions that are carried out under the eyes of the
courts. To give a retrospective effect to the judicial determination of
invalidity inevitably will tend toward confusion and uncertainty in
the field of commercial enterprise. Such considerations, however, are
absent in the criminal cases, since ordinarily no person except the pris-
oner will be directly affected by the decision, and no influence will be
felt in the commercial world. No inconsistency is present, therefore, in
the position taken by the courts in criminal cases that proper protec-
tion for the liberty of the individual demands that retrospective effect
be given a determination of unconstitutionality.24

G. Murray Smith, Jr.

INSURANCE—RECOVERY UNDER A POLICY INSURING AGAINST DEATH
CAUSED "SOLELY" BY ACCIDENTAL MEANS. [Massachusetts]

In the recent Massachusetts case of Barnett v. John Hancock Mutual
Life Insurance Company4 it appeared that the insured was injured in an

24In Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717 (1879), Mr. Justice Bradley said
at page 377, "But personal liberty is of so great moment in the eye of the law that
the judgment of an inferior court affecting it is not deemed so conclusive but that
. . . the question of the court's authority to try and imprison the party may be re-
viewed on habeas corpus by a superior court or judge having authority to award the
writ." In this case the plaintiff was convicted of violating the election laws and ap-
pealed. The court upheld the conviction saying that the election laws were valid,
but the Justice made the above statement in his opinion, by way of dictum.

24 N. E. (2d) 662 (Mass. 1939).
automobile accident, and after being confined in the hospital for nine days was released and went about his business. Two weeks later he became ill with pneumonia, which developed into empyema, causing his death within two months. His insurance policy contained a clause which provided that double indemnity would be paid the beneficiary if the death of insured should be caused "... solely by external, violent and accidental means, ... independently and exclusive of all other causes." The Massachusetts court held that double indemnity should be awarded saying that if the germs were already in his system and his body was so weakened as a result of the accident that the germs were enabled to develop into pneumonia, then the jury was warranted in finding that the death of the insured was "caused solely by external, violent, and accidental means ... independently and exclusively of all other causes." The court stated further that even if the germs entered the body after the accident, and, because of the accident's having weakened his resistance, developed into pneumonia the jury would be warranted in reaching the same conclusion as to the cause of the death.  

Judging from cases in which the courts have dealt with the problem of causation, the court in the instant case could readily have regarded the automobile accident as the "proximate" cause of the death. However, the provision of the policy, mentioned above, does not employ the term "proximate" but provides for the payment of double indemnity only where the accident is the sole cause of the death. Provisions such as this are obviously inserted by the insurance companies for the purpose of preventing payment of double indemnity in cases where disease, or bodily or mental infirmity concur with the accident to cause death, or in any way contribute to the death. Yet the courts have ig-

2This statement seems to repudiate an implication of the case of Larson v. Boston Elevated Ry. Co., 212 Mass. 262, 98 N. E. 1048 (1912) in which the court said, in speaking of germs entering the body after an accident: "If, however, her tuberculosis came from germs introduced into her system after she had sustained these injuries, or by the operation of some other subsequent and independent cause, then, even though the disease would not have developed and manifested itself but for her physical condition having been weakened and her power of resistance diminished by those injuries, it well may be that she could recover no damages for that sickness and its consequences." 98 N. E. 1048, 1050. It should be noticed that the Larson case involved not an insurance claim, but an action for damages for negligent injuries, and that the quoted portion of the opinion is dictum. But the language of the Massachusetts court in the instant case would seem to indicate that the dictum of the Larson case would not be followed by that court in such a situation.

3Kliebenstein v. Iowa Ry. & Light Co., 193 Iowa 892, 188 N. W. 129 (1922); Watson v. Rhindenerchtek, 82 Minn. 295, 84 N. W. 798 (1901); Hoseth v. Preston Mill Co., 49 Wash. 682, 96 Pac. 423 (1908). See Restatement, Torts (1934) § 458.

nored these provisions and almost uniformly have awarded payment of double indemnity in cases where the accident was merely the "proximate" cause of death.5

This practice seems to have first crept into the law with the case of North American Life & Accident Insurance Co. v. Burroughs.6 The policy provided that "death must be caused solely by such accidental injury. . . ." Here there was an accident followed by disease resulting in death, and the court permitted the plaintiff to recover for the accidental death. In its decision the only authority the court found necessary to cite was the definition given the word "accident" in Webster's Dictionary.7 The Burroughs case was relied upon in Freeman v. Mercantile Mutual Accident Association,8 which later decision was cited as controlling in the principal case and in others to be mentioned in this discussion.

Further illustrative of this position is the case of Pacific Mutual Life Insurance Co. v. Meldrim.9 Here the policy provided that double indemnity would be paid in cases where the accident was "the direct, independent and exclusive cause of death." The insured was lying in the hospital with an open wound from a very recent appendicitis operation. He happened to slip from his pillow, the jar causing an embolus to form in the wound, ultimately resulting in his death. The court failed to take into account the appendicitis operation, the open wound, and the weakened condition of the body, but blandly said that the accident of slipping from the pillow was the sole cause of the death, "independent, and exclusive of all other causes."10

of the death of the insured . . . caused solely by external, violent and accidental means, of which there is a visible wound or contusion on the exterior of the body (except in case of drowning or of internal injuries revealed by an autopsy), and that such death occurred . . . as a direct result thereof, independently and exclusive of all other causes, . . . and provided further that the death of the Insured was not caused directly or indirectly by disease or bodily or mental infirmity. . . ."


9Pa. St. 43 (1871).

10Pa. St. 51 (1871): "An accident is 'an event which takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause and therefore not expected; chance; casualty; contingency.'"


The following cases involved similar facts and policies: Manufacturers' Acc. Indemnity Co. v. Dorgan, 58 Fed. 945 (C. C. A. 6th, 1893), 22 L. R. A. 620 (1894);
An even more surprising result was reached in *Travelers' Insurance Co. v. Melick*.11 The insured accidentally injured his foot, and gangrene and tetanus set in. From time to time he suffered tetanic spasms causing excruciating pain. While he was suffering from such a spasm, the attendant momentarily left him, and upon returning found the insured with a knife in his hands and his throat and jugular vein cut. But the judge instructed the jury that they could find that the accident was the “proximate” cause of the death and award recovery for the plaintiff, in spite of the fact that the policy stated that double indemnity should be awarded only in case death arose, “through external, violent and accidental means alone . . . independently of all other means.”

