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NOTES

THE FEDERAL INJUNCTION AND STATE COMMISSIONS: THE RULE OF THE *PRENTIS* CASE

The exercise by the federal courts of the power to enjoin activities of state regulatory commissions¹ has been subjected to much criticism,² since a great part of the litigation involves highly controversial questions of interpretation

¹ This power is based on the principle stated in *Ex parte Young*, 209 U.S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714 (1908): a state official exceeding the authority granted him by the state is personally subject to suit in the federal courts; the action is not one against the state, within the meaning of the Eleventh Amendment.

² As a result Congress has passed an act providing for a special three-judge federal court whenever an interlocutory injunction is sought to restrain the enforcement of any state statute,

of state constitutions and statutes on which state courts are best qualified to pass.³ It is not surprising, therefore, to find that the Supreme Court has evolved a number of limitations on this broad injunctive power.⁴

One such self-imposed limitation, first enunciated in *Prentis v. Atlantic Coast Line Co.*,⁵ requires the federal courts to refrain from enjoining the enforcement of orders of a state commission which are still subject to "legislative" revision by another state agency. Although the revising body may be termed a court, and may perform other functions of an undoubtedly judicial nature, it may be empowered by statute to revise commission orders upon the same general considerations—policy and expediency—that motivated the commission. Until such revision is completed an order is still in the "legislative" stage, and as a matter of "comity" it is thought best to require a litigant to exhaust his legislative remedies before appealing to the courts; he may eventually find it unnecessary to seek an injunction.⁶

or commission order under a state statute; see Judicial Code § 266, 36 Stat. 1162 (1911) 28 U.S.C.A. § 380 (1928); cf. the pending Johnson Bill, S. 752, which would deprive the federal courts of all injunctive jurisdiction over state legislative or administrative action; 1 U.S. Law Week 497 (1934); Hutcheson, *A Case for Three Judges*, 47 Harv. L. Rev. 795 (1934).

³ See Frankfurter and Landis, *Business of the Supreme Court at October Term, 1928*, 43 Harv. L. Rev. 33, 61-62 (1930); Lilienthal, *The Federal Courts and State Regulation of Public Utilities*, 43 Harv. L. Rev. 379 (1930); cf. Barnes, *Federal Courts and State Regulation of Utility Rates*, 43 Yale L. Jour. 417 (1934).

⁴ In *Gilchrist v. Interborough Rapid Transit Co.*, 279 U.S. 159, 49 Sup. Ct. 282, 73 L. Ed. 652 (1929), a complicated and important piece of utilities litigation was denied a federal adjudication, mainly because it presented primarily state issues and could be dealt with more effectively in the state courts. See Frankfurter and Landis, *supra* note 3; Lilienthal, *supra* note 3, 398-399. And recently, in *Glenn v. Field Packing Co.*, 290 U.S. 177, 54 Sup. Ct. 138 (1933), a decree of a federal district court that a state tax statute violated the state constitution was modified to permit further application to the court, "in case it shall appear that the statute has been sustained [subsequently] by the state court as valid under the state constitution."

⁵ 211 U.S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150 (1908). Holmes, J., said, "It seems to us only a just recognition of the solicitude with which [complainant's] rights have been guarded, that they should make sure that the State in its final legislative action would not respect what they think their rights to be, before resorting to the courts of the United States." (211 U.S. 210, 230).

⁶ This rule perhaps might have been based on general jurisdictional grounds; until a legislative order is in final, enforceable form, there is nothing to which an injunction will attach. However, the reason given for the rule was "equitable fitness and propriety," reduced in later cases to "comity." The rule has been applied to legislative proceedings other than appeals to courts, such as rehearings in commission, *Palermo Land & Water Co. v. Railroad Commission of California*, 227 Fed. 708 (D.C.N.D. Cal. 1915), appeal dismissed 225 Fed. 1022 (C.C.A. 9th 1915); *Columbia Railway, Gas & Electric Co. v. Blease*, 42 F. (2d) 463 (D.C.E.D.S.C. 1930). Other proceedings of administrative nature were pending in *Mellon Co. v. McCafferty*, 239 U.S. 134, 36 Sup. Ct. 94, 60 L. Ed. 181 (1915), and *Henderson Water Co. v. Corporation Commission*, 269 U.S. 278, 46 Sup. Ct. 112, 70 L. Ed. 273 (1925).

The rule has no application to a suit to enjoin enforcement of the statute which defines the commission's powers. *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 29 Sup. Ct. 192, 53 L. Ed.

On the other hand, the power of the revisory agency may be "judicial" in nature, confined to questions of the conformity of the order to constitutional and statutory requirements, not its policy or expedience. The "legislative" process is then deemed complete when the commission promulgates its order. Instead of applying to a state court for relief, a litigant may, if proper jurisdictional grounds exist, seek the assistance of a federal court, which is considered as competent as any state court to pass on questions of a judicial nature.⁷

Many states have constitutional or statutory provisions for the revision of orders,⁸ but the language used is often ambiguous and shows that the draftsmen did not have in mind the distinction drawn in the *Prentis* case. As a result, the application of the rule of that case to a particular statute may be difficult. If the highest court of a state has held that the type of review intended is either "legislative" or "judicial," the federal courts will respect that decision, provided that the state court's definition is not at variance with the federal concept of the two types of review.⁹ But in the absence of any determinative decision by the state tribunal, the federal courts must decide for themselves when the "legislative" process is complete.

The question then becomes: what are the criteria of each of the two types of review? It seems that the possible differentiating factors may be grouped as follows: (1) the scope of the revisory inquiry; (2) the form of the revisory proceeding; (3) the evidence which the revising agency may consider; (4) the power of

382 (1909). The rule is disregarded when, in the course of the legislative proceedings, there is a violation of due process, such as undue delay, *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 46 Sup. Ct. 408, 70 L.Ed. 747 (1926); or refusal of *supersedeas*, either by statute, *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U.S. 196, 44 Sup. Ct. 553, 68 L. Ed. 975 (1924), or by the reviewing body, *Oklahoma Natural Gas Co. v. Russell*, 261 U.S. 290, 43 Sup. Ct. 353, 67 L. Ed. 659 (1923). See Lillenthal, *supra* note 3, 391, 399 ff.

⁷ *Bacon v. Rutland R.R. Co.*, 232 U.S. 134, 34 Sup. Ct. 283, 58 L. Ed. 538 (1914). See Isaacs, *Judicial Review of Administrative Findings*, 30 *Yale L. Jour.* 781 (1921).

⁸ See note, 25 *Mich. L. Rev.* 178 (1926) for a list, now perhaps only partial, of these states, and a summary of the provisions. The present paper is confined, with few exceptions, to statutes which have been examined by the United States Supreme Court.

⁹ This was true in both the *Prentis* and *Bacon* cases, *supra* notes 5 and 7. *Winchester & S.R. Co. v. Commonwealth*, 106 Va. 264, 55 S.E. 692 (1906); *Bacon v. Boston & M.R.R.*, 83 Vt. 421, 457, 76 Atl. 128, 143 (1910). On the Virginia system, see Dobie, *Judicial Review of Administrative Action in Virginia*, 8 *Va. L. Rev.* 477, 557 (1922).