It is worthy of note that in situations in which the disease already existed when the accident occurred, and the effects of both contributed to cause death, the courts have reached a different conclusion and denied recovery.12 Such a case was that of *Maryland Casualty Co. v. Morrow*.13 Here the insured, who had diabetes, accidentally injured his toe; gangrene set in, and when he was operated upon he died. The court denied recovery saying that the accident was not the “sole and exclusive cause of the death.” And in a similar case the court said that “The death in such a case would not be the result of accident alone, but it would be caused partly by the disease and partly by the accident, and the contract exempted the association from liability therefor.”14


Another case differing from the instant decision only in the phraseology of the policy is Sheehan v. Aetna Life Insurance Co., 6 N. E. (2d) 777 (Mass. 1937), in which an accident was followed by pneumonia resulting in the death of the insured. Here again the court ignored the fact that the parties had expressly contracted against payment of double indemnity in situations where death should be “caused wholly or partly, directly or indirectly by infirmity or disease,” and awarded double indemnity even though it seems highly probable that the pneumonia must have played some part in causing the death.

That the authorities are by no means unanimous even on this proposition is illustrated by the holdings in the following cases: Scanlan v. Metropolitan Life Ins. Co., 93 F. (2d) 942 (C. C. A. 7th, 1937); Fetter v. Fidelity & Casualty Co., 174 Mo. 256, 73 S. W. 599, 61 L. R. A. 459, 97 Am. St. Rep. 560 (1903).
It seems highly questionable whether there is any material difference between the two situations. In the one, the disease or bodily infirmity existed before the accident; in the other it arose after the accident. In neither situation was the disease or the accident the sole and exclusive cause of the death, for in both situations each aggravated the effects of the other.

It is difficult to see how the parties could have entered into contracts which would more specifically set out the obligations of the various insurance companies. There is nothing ambiguous about the phrases, "solely and exclusively" and "independent of all other causes." Yet the courts have refused to adopt the ordinary meaning of these words when so used in insurance policies. The reason for such interpretations may be that when the average man purchases such accident policies as discussed here, he is unaware of the exact wording of the contract, and the salesman usually does not bother to explain it to him. All the purchaser knows is that he has bought an insurance policy which will pay him double indemnity in case he dies as a result of an accident. But merely because the layman is unaware of the difference between "sole" and "proximate" cause, the courts should not in effect make a different contract between the parties. If the insurer has in any manner acted fraudulently, a different case would be presented, but no such theory is relied upon by the courts in the cases under discussion. It may be that as a matter of social policy, the public should be afforded protection against its own lack of business acumen, and the insurance companies should be prevented from limiting the extent of their liability on policies by inserting phrases not understood or noticed by persons taking insurance. But since the legislative departments of the state governments have widely assumed the power to regulate the insurance business as it affects the public interest, it seems that the needed aid should be extended to the insuring public by means of direct regulatory statutes adopted by the legislatures, and not by strained constructions of contracts by the courts. In any event, this purported protection will be indirectly neutralized by the necessary raising of insurance rates by the companies to cover the increased risk. The net result will still involve an improved situation, however, since both the companies and those insured will be certain of the extent of the coverage accorded by the policies.

Stanford Schewel
INSURANCE—WHETHER A TRAILER IS A "BUILDING" WITHIN THE TERMS OF AN ACCIDENT POLICY. [Federal]

In Aetna Life Insurance Company v. Aird, the plaintiffs sued as beneficiaries on an accident policy containing a clause providing for double indemnity in case of injuries sustained by the insured by the "burning of a building . . . if the insured is therein at the time of the . . . commencement of the fire." At the time of his death, the insured was on the lease engaged in drilling oil wells, and was using as a combined office and dwelling a trailer which had been raised off its wheels and placed on supporting jacks. In this condition, the trailer was destroyed by a fire, in which the insured was burned to death. The insurance company defended against paying double indemnity on the ground that "the trailer was not and could not be 'a building' within the policy terms." The district court ruled that the trailer so situated was such a building, and submitted to the jury the single question of whether the death was caused by the burning of the trailer, the jury finding for the plaintiffs. On appeal to the Court of Appeals for the Fifth Circuit, the holding of the district court on the nature of the trailer as a building within the meaning of the policy was affirmed. Judge Hutcheson, though writing the opinion for a unanimous court, went further in his characterization of a trailer as a building than his colleagues were willing to follow. In his opinion he stated that "the trailer's mobility is of small significance in determining whether, within the policy terms, it is 'a building'"; for the dominant consideration lay in the fact that the trailer was built for use as a dwelling house, and this purpose persisted whether the trailer was fixed on jacks or was running on its wheels.

2 In the courts' opinions the policy is referred to sometimes as a life policy and sometimes as an accident policy. The different terminology is immaterial to this discussion.
3 The Insurance Company also defended on the ground that the insured's death was caused by a gasoline explosion which preceded the fire, rather than by the burning of the trailer. The jury decided that death resulted from the burning, and this conclusion was accepted by the trial and appellate courts.
6 Aetna Life Ins. Co. v. Aird, 108 F. (2d) 136, 138 (C. C. A. 5th, 1939): "What is dominant here, as to the trailer, is the purpose for which it was built and used, and to which it is primarily adapted. That purpose, to be used as a shelter and habitation for deceased, in short, a dwelling house, stands out in and dominates the case. A dwelling house, constructed so as to be easily movable, at times running or standing on its wheels, at times, sitting fixedly on jacks or other rigid support, it is still at all times a dwelling house."

Judge Hutcheson seems to use the term "building" and "dwelling house" sy-
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The district judge had expressly declared that a trailer when attached to an automobile and moving along the highway “could not by any stretch of the imagination be conceived to be a building,” and the two circuit judges concurring in the result reached by Judge Hutcheson specifically limited their holding to “this trailer, circumstanced as it was at the time of the fire.”

Despite the fact that courts have occasionally purported to set up a general definition capable of covering the meaning of the word “building,” an examination of numerous case holdings makes it clear that the term is given widely varying significance by the courts when different issues are involved. Each decision is likely to furnish its own conclusion as to the import of the word, and a determination in one case that a certain structure is a “building,” may be given no weight as precedent for the question arising in a different type of case. Nor do the courts necessarily tend to adopt popular conceptions or the layman’s understanding of the scope of the term. Thus a fence to be put around a courthouse was held to be a “building” within the provisions of a statute requiring certain procedure for the letting of contracts for the construction of “public buildings”; and the English chancery court decided that a trelliswork screen erected by the tenant on the leasehold was a “building,” the erection of which violated a covenant in the lease whereby the tenant promised not to construct any “building” without the consent of the landlord.

Although the fact that a structure is fixed to the land and not

necessarily; but for the purpose of the principal case this usage would have no significance.