The statute allowing appeals from the Illinois Commerce Commission has never been examined by the United States Supreme Court; however, the Illinois Supreme Court has definitely determined that the statute provides for "judicial" review. *Ill. Cahill's Rev. Stat.* (1933), c. 111A, § 87; *People's Gas Co. v. City of Chicago*, 309 Ill. 40, 139 N.E. 867 (1923); *Wabash, C.&W. R.R. Co. v. Commerce Commission*, 309 Ill. 412, 141 N.E. 212 (1923). A provision that an order should not be set aside unless "against the manifest weight of the evidence" has been declared unconstitutional, since the judicial test is whether there is any substantial basis for the findings. *Commerce Commission v. Cleveland, C., C. & St.L. Ry. Co.*, 309 Ill. 165, 140 N.E. 868 (1923). See *Smith, Judicial Review of the Decisions of the Illinois Commerce Commission*, 24 *Ill. L. Rev.* 423 (1929).

the revising agency to modify the commission's order (as distinguished from affirmance or reversal *in toto*); and (5) the effect of the revising agency's determination as *res judicata*.

(1) *The scope of the revisory inquiry.* Direct statements as to the extent to which it is intended the revising agency shall have power to examine the commission's order are extremely rare. The clearest expression is found in a New York statute providing for review of the orders of the public service commission. The issues to be considered on review are limited to: (a) the authority of the inferior body to make the order; (b) the conformity of the order to law; (c) the competence of the proof taken; and (d) the consistency of the order with the weight of the evidence.¹⁰ This provision gives no power to consider the expedience of the order; the revision contemplated is definitely "judicial."

Several other types of provisions, although often found, are not as clear. For example, the reviewing agency may be directed to proceed as in chancery, and make its decision as law or equity shall require.¹¹ Perhaps on its face such a pro-

¹⁰ N.Y. Civil Practice Act (1927), §§ 1304, 1305. See *Prendergast v. New York Telephone Co.*, 262 U.S. 43, 43 Sup. Ct. 466, 67 L. Ed. 853 (1923). Compare the Supreme Court's analysis of "judicial" review in *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U.S. 452, 470, 30 Sup. Ct. 155, 160, 54 L. Ed. 280 (1910).

Compare also the analogous situation existing under the appellate provisions of the Federal Radio Act. The act of 1927, 44 Stat. 1169 (1927), 47 U.S.C.A. Supp. § 96 (1933), allowing appeals from the Federal Radio Commission to the District of Columbia Court of Appeals, was construed to establish "legislative" review. As a result, no appeal could be taken to the Supreme Court from the Court of Appeals, since the proceeding would be an original judicial action and would constitute an attempt to add to the original jurisdiction of the Supreme Court, in contravention of U.S. Const. Art. III. *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464, 50 Sup. Ct. 389, 74 L. Ed. 969 (1930); see Caldwell, *Appeals from Decisions of the Federal Radio Commission*, 1 *Jour. Air Law* 274, 276-279 (1930); notes, 29 *Mich. L. Rev.* 766 (1931), 1 *Jour. Air Law* 353 (1930). Congress then amended the Radio Act to limit the review of the Court of Appeals to "questions of law"; the fact findings of the commission to be "conclusive unless it shall clearly appear that the findings . . . are arbitrary or capricious." 46 Stat. 844 (1930), 47 U.S.C.A. Supp. § 96 (1933). The Supreme Court readily recognized that the section as amended provided for "judicial" review by the Court of Appeals; hence the proceedings before the Supreme Court were no longer original judicial proceedings, and constituted part of the appellate jurisdiction of the court. *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 53 Sup. Ct. 627, 77 L. Ed. 808 (1933). Cf. act providing for review of decisions of the Interstate Commerce Commission, 36 Stat. 542 (1910), 38 Stat. 219 (1913), 28 U.S.C.A. §§ 41 (28), 44-48, notes; Tollefson, *Judicial Review of Decisions of the Interstate Commerce Commission*, 11 *Minn. L. Rev.* 389, 504, 510 ff. (1927). See in general Albertsworth, *Judicial Review of Administrative Action by the Federal Supreme Court*, 35 *Harv. L. Rev.* 127 (1921).

¹¹ *Michigan*: Comp. Laws (1929), § 11042a; *Detroit & Mackinac Ry. Co. v. Michigan R.R. Commission*, 235 U.S. 402, 35 Sup. Ct. 126, 59 L. Ed. 288 (1914). *Minnesota*: Laws (1921), c. 278, § 10; *Railroad & Warehouse Commission v. Duluth Street Ry. Co.*, 273 U.S. 635, 47 Sup. Ct. 489, 71 L. Ed. 807 (1927); *Duluth v. Railroad & Warehouse Commission*, 167 *Minn.* 311, 209 N.W. 10 (1926). *Montana*: Rev. Code (1921), § 4038, as amended Laws (1931), c. 194, § 3; *Porter v. Investors' Syndicate*, 286 U.S. 461, 52 Sup. Ct. 617, 76 L. Ed. 1226 (1932). *Pennsylvania*: 66 *Purdon's Stats.* (1930) § 838; *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 40 Sup. Ct. 527, 64 L. Ed. 908 (1920). *Vermont*: Acts (1908), No. 116, § 12; *Bacon v. Rutland R.R. Co.*, *supra* note 7.

vision looks to a re-investigation of the facts only so far as is necessary to determine the legality of the order. But it is possible that the words "law" and "equity" are used in the loose sense of "justness," which would at least admit of the interpretation that the entire inquiry may be reopened, and questions of expediency and policy determined.¹²

Frequently the reviewing agency is authorized to determine the "justness"¹³ or "reasonableness"¹⁴ or "lawfulness"¹⁵ of the order. The first expression would seem to point to "legislative" review, including an examination of the underlying policy of the order. "Reasonableness" seems so ambiguous that it provides no clue either way: it might apply to the commission's exercise of discretion, or to the consistency of the findings with the evidence. "Lawfulness" perhaps tends to indicate that review of the legality, only, of the commission's findings is contemplated. The Supreme Court seems to attach no importance to these terms.

(2) *The form of the revisory proceeding.* A few statutes refer to the proceeding to review an order as an "action,"¹⁶ thus perhaps implying an original, not an appellate, proceeding. If original, the proceeding would seem to be "judicial" in nature, since only a "legislative" inquiry would be an appeal from, and part of, the commission's activities. The term, however, has been accorded little or no weight, and the colorless word "proceeding" is probably as satisfactory.

Conversely, several statutes provide for an "appeal" from the order of the commission.¹⁷ This word may be interpreted to refer to "legislative" proceedings, since it is a continuation of the activities of the commission, and not an original suit; and such an interpretation is especially plausible when the statute provides, as in Oklahoma, that the review by the state supreme court "shall complete the appeal allowed by law" from the assessment proceedings before an

¹² In the analogous situation of review of the orders of the Public Utilities Commission of the District of Columbia by the District Court of Appeals, the Supreme Court has construed the term "equity proceedings" to mean that a trial *de novo* may be conducted and such order promulgated as the commission should have made, and has thus held the review is "legislative." 37 Stat. 974, 988 (1913); *Keller v. Potomac Electric Co.*, 261 U.S. 428, 43 Sup. Ct. 445, 67 L. Ed. 731 (1922).