10In the principal case the concurring judges, Sibley and Holmes, denied that the burglary cases cited by Judge Hutcheson were in point in regard to the meaning of an accident policy. Aetna Life Ins. Co. v. Aird, 108 F. (2d) 136, 138 (C. C. A. 5th, 1939).
11Courts sometimes adopt the interpretation of the word “building” as used by the layman when such interpretation will strengthen their argument toward the desired result. See Rouse v. Catskill and N. Y. Steamboat Company, 59 Hun 80, 15 N. Y. Supp. 126 (1891).
12Swasey v. Shasta County, 141 Cal. 302, 74 Pac. 1091 (1903).
capable of being easily adapted for movability aids in identifying it as a "building," the conclusion does not follow that movable objects can not be held to fall within the same classification. In cases arising under the common law or under criminal statutes defining burglary as "breaking and entering a building...", a sheep wagon used as habitation by sheepherders on the range was held to be a "building,"14 and a popcorn and peanut vendor's wagon was given the same standing.15 Similarly the New Jersey court held a movable lunch wagon to be a "building" within the meaning of a fire ordinance requiring inspection of buildings by city officials.16 Freight cars have been denominated "buildings" in cases arising under burglary17 and arson18 statutes. But as against these decisions, one court ruled that a box car is not a "building" such as to satisfy the clause in a deed that the grantee-railway should erect a building for a depot on the land conveyed.19 A floating wharf for receiving, storing, and forwarding goods in river traffic was found to be subject to a mechanics' lien under a statute allowing such liens to be filed against "buildings."20 In Inter-Ocean Casualty Co. v. Warfield,21 the Arkansas court, construing an insurance policy provision closely similar to the one involved in the principal case, held that the insured was entitled to recover for injuries suffered in a fire which burned a "quarter boat" in which insured and other workmen lived while employed by the government on a river improvement project. Despite the apparent readiness of the courts to find that objects adapted to movability are "buildings," a Maryland decision held that the term "building" could not be appropriately applied to a schoolhouse which was constructed so as to rest directly on the ground without any foundation, and which, though it had on occasion been moved from place to place within the city, could only be moved by being taken to pieces and transported section by section to the new location, to be reassembled there.22


14State v. Ebel, 92 Mont. 418, 15 P. (ad) 293 (1932).
17State v. Anderson, 154 Iowa 701, 135 N. W. 405 (1912) (wheels and trucks of car had been removed, and body rested on timbers on ground).
19St. Louis Ry. Co. v. Berry, 86 Ark. 309, 110 S. W. 1049 (1908) (deed did not use word "building"; it called for "depot" to be put on land, and court held "depot" necessarily involves a "building").
20Olmsted v. McNall, 7 Blackf. 387 (Ind. 1845).
2173 Ark. 287, 292 S. W. 129 (1917).
22Whiteley v. Mayor and City Council of Baltimore, 113 Md. 541, 77 Atl. 882 (1910).
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Obviously, no simple rule of thumb generalization can be applied to determine whether an object will be classified as a building or as a non-building. But the apparent inconsistencies among decisions, and the outwardly surprising rulings which sometimes appear can very often be fully explained or justified by an examination of the individual cases, with regard to the particular end to be attained by holding that a structure is or is not a building. Where the public purpose of a statute or the private purpose of a contract can be served only by finding that a "building" does or does not exist, the courts will reach the conclusion needed to effectuate that purpose—within the bounds of rational determination, of course. Thus in the portable schoolhouse case, the Maryland court was confronted with a statute which required that before a city passed an ordinance for the opening of a new street, it must file with certain officials a map showing the location of all buildings which were so situated as to be disturbed by the opening of the new street. In the instance in question, the map filed by the city had not marked the position of the portable schoolhouse, though it was in the route of the proposed street. The court was clearly correct in holding that the schoolhouse was not a building within the meaning of the statute, inasmuch as the structure could readily be moved out of the area without damage, and thus could not become the subject of a claim against the city for compensation. On the other hand, the protection of the public against the theft and destruction of property requires that burglary and arson statutes be given broad application, and thefts or burnings involving structures of doubtful classification should be included within the penalties of the statutes. Similarly the public

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23Whiteley v. Mayor and City Council of Baltimore, 113 Md. 541, 77 Atl. 882 (1910).  
24People v. Burley, 26 Cal. App. (2d) 213, 79 P. (2d) 148 (1938); State v. Anderson, 154 Iowa 701, 135 N. W. 405 (1912); State v. Sanders, 81 Kan. 836, 106 Pac. 1029 (1910) (cave mostly below the surface of the ground but having a roof and a door made of lumber was held to be a "building" within a statute making it a misdemeanor to injure or destroy the doors and windows of a building); State v. Ebel, 92 Mont. 413, 15 P. (2d) 293 (1932); State v. Lintner, 19 S. D. 447, 104 N. W. 205 (1905). But cf. Rouse v. Catskill and N. Y. Steamboat Company, 59 Hun 80, 15 N. Y. Supp. 126 (1891), aff'd, adopting lower court opinion, 133 N. Y. 679, 31 N. E. 623 (1892), in which a statute provided that any person allowing liquor to be sold in a "building" of his ownership should be liable in damages to dependents of one who drinks liquor in the building and whose subsequent death is caused by the resulting intoxication. The court held that a river steamboat was not a building within this statute. If the public needs such protection at all, that need would seem to extend to the selling of intoxicants on steamboats as well as in saloons. But the court openly expressed its disapproval of the statute and declared that its application should be strictly limited and not extended beyond its "evident meaning."
interest in guarding against loss of life and property by the fire justified the holding that the lunch wagon was a building within the terms of the fire inspection ordinance.25 Further, the statute requiring a specific procedure for the letting of contracts to construct public buildings presupposes that the protection of the public against the misusing of public funds by government officials demands such regulations. Since the funds may be wrongly expended in building a fence around a courthouse as well as in building the courthouse itself, the court very properly held that such a fence was a building within the statute.26 When the argument was made to the Indiana court that the statute providing for mechanics' liens on buildings could not be applied to floating wharves, the answer was that "the statute, being remedial, should receive such a construction as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy."27 And in order to enable the workmen who had repaired the wharves to enforce payment for their services, the wharves were held to be "buildings."