¹³ *Montana: supra* note 11. *Virginia: Const.* (1902), § 156 f.

¹⁴ *Michigan, Montana, Pennsylvania: supra* note 11. *Ohio: Throckmorton's Code* (1929), § 544; *Grubb v. Public Utilities Commission*, 281 U.S. 470, 50 Sup. Ct. 374, 74 L. Ed. 972 (1930); *Hocking Valley Ry. Co. v. Public Utilities Commission*, 92 Ohio St. 9, 110 N.E. 521 (1915); *Hocking Valley Ry. Co. v. Public Utilities Commission*, 100 Ohio St. 321, 126 N.E. 397 (1919); note, 29 Mich. L. Rev. 1067 (1931). *Virginia: supra* note 13. *Washington: Remington's Comp. Stat.* (1922), § 10428; *Pacific Tel. & Tel. Co. v. Kuykendall, supra* note 6; *Pacific Tel. & Tel. Co. v. Cushman*, 292 Fed. 930 (C.C.A. 9th 1923), cert. den. *Cushman v. Pacific Tel. & Tel. Co.*, 263 U.S. 729, 44 Sup. Ct. 181, 68 L. Ed. 529 (1924).

¹⁵ *Michigan, Pennsylvania: supra* note 11. *Ohio, Washington: supra* note 14.

¹⁶ *Michigan, Montana: supra* note 11.

¹⁷ *Minnesota: supra* note 11. *Ohio: supra* note 14. *Oklahoma: Stat.* (1931), § 12661; *Ex parte Oklahoma*, 37 F. (2d) 862 (C.C.A. 10th 1930); *Kansas City Southern Ry. Co. v. Cornish*, 65 F. (2d) 671 (C.A.A. 10th 1933); *Anderson v. Ritterbusch*, 23 Okla. 761, 98 Pac. 1002 (1908); *In re Earlsboro Assessment*, 25 P. (2d) 632 (Okla. 1933). *Vermont: supra* note 11. *Virginia: Const.* (1902), § 156d.

administrative board, and that this statutory provision "shall be construed to give remedies and rights in addition to those of appeal heretofore given by statute, but the remedies of resort to the boards and appeal therefrom shall be the sole remedies for the correction of assessment or equalization."¹⁸ In general however, it seems probable that the word "appeal" is used in the loose sense of invoking the aid of the revisory agency, and conveys no information as to the type of proceeding contemplated.

The fact that the reviewing agency is authorized to grant a *supersedeas*, or stay of enforcement, of the order pending review,¹⁹ seems of little importance in determining the character of review intended, although it may raise a question of compliance with due process.²⁰

(3) *The evidence which may be considered by the revising agency.* The practice has become quite general to confine the review of the commission's orders to the transcript of the proceedings before the commission, and to exclude additional evidence.²¹ Such a limitation might seem to indicate that "legislative" review was contemplated, since the orthodox theory of original "judicial" proceedings requires that evidence be collected through the court's own fact-finding agencies. To some extent this conclusion is sanctioned by the recent Supreme Court case of *Crowell v. Benson*,²² holding that, at least under the federal separation of powers, a reviewing court may not be confined to the transcript of commission proceedings in so far as "jurisdictional facts" are in issue, the existence of which is a statutory condition precedent to the power of the commission to act. The decision was limited expressly to the federal constitutional system; but most state governments are similar in structure and embody the same principles of an independent judiciary; hence *Crowell v. Benson* would seem to be a very persuasive authority.

The limits of this "jurisdictional fact" doctrine are still undefined, and its ap-

¹⁸ Okla. Stat. (1931), §§ 12661, 12663.

¹⁹ *Supersedeas* is expressly permitted in *New York*, *supra* note 10; *Ohio*, *supra* note 14; *Pennsylvania*, *supra* note 11; and *Washington*, *supra* note 14, all of which have "judicial" review; also in *Virginia*, Const. (1902), § 156e, where review is "legislative."

²⁰ See *supra* note 6; also *Porter v. Investors' Syndicate*, *supra* note 11. Cf. *Banton v. Belt Line Ry. Corp.*, 268 U.S. 413, 45 Sup. Ct. 534, 69 L. Ed. 1020 (1925).

²¹ *Michigan*: *supra* note 11. *Nebraska*: Comp. Stat. (1929), c. 75, § 505; *Northwestern Bell Telephone Co. v. Spillman*, 6 F. (2d) 663 (D.C. Neb. 1925); *Hooper Telephone Co. v. Nebraska Telephone Co.*, 96 Neb. 245, 147 N.W. 674 (1914); see *Durisch*, *Judicial Review of the Railway Commission in Nebraska*, 11 Neb. L. Bull. 365, 371 (1932). *Ohio*: *supra* note 14. *Oklahoma*: *supra* notes 17, 18. *Pennsylvania*: *supra* note 11. *Virginia*: *supra* note 13. *Washington*: *supra* note 14. Some statutes provide that if new evidence is offered, the court shall remand to the commission, for hearing on the new evidence; and if, as a result, the commission shall revise its order, the revised order shall be substituted in the proceedings before the court. See statutes of *Michigan*, *Pennsylvania*, and *Virginia*, *supra*.

²² 285 U.S. 22, 52 Sup. Ct. 285, 76 L. Ed. 598 (1932). See *Dickinson*, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact,"* 80 Univ. Pa. L. Rev. 1055 (1932); notes, 41 Yale L. Jour. 1037 (1932); 30 Mich. L. Rev. 1312 (1932); 46 Harv. L. Rev. 478 (1933); 32 Col. L. Rev. 738 (1932).

plication to regulatory commissions has not yet been attempted; but it would seem to extend at least to questions of the commission's power over the subject matter of the proceeding, and over the parties thereto. Whether the theory will be accepted by the state courts, however, seems doubtful, in view of the readiness with which they have accepted restriction to the transcript while holding that the review provided for is "judicial" rather than "legislative" in nature.²³ It may also be doubted whether the Supreme Court would consider such a state statutory provision a good criterion of "legislative" review.

On the other hand, state constitutional provisions for the separation of judicial and legislative powers appear, in several cases, to have been important factors in determining that the review prescribed was "judicial" rather than "legislative"; it is assumed that the state assembly, in according the power of review to a body exercising other functions undoubtedly judicial in nature, intended to comply with the constitutional requirements; and ambiguous language therefore is construed to contemplate "judicial" review.²⁴

(4) *The power of the revising agency to modify the commission's order.* An expression often noticed in the statutes is that the reviewing agency may "modify" the order of the commission, as an alternative to either affirming or reversing it as a whole.²⁵ This perhaps means that the reviewing body may make a thorough revision of the order on the basis of policy and expediency, perhaps conceding the legality of the commission's original action; such review would be "legislative."²⁶ The term "modify" is so general, however, that it may well be construed to limit the power of the revising agency to removing provisions considered illegal, without reference to questions of policy or expediency. As a result, it is not surprising that modification provisions are found in statutes interpreted to prescribe "judicial" as well as "legislative" review.²⁷

The same interpretation would be made, probably, if the word "substitute" was used in place of "modify." The Virginia Constitution provides that the Court

²³ Restriction specifically held valid in *Illinois, Commerce Commission v. Cleveland, C., C. & St. L. Ry. Co.*, *supra* note 9.

²⁴ See cases cited: *Michigan*, *supra* note 11; *Nebraska*, *supra* note 21; *Vermont*, *supra* note 11; *Washington*, *supra* note 14. In *Ohio*, the Constitution (1912), Art. IV, § 2, provides that the supreme court shall have "such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law."

²⁵ *Minnesota, Montana*: *supra* note 11. *Nebraska*: *supra* note 21. *New York*: *supra* note 10. *Ohio*: *supra* note 14. *Oklahoma*: *supra* note 17. *Pennsylvania*: *supra* note 11.

²⁶ The *Montana* statute, *supra* note 11, was construed by the United States Supreme Court as providing "legislative" review, the court relying mainly upon the term "modify" in the statute (*Porter v. Investors' Syndicate*, *supra* note 11). Other expressions in the statute seemed to point the other way, however, and the *Montana* Constitution, Art. IV, § 1, provides for separation of powers [its effect perhaps weakened by *O'Neill v. Yellowstone Irrig. Dist.*, 44 Mont. 492, 121 Pac. 283 (1912); and see *State ex rel. Hillis v. Sullivan*, 48 Mont. 320, 137 Pac. 392 (1913)].

²⁷ "Judicial": *Minnesota, Nebraska, New York, Pennsylvania*. "Legislative": *Montana, Oklahoma*.

of Appeals "is to substitute such order as, in its opinion, the commission should have made."²⁸ Due perhaps to the addition of the last clause, this provision seems to point toward revision on grounds of expediency, and in fact has been so interpreted.²⁹

(5) *The effect of the revising agency's decision.* If adequately expressed, the intention of the state legislature as to whether or not the decision of the revising agency was intended to be *res judicata* would probably provide a good test of the nature of the review provided. The present statutes, however, afford little information on this point. In Virginia it is stipulated that the right to sue in "ordinary courts" is not impaired by the revisory system created, indicating perhaps that the decision of the revising tribunal is not intended to be *res judicata*.³⁰ An Oklahoma statute provides that it "shall be construed to give remedies and rights in addition to those of appeal heretofore given by statute";³¹ this, too, seemingly contemplates that the action of the revisory agency is not final. In both states the review provided has been determined to be of the "legislative" type.³²

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²⁸ Va. Const. (1902), § 156g. This section was not changed in the constitutional revision of 1928.

²⁹ See *Winchester & S.R. Co. v. Commonwealth*, *supra* note 9.

³⁰ Va. Const. (1902), § 156h. Compare the federal statute providing for appeals from decisions of the Commissioner of Patents, 16 Stat. 204 (1870), 35 U.S.C.A. § 62 (1929): "But no opinion or decision of the court in such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question." See *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 47 Sup. Ct. 284, 71 L. Ed. 478 (1927). See also, as to *res judicata*, *Grubb v. Public Utilities Commission*, *supra* note 14.

³¹ *Supra* note 18.

³² Cases cited *supra* notes 5, 9, 17.

CHANGING RULES OF EVIDENCE IN THE FEDERAL COURTS

At common law,¹ interested witnesses² were not permitted to testify in their own behalf in civil³ or criminal⁴ cases. Spouses, for additional reasons of policy,⁵ were held incompetent to testify either for or against each other.⁶ Prior to statutory modifications of these common law rules of competency⁷ there was unani-

¹ Prior to the development of the modern jury trial, questions of competency of witnesses did not arise since the jury found a verdict of their own knowledge. For the development of the jury, see Hinton, *Cases on Evidence* (2d ed. 1931), c. 1, § 1; 1 Wigmore, *Evidence* (2d ed. 1923), 985; 9 Holdsworth, *History of English Law* (1926), 178-185.

² The interest disqualification was based on the theory that interested persons were biased and hence not credible; also the courts were unwilling to subject the interested witness to the temptation to commit perjury. *New Arcade v. Owens*, 258 Fed. 965 (D.C. Ct. App. 1919); *Skahen v. Strauss*, 199 Ill. App. 403 (1916); Gilbert, *Evidence* (4th ed. 1777) 119. For some exceptions to the interest disqualification because of necessity see *United States v. Clark*, 96 U.S. 37, 24 L. Ed. 696 (1877). *Parmelee v. McNulty*, 19 Ill. 556 (1858); *County v. Leidy*, 10 Pa. 45 (1848).

To disqualify, the interest had to be "some legal, certain and immediate interest in the result of the suit itself, or in the record thereof as an instrument of evidence to support his own claims." *Poe v. Dorrah*, 20 Ala. 288 (1852); *Evans v. Eaton*, 7 Wheat. (U.S.) 356, 5 L. Ed. 472 (1822); *Ackman v. Potter*, 239 Ill. 578, 88 N.E. 231 (1909).

Parties to the suit were of course directly interested as thus defined. For others who were considered disqualified because of interest, see 1 Wigmore, *supra* note 1, 996 ff; 5 Chamberlayne, *Modern Law of Evidence* (1916), § 3669; Jones, *Evidence* (3d ed. 1924), c. 20.

³ By 1582 the rule in civil cases was well established, *Dymoke's Case*, Savile 34, pl. 18. *Stein v. Bowman*, 13 Pet. (U.S.) 209, 10 L. Ed. 129 (1839); *Marks v. Butler*, 24 Ill. 568 (1860); *Frear v. Everton*, 20 Johns. (N.Y.) 142 (1822); *Radtke v. Taylor*, 105 Ore. 559, 210 Pac. 863 (1922); 1 Wigmore, *supra* note 1, 990 ff.

⁴ *Whelchell v. State*, 23 Ind. 89 (1864); *Harwell v. State*, 10 Lea (Tenn.) 544 (1882). The disqualification developed later in criminal cases than in civil. 1 Wigmore, *supra* note 1, 995 n. 42; 9 Holdsworth, *supra* note 1, 196. The complaining witness or prosecutor was not excluded under the rule since neither were parties to the record. *Best*, *Evidence* (4th ed. 1866), 238.

⁵ The reasons usually given: 1. Likelihood of false testimony because of a common interest. *Merriam v. Hartford Ry. Co.*, 20 Conn. 354 (1850); Gilbert, *Law of Evidence* (4th ed. 1777), 133. 2. Metaphysical unity. *Coke Litt.* 6b, Wigmore, *Cases on Evidence* (3d ed. 1932), 116. 3. Public policy to prevent marital disharmony. *Mitchinson v. Cross*, 58 Ill. 366 (1871); *Bird v. Davis*, 14 N.J. Eq. 467 (1862).

⁶ Civil cases: *Stein v. Bowman*, 13 Pet. (U.S.) 209, 10 L. Ed. 129 (1839); *Schreffler v. Chase*, 245 Ill. 395, 92 N.E. 272 (1910).

Criminal cases: *Jin Fuey Moy v. United States*, 254 U.S. 189, 41 Sup. Ct. 98, 65 L. Ed. 214 (1920); *Barber v. People*, 203 Ill. 543, 68 N.E. 93 (1903); *Wilke v. People*, 53 N.Y. 525 (1873).

That the incompetency was absolute and did not rest on privilege see *Stein v. Bowman*, 13 Pet. (U.S.) 209, 10 L. Ed. 129 (1839); *Ex parte Beville*, 58 Fla. 170, 50 So. 685 (1909); but see *Ficken v. State*, 97 Ga. 813, 25 S.E. 925 (1895).