Where the term "building" as employed in a private contractual instrument is before the court for interpretation, the same considerations are involved. Whether or not a certain structure is included in the reference must depend on which decision will carry out the purpose and intention of the parties. Thus, when the landowner conveyed land to a railway company with the stipulation in the deed that as part of the consideration for the conveyance the railway should maintain a depot on the land, it seems certain that the landowner was demanding something more substantial than a boxcar parked on a side track and available for storing freight. He contemplated a permanent structure for the accommodation of passengers and freight, such as a railroad ordinarily erects at stopping places along the line.28 And the English landlord who desired to prevent his tenant from putting up buildings on the leased property without permission, may well have been as anxious to avoid having his premises defaced or his adjoining property injured by the contruction of a trelliswork screen as by the raising of a stable or woodshed.29 In the insurance contract, the intention of the parties is likewise controlling, with the courts here having available for use the established rule that the terms of the policy are to be construed most

26Swasey v. Shasta County, 141 Cal. 392, 74 Pac. 1031 (1903).
27Olmsted v. McNall, 7 Blackf. 387, 388 (Ind. 1845).
29Wood v. Cooper, [1894] 3 Ch. 671.
strongly against the insurer. Where the insured lived even temporarily in the boat in which he was burned, it would seem that a court need apply no particular favoritism to the insured to conclude that for the purposes of this case the boat was a building within the terms of the insurance contract. It is no doubt true that the company did not intend to insure against all hazards to life and limb attendant on travelling by boat. But unless the fire causing the injuries of insured was of such a nature as to be likely to occur only in the case of boats as distinguished from structures attached to land, the particular loss involved is not outside the intended coverage of the policy. Similarly, in the principal case when insured died in a fire which burned his trailer, his death was caused by such a disaster as the parties must have contemplated—so long as the occurrence of the fire was not peculiarly affected by the fact that a trailer, rather than an immovable structure was involved. When a trailer is attached to an automobile and moving along the highway, persons riding in it are doubtless subjected to various kinds of risk which insurance companies never intended to assume in writing policies covering “death by the burning of a building.” If the trailer is damaged in a manner characteristic of automobile accidents, and burns as a result thereof, the insurer should not be held liable under such policy terms. But if the burning was not materially influenced by the character of the trailer as a travelling structure, imposing liability on the insurer does not seem unreasonable, because only the type of risk contemplated in the policy is involved. Thus, neither the restrictive view of the concurring judges nor the expansive declarations of Judge Hutcheson would seem to include a safe generalization. Whether a trailer moving on the highway or stationed on a lot can furnish the subject of “the burning of a building” within the terms of the policy, should depend on whether the fire occurs in a manner and effect usual in the case of the burning of immovable structures.

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31 Inter-Ocean Casualty Co. v. Warfield, 173 Ark. 287, 292 S. W. 129 (1927).
32 Aetna Life Ins. Co. v. Aird, 108 F. (2d) 136 (C. C. A. 5th, 1939). Of course, the risk of being burned in a trailer is greater than the risk in a fireproof house, because trailers are flimsy and often made of inflammable materials. But there seems no difference between the risk in a trailer and in an insubstantial wooden immovable structure, which latter would be conceded to be a “building.”
33 See Aetna Life Ins. Co. v. Aird, 108 F. (2d) 136, 138 (C. C. A. 5th, 1939). Judges Sibley and Holmes in the concurring opinion said: “While so used [a trailer rolling down the highway] the risk of collapse and perhaps of fire would be very different.”
* Written in collaboration with the Editors.
INTERSTATE COMMERCE—VALIDITY OF SALES TAX AS APPLIED TO COMMODITIES SHIPPED INTO STATE FROM ANOTHER STATE. [United States Supreme Court]

The clause in the Federal Constitution providing that commerce among the several states shall be regulated by Congress has never been interpreted as imposing an absolute prohibition on state action in this field. And in order to insure the harmonious operation of powers reserved to the states with those conferred upon the national government, it has been necessary for the courts to make a reconciliation of competing constitutional demands. It is evident that commerce between the states must not be unduly hindered by state action, and that at the same time power to lay taxes for the support of a state government must not be too strictly curtailed.

A state-imposed tax which operates to regulate commerce between the states to an extent that infringes the power conferred upon Congress clearly exceeds constitutional limitations. Any form of state taxation the effect of which is to place interstate commerce at a competitive disadvantage with intrastate commerce is an unconstitutional exercise of taxing power. But the mere fact that a tax has an incidental and indirect effect is no cause to relieve those engaged in interstate commerce of their just share of state tax burdens. There is no prohibition of nondiscriminatory taxation of the instrumentalities of interstate com-

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2U. S. Const. Art. I, § 8, cl. 3.


4Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23 (U. S. 1824).


merce. Property is taxable before its movement across a state boundary, and likewise after such movement has terminated.

In the recent case of McGoldrick v. Berwind-White Coal Mining Co., the Supreme Court was faced with the problem of whether a New York City sales tax violated the commerce clause. New York City, duly authorized by the state legislature, placed a two per cent tax on purchases of tangible personal property. The respondent, a Pennsylvania corporation, produced coal in its mines in that state and sold it to consumers and dealers (largely public utility and steamboat companies) in New York City. The contracts of sale were made by the company through its New York City sales office. The coal was generally moved by rail from the mine to the Jersey City dock, and thence by barge to the point of delivery at the purchasers' plants or steamships. Having paid the sales tax, the respondent sought an order directing the comptroller to make a refund, contending that the tax was an infringement upon interstate commerce. The Supreme Court, with three Justices dissenting, held the tax valid. As a basis for its position, the Court stated that taxation of a local business, separate and distinct from transportation which was interstate commerce, was not forbidden merely because it was induced or occasioned by such business. The coal upon transfer of possession to the purchaser at the end of an interstate journey was no longer in interstate commerce, and was subject to the sales tax because the transfer of possession was the taxable event, regardless of the time and place of the passing of title. The Court agreed that a state tax upon the operations of interstate commerce measured by gross receipts derived from such commerce was an infringement of the commerce clause, but it held that this tax was conditioned a local activity, i.e., delivery of goods within the city, so that there was neither discrimination against nor obstruction of interstate commerce.

The respondent corporation, however, insisted that a distinction be made between sales with no previous contract, transacted after passage into another state, and sales the contracts for which when made

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60 S. Ct. 388, 84 L. ed. 343 (1940).
contemplated transportation across a state line. It maintained that sales of the latter class were protected by the commerce clause. In this respect Banker Brothers v. Pennsylvania\textsuperscript{10} presented a problem somewhat similar to the present situation. In that case a local automobile dealer sought to combat a one percent tax imposed upon sales of automobiles within the state. Its contention was that the tax was a violation of the commerce clause, since the cars came from a manufacturer in another state in response to the dealer’s orders. But the court found the taxable transaction wholly intrastate, there being no agency relationship between manufacturer and dealer in so far as the ultimate purchaser was concerned. Since title was transferred from manufacturer to dealer, and from dealer to purchaser, there were two sales. This case then, cannot be considered as authority, technically, for the present decision on this point, for it would make no difference whether the shipment interstate came before or after the purchaser’s orders. The second sale was intrastate and taxable as such.