⁷ a. The first outstanding attack on the exclusionary rules of evidence was made by Bentham in 1827. Bentham, *Rationale of Judicial Evidence*, bk. IX, pt. 3; 1 Wigmore, *supra*, note 1, 997, 1002; Appleton, *Evid.* (1860), c. 1, 4; Phil. *Evid.* (5th Am. ed.), 24 ff.

b. Civil Cases.

In England the interest disqualification for witnesses was not removed until 1843 (St. 6 & 7

mous agreement both among the various states and between federal and state courts as to the inadmissibility of such evidence.⁸

In civil cases, this uniformity between federal and state courts as to competency of witnesses continued despite the legislative abolition by the states of the common law testimonial disqualifications,⁹ by operation of conformity statutes¹⁰ directing the federal courts to follow state rules of evidence.

Vict. c. 85) by Lord Denman's Act, which specifically excepted parties to the suit and spouses. Parties to the action were not made competent in civil cases until 1851. St. 14 & 15 Vict. c. 99.

In the United States the development came later. 1 Wigmore, *id.*, 1004, note 4 and § 488. Parties and witnesses were not made competent in the Federal courts until 1864. Rev. Stat. § 858, 28 U.S.C.A. § 631 (as amended). *Monongahela National Bank v. Jacobus*, 109 U.S. 275, 3 Sup. Ct. 219, 27 L. Ed. 935 (1883); *De Beaumont v. Webster*, 81 Fed. 535 (C.C.A. 3d 1897). For other cases see 28 U.S.C.A. 631.

Today the disqualification has everywhere disappeared. 1 Wigmore, *id.*, 1004, the various state statutes being listed at p. 870.

c. Criminal Cases.

The abolition of the interest disqualification in criminal cases came later both in America and England. For suggested explanations see 1 Wigmore, *id.*, 1009.

In England the defendant was not competent until 1898. St. 61 & 62 Vict. c. 36, § 1; *Rex v. Wheeler*, [1916] 1 K.B. 283. Best, *Evidence* (8th ed. 1916), § 822 A.

In the federal courts the defendant was made competent in 1878. 20 Stat. 30 (1878), 28 U.S.C.A. 632 (1928). For state statutes see 1 Wigmore, *id.*, § 488.

d. Spouses.

Incompetency of spouses was not abolished by statute in civil cases in England until 1853 (St. 16 & 17 Vict. c. 83, § 4; 32 & 33 Vict. c. 68, § 3, 1869), and in criminal cases not until 1898 (St. 61 & 62 Vict. c. 36, § 1) all of which are reprinted in 1 Wigmore, *supra*, note 1, § 488.

In the United States the removal occurred later. 1 Wigmore, *id.*, 1036. Civil Cases: In re Domenig, 128 Fed. 146 (D.C.Pa. 1904); *Brown v. Norton*, 67 Ind. 424 (1879); *Shepard v. Parker*, 97 Me. 86, 53 Atl. 879 (1902); *Evans v. Evans*, 155 Pa. 572, 26 Atl. 755 (1893). Criminal Cases: *Walker v. State*, 34 Fla. 167, 16 So. 8 (1894); *Commonwealth v. Moore*, 162 Mass. 441, 38 N.E. 1120 (1894); *People v. Hovey*, 92 N.Y. 554 (1883); *State v. Reynolds*, 48 S.C. 384, 26 S.E. 679 (1896) (spouse permitted to testify against her husband).

Some states require the consent of the other spouse. In re Holt, 56 Minn. 33 (1893); *Hubbell v. Grant*, 39 Mich. 641 (1878); *Stanley v. Stanley*, 27 Wash. 570 (1902); *State v. Willis*, 119 Mo. 485 (1894).

⁸ See cases *supra*, note 7.

⁹ See *supra*, note 7.

¹⁰ All the applicable statutes will be included in this note for convenient reference.

a. 12 Stat. 588, Act of July 16, 1862, c. 189, § 1; as amended Rev. Stat. 858 (1906), 28 U.S.C.A. 631 (1928):

"The competency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held."

In its original wording the section was construed not to apply to federal criminal trials. *The Abbotsford*, 98 U.S. 440, 25 L. Ed. 168 (1878); *Logan v. United States*, 144 U.S. 263, 301 ff., 12 Sup. Ct. 617, 36 L. Ed. 429 (1892); *Hendrix v. United States*, 219 U.S. 79, 31 Sup. Ct. 193, 55 L. Ed. 102 (1910). The same is true of the section in its present form. *Adams v. United States*, 259 Fed. 214 (C.C.A. 8th 1919).

b. 17 Stat. 197, Act of June 1, 1872, c. 255, § 5, 28 U.S.C.A. 724 (1928):

"The practice, pleadings and forms and modes of proceeding in civil cases, other than equity or admiralty causes, in the district courts, shall conform, as near as may be, to the practice,

In criminal cases, on the other hand, a divergence soon appeared due to decisions which prevented state statutory liberalizations of rules of competency from being reflected in the federal courts,¹¹ by holding that the various conformity acts did not apply to criminal prosecutions.¹² Conflicting interpretations of these and other applicable Supreme Court cases, however, created some uncertainty as to the law which should control,¹³ though all agreed on the negative proposition that the law which did govern competency in federal criminal cases was not affected by subsequent state statutes.¹⁴ Three bodies of law were suggested: (1) The common law rules of evidence fixed unchangeably (in the absence of further congressional action) as they existed in 1789, the date of the passage of the Judiciary Act.¹⁵ This view was followed by the majority of

pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."

By its terms this section applies only to civil proceedings.

c. 1 Stat. 92, Act of Sept. 24, 1789, c. 20, § 34, as amended Rev. St. 721 (1878), 28 U.S.C.A. 725 (1928):

"The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide shall be regarded as rules of decisions in trials at common law in the courts of the United States, in cases where they apply."

This section as construed by the federal courts does not apply to rules of evidence in criminal prosecutions. *United States v. Reid*, 12 How. (U.S.) 361, 13 L. Ed. 1023 (1851); *Logan v. United States*, 144 U.S. 263, 300, 12 Sup. Ct. 617, 36 L. Ed. 429 (1892); *American Ry. Express Co. v. Rowe*, 14 F. (2d) 269 (C.C.A. 1st 1926), cert. denied 273 U.S. 743, 47 Sup. Ct. 336, 71 L. Ed. 869 (1927).

The courts are divided on the question of whether this section compels them to follow state rules of evidence in civil cases. Holding that it does are *Wilcox v. Hunt*, 13 Pet. (U.S.) 378, 10 L. Ed. 209 (1839); *Gormley v. Clark*, 134 U.S. 338, 10 Sup. Ct. 554, 33 L. Ed. 909 (1890); *Stewart v. Morris*, 89 Fed. 290 (C.C.A. 7th 1898); *Von Crome v. Traveler's Ins. Co.* 11 F.(2d) 350 (C.C.A. 8th 1926). For other cases see 28 U.S.C.A. § 725 (1928), note 84. *Contra*, explaining away the Supreme Court decisions, are *Union Pacific Rr. Co. v. Yates*, 79 Fed. 584 (C.C.A. 8th 1897); *Gilbert v. American Surety Co.*, 121 Fed. 499 (C.C.A. 7th 1902), cert. denied 190 U.S. 560, 23 Sup. Ct. 855, 47 L. Ed. 1184 (1903); *Mankato v. Barber Asphalt Paving Co.*, 142 Fed. 329 (C.C.A. 8th 1905). For other cases see 28 U.S.C.A. 725, note 83.

d. For other related statutes and statutory chronology of those cited above see *Sweeney, Federal or State Rules of Evidence in Federal Courts*, 27 Ill. L. Rev. 394, 400 (1932).

¹¹ Thus in *Fitter v. United States*, 258 Fed. 567 (C.C.A. 2d 1919), the wife of the defendant was not permitted to testify in his behalf in the federal courts, though she would have been competent in a prosecution in the state court under *People v. Hovey*, 92 N.Y. 554 (1883).

¹² Cases and statutes, *supra* note 10.

¹³ See cases *infra*, notes 15, 16, 17. The leading Supreme Court cases will be discussed in detail below. See also *Sweeney, Federal or State Rules of Evidence in Federal Courts*, 27 Ill. L. Rev. 394, 400 (1932).

¹⁴ See cases *infra*, notes 15, 16, 17.

¹⁵ The cases following this view purport to rely upon *United States v. Reid*, 12 How. (U.S.) 361, 13 L. Ed. 1023 (1851). The validity of this interpretation will be discussed subsequently.

courts.¹⁶ (2) The rules of evidence fixed unchangeably (in the absence of further congressional legislation) as they existed in the individual state at the time of its admission into the Union, thus including whatever statutory changes in the common law the territorial legislatures had enacted before such admission.¹⁷ (3) A third view refused to regard the rules of evidence as crystallized into immobility and declared that the courts had power to modify the common law rules (even in the absence of Congressional action) when necessitated by changing societal conditions.¹⁸

Up to 1933 the results of the operation of these tendencies were these: In civil cases virtually all the states had abolished the common law disqualifications of witnesses and spouses. Since this was reflected in the federal courts by the conformity acts, there was uniformity both among the federal courts themselves and between the federal and state courts as to rules of competency in civil cases. In criminal cases state statutes abolishing incompetency were not thus reflected, and since three dissimilar views were adopted as stated above, conflicting rules of competency prevailed not only between federal and state courts but among the various federal courts themselves. This divergence was not bridged by federal legislation.¹⁹

At the October 1933 term, in *Funk v. United States*,²⁰ the Supreme Court conclusively affirmed the power of the federal courts to modify the common law rules of evidence without statutory assistance by Congress, and definitely re-

¹⁶ *United States v. Hall*, 53 Fed. 352 (D.C.Pa. 1892); *United States v. Hughes*, 175 Fed. 238 (D.C.W.D.Pa. 1910); *Maxey v. United States*, 207 Fed. 327 (C.C.A. 8th 1913); *Fisher v. United States*, 32 F. (2d) 602 (W.C.C.A. 4th 1929); *Barton v. United States*, 25 F. (2d) 967 (C.C.A. 4th 1928); *Scaffidi v. United States*, 37 F. (2d) 203 (C.C.A. 1st 1930).

¹⁷ *Brown v. United States*, 233 Fed. 353 (C.C.A. 6th 1916) (*dictum*); *McCoy v. United States*, 247 Fed. 861 (witness convicted of a felony held competent because the territorial legislature, prior to the admission of the state into the Union, had removed the disqualification); *Ding v. United States*, 247 Fed. 12 (C.C.A. 9th 1918) (atheist held competent for the same reason); *Rendleman v. United States*, 18 F. (2d) 27 (C.C.A. 9th 1927) (wife held competent for same reason).

¹⁸ *Rosen v. United States*, 245 U.S. 467, 38 Sup. Ct. 148, 62 L. Ed. 406 (1918). The authority of this case was considered to be questionable in view of subsequent cases. See Leach, *State Law of Evidence in Federal Courts*, 43 Harv. L. Rev. 554, 565 (1930). *Funk v. United States*, 290 U.S. 371, 54 Sup. Ct. 212 (1933) affirms the *Rosen* case, however. Both will be discussed in detail below.

¹⁹ Where Congress has passed specific legislation, such provisions control, *Cohen v. United States*, 214 Fed. 23 (C.C.A. 9th 1914), cert. denied 235 U.S. 696, 35 Sup. Ct. 199; *Parker v. United States*, 3 F. (2d) 903 (C.C.A. 9th 1925). For example, the defendant in a criminal case is made a competent witness in the federal courts regardless of the state law by 20 Stat. 30 (1878), 28 U.S.C.A. § 632 (1928).

In 1887 Congress made competent the spouse of a defendant in a criminal prosecution for bigamy. Act of March 3, 1887, c. 397, § 1, 28 U.S.C.A. 633 (1928). This was the sole legislation on the subject during the period.

²⁰ *Funk v. United States*, 290 U.S. 371, 54 Sup. Ct. 212 (1933), where a wife was permitted to testify for her husband in a criminal case. At common law she would have been incompetent.

jected the views which held the rules of competency were fixed unalterably as of any one time.

Funk v. United States will therefore have a threefold effect on rules of evidence in criminal cases: (1) It will level off the differences between federal and state courts on rules of competency, by bringing the federal law into conformity with those of a great majority of the states. (2) It will also make for uniformity among the various federal courts since it definitely overrules the view that the federal rules of evidence are those which existed in each state at the time of its admission into the Union. (3) It frees the federal courts from the anomalous necessity, under modern conditions, of following the common law rules of 1789, and by rejecting the doctrine that such adherence was mandatory, lays down a principle which will permit further development in the same direction. The court based this principle, however, upon an interpretation of the prior Supreme Court cases which resulted in the uncertainty and conflict already described. In order to permit further growth without the confusion which attended that growth heretofore, and because of its importance in the future development of the law of evidence the principle requires a clear enunciation and restatement.

The primary cause of the confusion was a misunderstanding of the scope of the decision in the case which first raised the direct question of the proper rules of evidence to be applied in criminal cases in the federal courts, *United States v. Reid*²¹ (decided in 1851). This was a criminal prosecution brought in a federal court in Virginia, and involved the competency of a witness to testify for the defendant. The witness would have been incompetent at common law, but under a statute passed in Virginia some sixty years after the federal Judiciary Act he became competent to testify in the state courts. Thus the question was presented whether such state statute would be given any effect in the federal courts. The Judiciary Act of 1789 provided that:

The laws of the several States . . . shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.

The Supreme Court decided the Act did not apply to criminal cases²² and that the witness was incompetent, holding that Congress by this section of the Judiciary

²¹ *United States v. Reid*, 12 How. (U.S.) 361, 13 L. Ed. 1023 (1851).