In Wiloil Corporation v. Pennsylvania\textsuperscript{11} the factual situation was somewhat different and more closely analogous to the principal case. An order for a shipment of oil was placed by a Pennsylvania customer with a distributor having headquarters in Philadelphia. Pursuant to this order, the distributor purchased oil in Delaware and had the shipment made directly to the customer. The Court in sustaining a sales tax upon the transaction, held that interstate shipment was neither contemplated nor required by the contract for sale, and since the orders could have been filled from sources in Pennsylvania, it deemed the interstate transportation merely incidental. However, it is doubtful that this case is absolute authority for the Court’s refusal in the Berwind-White case to make a distinction between sales contemplating and requiring interstate movement, and sales made after such shipment.

Closer to the principal case is Graybar Electric Co. v. Curry,\textsuperscript{12} which was decided upon the authority of the Banker Brothers and Wiloil cases. Alabama purchasers ordered goods from a dealer in electrical supplies who maintained a sales office and warehouse in that state. The goods were shipped directly from an out of state manufacturer to the Alabama purchaser, the manufacturer billed the dealer, and the dealer billed the purchaser. The dealer also maintained a warehouse in Georgia, and orders which could not be filled from stock in the Ala-

\textsuperscript{10}222 U. S. 210, 32 S. Ct. 38, 56 L. ed. 168 (1911).
\textsuperscript{12}60 S. Ct. 139, 84 L. ed. 97 (1939).
bama warehouse were billed by direct shipment to the purchasers from the Georgia warehouse. The first of these situations involved two sales and, except that it necessitated but one delivery, was analogous to the Banker Brothers case. The second situation was very close to the principal case, the goods being supplied from stock of the dealer warehoused out of the state and requiring interstate delivery to reach the purchaser. Contracts were presumably made prior to the shipment across a state boundary and obviously contemplated such shipment, but the Court sustained a sales tax in both situations. The sales were held to be local transactions, the interstate character of the shipment was deemed to be incidental, and the contracts for the sales were thought neither to require nor contemplate transportation in interstate commerce.

The Berwind-White case differs from the second method of distribution in the Graybar case in that no coal was stored in New York so that any fulfillment of orders necessitated an interstate shipment. Yet the Court said "we have sustained the tax where the course of business and agreement for sale plainly contemplated the shipment interstate in fulfillment of the contract," and cited the Wiloil and Graybar cases. It is to be noted that in those cases, the Court specifically stated that the contracts for the sales did not contemplate nor require interstate shipment. Regardless of this inference to the contrary, the Court here decided that commerce would be subjected to no greater burden whether the contracts were solicited before or after the interstate shipment.

It was further contended that the conclusion reached in the present case would be inconsistent with those decisions which held invalid attempts to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. However, the Court stated

\[\text{McGoldrick v. Berwind-White Coal Mining Co., 60 S. Ct. 388, 397, 84 L. ed. 343 (1940).}\]
that such rule was narrowly limited to fixed-sum license taxes imposed on the business mentioned. The taxes in those cases seem to have been aimed at suppression of this business when brought into competition with intrastate sales, and clearly should be declared invalid.

It was last argued that the tax was measured by gross receipts derived from interstate sales and thus reached for taxation commerce both within and without the taxing state. The Court admitted that a "tax upon the operation of interstate commerce measured either by its volume or the gross receipts from it" would infringe upon the commerce clause for this very reason; but it held that this tax was upon a local sale—"a local activity [...] delivery of goods within the taxing state upon their purchase for consumption"—there being no attempt to tax anything in Pennsylvania. The Court said:

"The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce." Mr. Chief Justice Hughes, in whose dissent Justices McReynolds and Roberts concurred, felt that the delegation to Congress of power to regulate commerce among the states had as its purpose the safeguarding of a free national market and the prevention of erection of state trade barriers. The case of Robbins v. Shelby County Taxing District, established the doctrine that a state cannot tax interstate sales. The Court there held invalid a tax imposed upon an agent soliciting orders for subsequent delivery from an extrastate merchant. The actual decision in the case was satisfactory, but its dictum seemingly stated too universal
a rule in the declaration that "Interstate commerce cannot be taxed at all, even though the same amount of the tax should be laid on domestic commerce. ..."21 The Chief Justice did not go this far but stated a general rule that state taxation of interstate commerce "either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it"22 would be beyond the limitations set by the Constitution.23 He further thought it was a direct burden on interstate commerce since it was imposed immediately upon the gross receipts of that commerce.

The minority argued for disallowance of the tax on still another ground—the possibility that each state through which the commerce passed might impose similar taxes with equal right. It contended that Pennsylvania might tax the shipment of the coal just as New York has taxed the delivery, and in that manner subject the interstate commerce to a double burden. The majority held the delivery an event taxable only in New York and in that way attempted to avoid the argument of cumulative taxation. But the contention was not conclusively answered. The Chief Justice considered the shipment, transshipment, and delivery all integral parts of an interstate sale and saw no reason why New York should have more right to tax than Pennsylvania. It is but a matter of conjecture as to what the Court would do in the event that Pennsylvania attempted to tax the sales by virtue of the shipment within that state. It might, as the majority hints here, invalidate such a tax in the state of origin by holding the delivery the only taxable event of the transaction. But the minority has raised a point which is not decided here, and which, in the near future may arise for determination.24

This decision has adopted the test of transfer of possession as the point where interstate commerce ceases for purposes of a nondiscrim-

22Robbins v. Shelby County Taxing District, 120 U. S. 489, 497, 7 S. Ct. 592, 596, 30 L. ed. 694 (1887).
25Thomas Reed Powell suggests that Pennsylvania would hardly impose a tax upon the shipment for such would be prejudicial to its own coal industry. For a complete discussion of the case, see Powell, New Light on Gross Receipts Taxes—The Berwind-White Case (1940) 53 Harv. L. Rev. 909.

It is also of interest to note McGoldrick v. Compagnie Generale Transatlantique, 60 S. Ct. 670, 84 L. ed. 672 (1940) which sustained the New York City sales tax when applied to sales within the city of fuel oil from storage tanks in New Jersey. The oil was transported to New York piers and then sold and delivered to ships from foreign countries.
inatory sales tax. In effect, this is the adoption of the rule established in the use tax cases which hold that once the goods come to rest a non-discriminatory tax upon use or enjoyment may be levied on the users to be collected by the seller.\textsuperscript{25} Technically, interstate commerce may now be said to end when there is a transfer of possession of the goods; but practically it may be said that interstate sales are taxable (if the sales tax is nondiscriminatory) since the consummation of every interstate sale must necessarily include "a coming to rest" at point of destination and an unloading or delivery of the physical object sold.