²² We are not interested here in the question of the correctness of this interpretation by the Reid case. 1 Wigmore, *supra* note 1, § 6 calls this an indefensible construction. See also Leach, *State Law of Evidence in the Federal Courts*, 43 Harv. L. Rev. 554, 556 (1930). Chief Justice Taney reasoned that Congress intended by the act to confer jurisdiction on the federal courts, without which they could not have administered the laws of the states, and that the wording would have to be more definite to include the rules of evidence of the states, since so to hold would be to "place the criminal jurisprudence of one sovereignty under the control of another." From that premise he reasoned by a process of elimination that Congress could not have intended the common law of England to control, nor the common law of the colonies, and that "the only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of Congress, was that which was then in force in the respective states [at the time of the Judiciary Act of 1789], and which they were accustomed to see in daily and familiar practice in the state courts." 12 How. (U.S.) 361, 365, 13 L. Ed. 1023, 1025 (1851).

Act had directed the federal courts to apply the rules of evidence in force "in the respective states" at the time that Act was passed, 1789, and that the common law rules so adopted and established could not be changed by subsequent state legislation.

This decision was implicitly understood to mean that in the absence of a new statutory direction by Congress the rules of evidence were fixed unchangeably as they existed in 1789. The line of reasoning by which this result was reached may be articulated thus:

The *Reid* case decided (1) that Congress had in the Judiciary Act directed the federal courts to follow the common law rules of competency of 1789, and (2) that subsequent state statutes could not change those rules.

Abolition of incompetency was effected solely through state statutes which under (2) left the federal rule unchanged.

Any decision which would attempt to abolish a common law disqualification without action by Congress, therefore, would be erroneous, since it would be contrary to the *Reid* case and would be disregarding the Judiciary Act.

Therefore the rules of evidence in the federal courts are fixed unchangeably as they were in 1789 unless Congress chooses to modify them by statute.

A court which so understood the *Reid* case would consequently feel compelled to overrule it, in part, to justify a change in the common law rules of competency. And conversely, a court which, in abolishing a common law rule of competency, felt it necessary to overrule the *Reid* case, would implicitly indicate that it had so interpreted the *Reid* case, whether it had articulated the line of reasoning or not. The first Supreme Court to clearly demonstrate this implicit analysis was *Rosen v. United States*²³ in which the court said:

While the decision in *United States v. Reid* has not been specifically overruled, its authority must be regarded as seriously shaken. . . .²⁴

²³ *Rosen v. United States*, 245 U.S. 467, 38 Sup. Ct. 148, 62 L. Ed. 406 (1918). The question raised was as to the competency, in a federal court in New York, of a witness previously convicted of a felony in the state courts of New York. The court believed it was overruling the common law rule by holding the witness competent and decided the question "in the light of sound reason."

Professor Hinton points out in 22 Ill. L. Rev. 545, 551 (1928) that the case could have been decided upon the ground that the conviction was by a court of a different sovereignty and that by the common law rule such a conviction did not make the witness incompetent, citing *Brown v. United States*, 233 Fed. 353 (C.C.A. 6th 1916), L.R.A. 1917 A, 1133 (note).

²⁴ The *Rosen* case relies upon two prior Supreme Court decisions to justify its conclusion that the *Reid* case was not sound law, discerning in them an inconsistency with the holding in the *Reid* case:

(1) *Logan v. United States*, 144 U.S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429 (1892), which raised the converse of the issue in the *Rosen* case, the witness being competent at common law, but incompetent under a statute of Texas passed after it had come into the Union. While it was a republic, Texas had adopted the common law in general terms. In upholding the competency of the witness in the federal court of Texas in a criminal trial, the Supreme Court opinion said:

" . . . the competency of witnesses in criminal trials in the courts of the United States held within the State of Texas is not governed by a statute of the State which was first enacted in

Funk v. United States confirms this analysis.²⁵ By so interpreting the *Reid* case however, *Rosen v. United States* presented a distorted picture of the decision (which the *Funk* case perpetuates), since it implied that the *Reid* case intended to anchor the laws of evidence as they existed in 1789. This, it may be suggested, the *Reid* case did not purport to do, and to so understand the decision demonstrates a subtle misconception of the nature of the common law which has confused the cases in the past and may cause trouble in the future. And it creates the apparent incongruity of state statutes automatically becoming

1858, but, except so far as Congress has made specific provisions upon the subject, *is governed by the common law, which, as has been seen, was the law of Texas before the passage of that statute and at the time of the admission of Texas into the Union as a state.*"

All the cases which adopt the view that competency is governed by the rules of evidence as they existed in the individual states at the time of their admission to the Union (see *supra*, note 17) rely upon the italicized part of the quotation given above. When read in its context, however, this passage does not seem to justify that interpretation, though there is some difference of opinion on the point. Professor Hinton in 22 Ill. L. Rev. 545, 551 (1928) suggests that the case does not conflict with *United States v. Reid*. Acc. Leach, *State Law of Evidence* in the Federal Courts, 43 Harv. L. Rev. 554, 562 (1930); Justices Van Devanter and McReynolds, dissenting in *Rosen v. United States*, 245 U.S. 467, 473, 38 Sup. Ct. 148, 151, 62 L. Ed. 406, 408 (1918). A contrary view is taken by Sweeney, *Federal or State Rules of Evidence* in Federal Courts, 27 Ill. L. Rev. 394, 414 (1932), and Justice Clarke speaking for the majority in *Rosen v. United States*, *id.*, 470.

(2) *Benson v. United States*, 146 U.S. 325, 13 Sup. Ct. 60, 36 L. Ed. 991 (1892), which involved the competency of a joint indictor as a witness for the prosecution in a separate trial of his co-indictor in a federal court. The *Reid* case had raised the same question with regard to a witness called by the defendant. In answering the defendant's contention that the *Reid* case was decisive of the case before it, the court in the *Benson* case said:

"The precise question in that case [*United States v. Reid*] was as to the right of the defendant to call his co-defendant, and not that of the government to call the co-defendant, and a distinction has been taken between the two cases. . . . And as the distinction prevailed, whether founded on satisfactory reasons or not, it is sufficient to justify us in holding that that case is not decisive of this. . . . We do not feel ourselves, therefore, precluded by that case from examining this question in the light of general authority and sound reason."

The court then pointed out the great changes in competency wrought by statute, all tending toward a liberalization of the strict common law rules, and continued: "The spirit of this legislation has controlled the decisions of the courts. . . ." The court's lengthy discussion of this point may indicate an incipient dissatisfaction with the state of the existing rules of evidence, but the decision does not seem to overrule the *Reid* case. The court was only deciding what the common law rule was on the question before it.

²⁵ *Funk v. United States*, 290 U.S. 371, 54 Sup. Ct. 212, 214 (1933) adopts the interpretation of the *Reid* case given in *Rosen v. United States*:

" . . . it is plain enough that the ultimate doctrine announced is that in the taking of testimony in criminal cases, the federal courts are bound by the rules of the common law as they existed at a definitely specified time in the respective states.

"With the conclusion that the controlling rule is that of the common law, the *Benson* case and the *Rosen* case do not conflict; but both cases reject the notion, which the [*Reid* case seems] to accept, that the courts, in the face of greatly changed conditions, are still chained to the ancient formulae and are powerless to declare and enforce modifications deemed to have been wrought in the common law itself by force of these changed conditions."

ing federal common law.²⁶ A clarification of what the *Reid* case stands for shows that it need not cause these difficulties.