FRANK C. BEDINGER, JR.

PROCEDURE—WHETHER RADIO BROADCASTING COMPANY IS SUBJECT TO JURISDICTION OF COURTS OF STATE IN WHICH BROADCAST IS HEARD OVER LOCAL AFFILIATED STATION. [Washington]

The Columbia Broadcasting Company, a New York corporation, had leased the facilities of the Queen City Broadcasting Company, a Washington State corporation, to retransmit programs originating in Columbia's studios, and in studios of affiliated stations. These programs were furnished to the local station over program transmission lines. In the course of a Columbia broadcast emanating from an affiliated station in St. Louis, and broadcast in Washington State through the facilities of the Queen City station, statements allegedly defaming the Waldo Hospital Association of Washington were made. The Hospital Association, in an action for damages for defamation, joined the Columbia Broadcasting Company as defendant with the Queen City Company. In an original application to the Supreme Court of Washington for a writ of prohibition,\textsuperscript{1} Columbia questioned the power of the State of Washington to subject it to the jurisdiction of its courts. The Washington court held, in \textit{State ex rel. Columbia Broadcasting Co.}


\textsuperscript{1}This device has been increasingly and effectively employed in preventing trial courts from taking jurisdiction where none exists in fact, and has done much to reduce the unnecessary time and expense of litigating issues beyond the power of the trial court to entertain. Jardine v. Superior Court in and for Los Angeles County, 213 Cal. 501, 2 P. (2d) 756 (1931), 79 A. L. R. 291 (1932); Westinghouse Electric and Mfg. Co. v. Justices' Court of Corcoran Tp. in and for Kings County, 79 Cal. App. 413, 250 Pac. 1104 (1926); Baltimore Mail S. S. Co. v. Fawcett, 269 N. Y. 379, 199 N. E. 628 (1933).
v. Superior Court of King County, with one justice dissenting, that Columbia was "doing business" in Washington State to an extent sufficient to make it amenable to suit in the courts of that state, and that service of process on the general manager of the Queen City Company was good service of process on Columbia.

The complexity of the problem of a state's power over a nonresident corporation doing business in the state is attested by a marked lack of harmony in both state and federal decisions. No general rules are deducible from the decided cases and the courts seem content to decide each case upon its own facts. The novel character of an advertising business carried on through the medium of radio, renders factual analogies both attenuated and unsatisfactory.

"The foundation of jurisdiction is physical power," but when, in the absence of express consent, does a state have this power over a nonresident corporation? In general, a state may exclude a foreign corporation from doing domestic business within the state, and it may impose the condition precedent to its doing such business that it submit to service of process of the state courts. Further, a state may impose such conditions even on corporations engaged in interstate commerce, so far as acts done within the state are concerned. Absent express consent, three possible theories may be suggested as supplying the foundation of the court's jurisdiction over foreign corporations doing business within

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296 P. (2d) 248 (Wash. 1939). An appeal to the United States Supreme Court is pending, 8 U. S. L. Week 493.


St. Louis S. W. Ry. of Texas v. Alexander, 227 U. S. 218, 33 S. Ct. 245, 57 L. ed. 486 (1913); Hutchinson et al. v. Chase & Gilbert Inc. et al., 45 F. (2d) 139 (C. A. 2d, 1930).


Paul v. Virginia, 8 Wall. 168 (U. S. 1868); Scott, Jurisdiction Over Non Residents Doing Business Within a State (1919) 32 Harv. L. Rev. 871.


the state. One theory is that of "implied consent," presumed from the acts of the corporation in doing business in the state. This concept has been generally discarded in the more recent decisions as fictional. Another theory is that of "presence," which still is widely adhered to, but which would seem to be inapplicable to the principal case in the light of Bank of America v. Whiting Central National Bank. A third theory is that of "submission," based on principles of justice which require a corporation doing business within a state to submit to the jurisdiction of its courts to the extent that its laws provide for the exercise of jurisdiction and are reasonable. As indicated by Judge Learned Hand with reference to the "presence" doctrine, these theories do no more than put the question to be answered. Each of them leaves unsolved the nebulous and elusive question of whether the foreign corporation is "doing business" within the state; and an affirmative answer to this query is essential to the application of any principle giving jurisdiction to the courts of the state.

It is not the purpose of this discussion to attempt a general examination of the judicial scope of the term "doing business"; and no

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23Beale, The Conflict of Laws (1935) §§ 89.5, 89.6, 89.7, 89.8; Scott Jurisdiction over Non Residents Doing Business Within a State (1919) 32 Harv. L. Rev. 871.
24In Railroad Co. v. Harris, 12 Wall. 65, 81, 20 L. ed. 354 (U. S. 1870), Mr. Justice Swayne said: "If it do business there, it will be presumed to have assented and will be bound accordingly." Similar language is found in other cases. See, Robert Mitchell Furniture Co. v. Selden Breck Const. Co., 257 U. S. 215, 42 S. Ct. 84, 66 L. ed. 201 (1921); Old Wayne Mutual Life Ass'n v. McDonough, 204 U. S. 8, 27 S. Ct. 236, 51 L. ed. 345 (1907); Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451 (U. S. 1855).
25In Flexner v. Farson, 248 U. S. 289, 293, 39 S. Ct. 97, 98, 63 L. ed. 250 (1919), Mr. Justice Holmes said: "But the consent that is said to be applied in such cases is a mere fiction, founded on the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in." See also, Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co., 243 U. S. 93, 37 S. Ct. 344, 61 L. ed. 610 (1917).
29Hutchinson et al. v. Chase & Gilbert, Inc. et al., 45 F. (2d) 139 (C. C. A. 2d, 1930).
cases have been found which purport to apply to the specific business of radio broadcasting such general principles as may be thought to be available as guides in cases involving other types of enterprises. The case of *Fisher's Blend Station v. Tax Commission*,\(^\text{19}\) strongly relied on by the majority in the principal case, holds no more than that radio broadcasting is essentially interstate in character.\(^\text{19}\) It does not reach the conclusion of the majority that the broadcasting company is therefore present and carrying on business\(^\text{20}\) in those states in which the broadcast is heard. In *Hoffman v. Carter*,\(^\text{21}\) when that case was first before the Supreme Court of New Jersey, language was employed from which a conclusion contrary to that of the principal case could be inferred.\(^\text{22}\) However, on a re-appeal\(^\text{23}\) that court expressly reserved decision on the question of whether the delivery to radio receivers in New Jersey, of programs transmitted by the Columbia Broadcasting Company in New York, could be considered in any sense to constitute the doing of business in New Jersey. Many cases involving other businesses are of but negative assistance, in that they merely hold that a particular activity does not constitute doing business, and do not attempt to state what activities do amount to doing business.\(^\text{24}\) But it is apparent

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\(^{19}\) *297* U. S. 650, 56 S. Ct. 608, 80 L. ed. 956 (1936).

\(^{20}\) This point was made by Mr. Justice Robinson, dissenting in *State ex rel. Columbia Broadcasting Co. v. Superior Court for King County*, 96 P. (2d) 248, 250 (Wash. 1939); and the holding of *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650, 56 S. Ct. 608, 80 L. ed. 956 (1936), would appear to be correctly confined to the minority interpretation.

\(^{21}\) In *Consolidated Textile Corp. v. Gregory*, 289 U. S. 85, 53 S. Ct. 529, 77 L. ed. 1047 (1933) the Supreme Court of the United States reaffirmed the proposition laid down in *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 87, 38 S. Ct. 233, 235, 62 L. ed. 587 (1918) that, "The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction. ..." Engaging in interstate commerce, alone, would not necessarily meet the requirements of this rule, and the inference of the majority in the principal case would seem to be erroneous in this respect.

\(^{22}\) *117* N. J. L. 205, 187 Atl. 576 (1936).

\(^{23}\) In *117* N. J. L. 205, 187 Atl. 578, 577, 578 (1936) the court emphasized the fact that Columbia's acts were done in New York and that but for the independent acts of the local station nothing would transpire in the state of New Jersey.


that among the courts generally a practice or policy prevails whereby a minimum of activity is held to afford a basis for finding that a corporation is doing business within a jurisdiction and thus is amenable to service of process on its agents therein. However, the decisions are progressively stricter in requiring more activity for a holding that jurisdiction exists for purposes of taxation and of regulation. This minimum requirement for purposes of service of process would appear to be satisfied in the case of the Columbia Broadcasting Company, for although its programs emanated from an affiliated station outside of Washington State, the essential ends and conceded objects of the advertising business were accomplished only when they were received in homes all over the state. Advertising with Columbia is a business within itself, as distinguished from mere solicitations that are incidental to a business concern which is engaged in the actual selling and delivery of its products. Unlike these incidental solicitations, which are isolated and occasional in their nature, the acts of the Columbia Broadcasting Company are continuous. Regardless of the medium it chose, Columbia projected its advertising business into the State of Washington. It should be answerable in the courts of Washington for wrongs arising out of such business. Of the three possible theories of jurisdiction, it would appear that the theory of "submission" may correctly be applied to hold Columbia subject to the jurisdiction of the state court.

But in service of process on a foreign corporation two elements are necessary: the transaction of business, and an agent through whom the corporation can be reached. This agent must bear such a relation to the corporation as to sustain the conclusion that he has power to

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25International Harvester Company of America v. Commonwealth of Kentucky, 234 U. S. 579, 34 S. Ct. 944, 58 L. ed. 1479 (1914) (a continuous course of business in Kentucky, the solicitation of orders which were sent to another state and in response to which the machines of the Harvester Company were delivered within the state, was held to amount to "doing business" in Kentucky to the extent which authorized service of process on its agents engaged in conducting the business; St. Louis S. W. Ry. of Texas v. Alexander, 227 U. S. 218, 33 S. Ct. 245 (1913) (where a railroad company establishes an office in a foreign district and its agents there attend to claims presented for settlement, it is carrying on business to such an extent as to render it amenable to process under the laws of that state); Isaacs, An Analysis of Doing Business (1925) 25 Col. L. Rev. 1018.
receive such service. In the principal case this relationship could have been found, had there been in Washington State an agent duly consented to, a public official either consented to, or not consented to, or a "representative agent." The failure of either the Queen City Broadcasting Company or its manager to fall convincingly into any of the four named categories, as shown by an examination of the contract, displays an inherent weakness in the decision of the principal case. This difficulty of finding an agent on whom process may be served points to the need for legislation providing for statutory agents for the service of process on foreign broadcasting corporations.

William S. Burns

STATUTE OF LIMITATIONS—PERIOD OF LIMITATION APPLICABLE TO A SUIT ON A NEW PROMISE. [Virginia]

In 1938, the plaintiff instituted suit against the defendant to recover the balance due on a sealed promise to pay a debt made in 1923, payable on demand. The defendant filed a plea of the Statute of Limitations, alleging that suit on the instrument was barred by the ten-year limitation. Plaintiff then gave notice of his intention to rely upon the debtor's unsealed promise in writing, made in 1930, to pay the instrument. The defendant filed another plea of the Statute of Limitations, alleging that the claim sued on was barred five years after the date of the new promise. The sole issue was whether the limitation of ten


There is manifestly no question here of service upon a statutory agent, consented to or otherwise, since service was made pursuant to a Washington statute (Rem. Rev. Stat. § 226), providing for service upon "any agent" of the corporation. The contract between Columbia Broadcasting Company and the Queen City Broadcasting Company provides only for a leasing of facilities and broadcasting time for prescribed periods; and beyond a clause directing that Queen City shall obtain as much publicity for Columbia as possible, it is authorized in no way to act for Columbia, nor is it empowered in any respect to bind Columbia by its acts.

See, Restatement, Agency (1933) § 1.
years upon the sealed instrument or that of five years upon the new unsealed instrument, governed the period of limitation following the new promise.

The Court of Appeals of Virginia, faced with a case of first impression in the jurisdiction and thus proceeding without aid of local precedent, held in *Ingram v. Harris*¹ that the new promise merely revitalized the old debt and did not create a new and substantive contract, and that, therefore, the original ten-year period of limitation was applicable to the new promise.

Though this result might be considered to be in accord with the general rule announced by courts of other states, in order to evaluate the decision accurately, it is necessary to refer to the statutes involved and to the interpretation put upon them by the court. The Virginia Code of 1849 provided that in the case of a new promise, an action could be brought "within such number of years after the said promise, as it might originally have been maintained within upon the award or contract. . . ."² It is clear down to this point, as the court stated, that the period applicable to the original demand would govern the period of limitation following the new promise. When the Code was revised in 1887, however, the phraseology was changed to provide that an action could be brought on the new promise "within such number of years after such promise, as it might be maintained under section twenty-nine hundred and twenty,³ if such promise were the original cause of action."⁴ The revisors of the Code of 1919 adopted this language without charge,⁵ and the identical provision appears in the Code of 1936.⁶

The established rule of statutory construction is that the legislature will be held not to have intended to change the effect of the existing statute unless such intention clearly appears.⁷ Applying this rule, the

¹ 5 S. E. (2d) 624 (Va. 1939).
³ Section 2920 of the Virginia Code of 1887, as revised in Va. Code Ann. (1919) § 5810, provides that action may be brought upon any contract by writing under seal within ten years; if it be upon a contract not under seal, within five years. The same provision appears in Va. Code Ann. (Michie, 1936) § 5810.
⁷ Norfolk & Portsmouth Bar Ass'n v. Drewry, 161 Va. 833, 172 S. E. 282 (1934); Parramore v. Taylor, 11 Gratt. 220 (1854). Black, Interpretation of Laws (2d ed. 1911) 594: "When statutes are codified, compiled, or collected and revised, a mere change of phraseology should not be deemed to work a change in the law, unless there was an evident intention, on the part of the legislature, to effect such change."
majority of the court in the principal case was of the opinion that the revisors in 1887 did not intend to change the meaning of the law but merely to alter the phraseology. The provision "if such promise were the original cause of action" was held by the majority to mean "if the original cause of action had accrued at the date of such promise." However, if the Code of 1849 was perfectly clear, as the court itself stated, it would seem a logical assumption that the change in the language of the statute must have been made in order to alter the meaning. Otherwise, there would have been no reason for adopting the new phraseology. Surely the revisors would not substitute ambiguous terminology for clear statement, yet intend the statute to retain its original meaning. In the principal case, great weight seems to have been given to the address before the Virginia State Bar Association by Judge E. C. Burks, one of the revisors of the Code of 1887. The court felt that since he spoke of other changes in the Statutes of Limitations, he would have made some reference to this particular section of the statute had the revisors intended to make such an important change as that contended for in this case. But Judge Burks stated that he would only refer to a few of the more important changes, for otherwise his remarks would assume the length of a book. It is entirely conceivable that he thought this change was unimportant, and such an opinion is borne out by the fact that this is the first case requiring a construction of the statute since its enactment fifty-three years ago.

The insertion of the word new before the word promise in the section, "within such number of years after such [new] promise as it [the action] might be maintained under section fifty-eight hundred and ten, if such [new] promise were the original cause of action," as Mr. Justice Hudgins pointed out in his dissent, clearly shows that the intention was to make the form of the new promise the determining factor in fixing the new period of limitation. To say the least, if this interpretation had been adopted by the majority it would have done no undue violence to the words of the statute. The better rule would seem to be that the time should be extended by such a promise for the period allowed by law for the enforcement of simple contracts.

9See Ingram v. Harris, 15 S. E. (2d) 624, 627 (Va. 1939).
10Williston, Contracts (Rev. Ed. 1936) § 185.

If the intention of the revisors of the Code of 1887 was that the form of the old contract should govern the period of limitation of the new promise, it is submitted that such intention could have been plainly shown by employing the following language: "If any person against whom the right shall have so accrued on an award,
As a general rule, in other states, if the acknowledgment or new promise is made before the Statute of Limitations has run, the effect is to set aside the operation of the statute up to the time of the acknowledgment or promise, and to start the statute running anew against the original claim. But, when the acknowledgment or promise is made after the bar of the statute has become complete, the period of limitation is governed by the form of the new promise.

Even in the latter situation, however, there are numerous cases which apply the period of limitation that governs the original demand. The general view proceeds upon the theory that if the acknowledgment is made before the statute has run, it vitalizes the old debt, whereas if an acknowledgment is made after the statute has run, it creates a new cause of action. All authorities agree that the old debt or the moral obligation to pay, furnishes the consideration for the new promise. It is to be noted that in

or any such contract, shall, by writing signed by him or his agent, promise payment of money on such award or contract, the person to whom the right shall have so accrued may maintain an action for the money so promised, within such number of years after such promise as the original cause of action might have been maintained under section fifty-eight hundred and ten...

If the intention was that the form of the new promise should govern the new period of limitation, the following language would be appropriate: "If any person against whom the right shall have so accrued on an award, or any such contract, shall, by writing signed by him or his agent, promise payment of money on such award or contract, the person to whom the right shall have so accrued may maintain an action for the money so promised, within such number of years after such promise as it might be maintained under section fifty-eight hundred and ten, as if such new promise were an original cause of action.

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most jurisdictions, the statutes provide only that the new promise must be in writing and signed by the party to be charged, but make no provision as to the period within which an action may be brought on the new promise.\textsuperscript{15} It seems, therefore, that the courts have read into the statutes the distinction between a promise made before and a promise made after the bar of the statute has become complete. The decision in the principal case would place the Virginia statute in line with the general rule, so far as a promise made before the bar of the statute had run is concerned. Since the case did not involve a promise made after the bar of the statute was complete, and since the court expressed no opinion with reference to that question, assurance is lacking as to the court’s probable holding when such a case comes before it for decision.

The Virginia statute makes no distinction between a promise made before and one made after the running of the statute, and since it allows suit on either the original demand or the new promise,\textsuperscript{16} recognition of such a distinction by the court would be unnecessary. Yet it is difficult to see why the new period of limitation should be governed by considerations of whether the statutory bar was already complete when the new promise was made.\textsuperscript{17} Since the debt still exists in both instances, and only the remedy is gone where the bar is complete at the time of making the new promise, it would seem that the debt should be

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\item[464, 33 S. W. 410 (1895)] (no statute of limitation involved but there was a discharge in bankruptcy; since debt was discharged, moral obligation held sufficient consideration for the new promise).
\item[17] It may be suggested that a practical basis for the different rules exists in considerations of the meritorious character of the defendant-debtor’s conduct in the two cases. Where the bar has not yet run completely, the debtor by his new promise does not deprive himself of any existing defense, but merely postpones the time at which his defense of limitations may accrue. Though this is beneficial to the creditor, it may well be that the new promise is made with a view of aiding the debtor himself, as perhaps by persuading the creditor to refrain from immediate suit to collect the debt. On the other hand, where the bar has been completed before the new promise is made, the debtor seems voluntarily to give up an already perfect defense, and give the creditor a chance to enforce the obligation where without the promise there was no such chance. Thus, in the latter case, the debtor is more deserving of having the doubtful question of limitations determined in his favor. In most instances, the new promise would be made with less formality than the original promise, and to give the debtor his merited mercy would be to enforce the limitation period applicable to obligations in the form of the new promise. Though the courts have reached this result, none apparently has employed this type of reasoning.
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revived in both situations. But as previously stated the new period of limitation should be governed by the form of the new promise. The only thing that should turn upon the distinction is the matter of pleading—whether the plaintiff would sue upon the original claim or upon the new promise.

Roderick D. Coleman