The principles implicitly or expressly laid down by the *Reid* case may be separated as follows: (1) that Congress could prescribe the rules as to competency of witnesses which should be followed in the federal courts; (2) that Congress did not direct the federal courts in criminal cases to follow contemporary state rules of evidence; (3) that Congress had impliedly directed the federal courts to follow those rules of the common law in force "in the respective states"²⁷ at the time the Judiciary Act of 1789 was passed; (4) that state statutes passed subsequent to 1789 would not be binding upon the federal courts. If there is any inconsistency between the *Reid* case on the one hand and the *Rosen* and *Funk* cases on the other, it must result from the implied Congressional mandate that the federal courts were to follow the rules of evidence in force in the re-

²⁶ The following quotation from an article written before the *Funk* case was decided concretely illustrates this difficulty:

"No case was cited in the opinion [of the *Rosen* case] . . . in which a court without express legislative authority abolished the common law disqualification. . . . And independent investigation has failed to reveal such a case. The *Rosen* case must, therefore, rest upon the principle that state legislation, whose tendency perhaps has been followed in federal legislation not directly applicable to the case in hand, creates a weight of authority which the federal courts may and must follow. That such a holding is revolutionary need hardly be suggested." Leach, *State Law of Evidence in the Federal Courts*, 43 Harv. L. Rev. 554, 562 (1930).

Though it is often said that there is no federal common law, a realistic view must recognize it exists in the sense of "a general common law existing throughout the United States, not, it is true as a body of law distinct from the common law enforced in the states, but as containing the general rules and principles." *Western Union Telegraph Co. v. Call*, 181 U.S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765 (1901).

²⁷ It is not altogether clear what the *Reid* case meant by this phrase. On the one hand there is strong language in the case which specifically refers to the law of the individual state. On the other hand, in support of the view that a general body of common law was meant (see *supra*, note 26), it may be suggested (1) that the state laws were uniform at the time the *Reid* case was adopted and that the court consequently did not have a situation before it which required more precise language; (2) *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865 (1842) had been on the books for ten years, holding that common law decisions in the individual states did not control the federal courts in certain substantive law fields. It seems incongruous to consider the federal courts not bound to follow individual state rules when substantive law is involved and a statute expressly directs the court to consider the "laws of the several states" as rules of decision (see *supra*, note 10, c. for full text of the statute), and yet hold that when rules of evidence are involved, the laws of the individual states must be followed in the federal courts, even though the statute involved in *Swift v. Tyson* was held inapplicable.

If this phrase is construed to have meant a general common law, *Logan v. United States* *supra* note 24, may be treated as having applied the same rule as the *Reid* case, since it could be held to prevail in each state upon entering the Union, not as the common law of the state, but as the general common law of the whole country. Whether the *Logan* case adopts a distinct rule for the newer states or merely applies the rule of the *Reid* case, and whether the *Reid* case adopts the rules of the individual states or a general body of common law does not affect the validity of the subsequent analysis. The view will be adopted, however, that a general common law was adopted by the *Reid* case and that the *Logan* case is not inconsistent with it. The recent cases so treat it. *Funk v. United States*, 290 U.S. 371, 54 Sup. Ct. 212; *Wolfe v. United States*, 290 U.S. 617, 54 Sup. Ct. 279 (1934).

spective states in 1789, since all three cases are in accord as to the other principles. Clearly if the *Reid* case is to be interpreted as deciding that the rules of evidence in the federal courts were anchored unchangeably as they existed in 1789 unless Congress chooses to modify them, the *Funk* case is inconsistent, since it changes a common law rule without Congressional action in permitting a spouse to testify in a criminal trial.²⁸

That the *Reid* case should not be so interpreted can be shown by comparing it to express statutory adoptions of the common law such as the Illinois statute²⁹ The common law of England so far as the same is applicable and of a general nature, and all statutes prior to the fourth year of James the First shall be the rule of decision. . . .

It has never been intimated that this section, which is substantially enacted or judicially adopted in most of the states of the Union, crystallizes the rules of evidence as of the time of James the First, or of the adoption of such statute, and permits no additions or modifications.³⁰ On the contrary, as both the *Funk* and *Rosen* case recognize, one of the essential principles of the common law is the power of growth.³¹

If Congress, therefore, by a similar provision had in *express* words directed the federal courts to follow the common law rules of evidence as they existed in the respective states in 1789, it can hardly be questioned that such a statute would not have been construed to paralyze the common law into immobility. What the *Reid* case did, was to find by implication what such a statute would have provided expressly. And there is no reason for holding the common law to be unchangeably fixed because of an implied adoption when an express adoption would permit growth and change.

²⁸ *Funk v. United States*, *supra* note 20. In reaching this result Justice Sutherland re-examined the bases of the spouses' disqualification at common law—interest and public policy—(see *supra*, note 5) and showed their inapplicability in the light of "legislation and modern thought." Competency of a wife to testify against her husband was not involved, and the court expressly refused to decide that question.

The *Funk* case overrules *Jin Fuey Moy v. United States*, 254 U.S. 189, 41 Sup. Ct. 98, 65 L. Ed. 214 (1920) which did not cite the *Rosen* case as necessitating any change. See also *Hendrix v. United States*, 219 U.S. 79, 31 Sup. Ct. 193, 55 L. Ed. 102 (1910).

²⁹ Ill. Cahill's Rev. Stat. (1933), c. 28.

³⁰ On the contrary, as an Illinois court has pointed out in discussing this statute:

" . . . they [the English courts] have made many innovations upon its original principles, and . . . many of them have become much modified or wholly changed. The courts of the several States have also taken advantage of its pliant nature, in which consists one of its greatest excellencies, and adapted it to the evervarying exigencies of the country, and to the ever-changing conditions of society. This results from necessity; and in our further progressive improvement, other and more extensive modifications will be effected." *Boyer v. Sweet*, 3 Scam. (Ill.) 120 (1841).

³¹ The *Rosen* case itself shows this most strongly since without a statute it overthrew what was unquestionably the common law rule of 1789 by holding a convicted felon to be a competent witness; and the *Funk* case stresses the same point: The "rules [of the common law] are modified upon its own principles and not in violation of them." (Cited from *People v. Randolph*, 2 Park. Cr. Rep. (N.Y.) 174, 177).

The *Reid* case in short, must be understood to have enunciated a simple, sensible rule—Congress had directed the federal courts to follow in criminal cases the rules of evidence of the common law of 1789. One of the essential principles of the law thus adopted as a rule of decision was the capacity to change and grow.

With this rule of the *Reid* case, the holdings in the *Rosen* and *Funk* cases do not conflict. They exemplify it; and reaffirm its validity. And in the light of this analysis the apparent dilemma of state statutes becoming federal common law dissolves,³² since in the process of growth the common law may be influenced by the same philosophical ideas and societal changes which lead legislatures to pass statutes abolishing disqualifications of witnesses. That the legislature reacts more quickly to the stimuli should not be considered to preempt the field and to inhibit the natural development of the common law so as to prevent it from reaching the same result. In fact it is entirely proper for the courts to consider widespread legislation as one of the best indications that societal opinion has been modified.

Thus understood the words of the court in the *Funk* case take on a new significance when they state:

The final question to which we are thus brought . . . is the question of the power of these courts, in the complete absence of congressional legislation on the subject, to declare and effectuate upon common law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions, without regard to what has previously been declared and practiced. It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.

If adhered to in its unconfused simplicity, the same principle will occasion no difficulty in years to come when further changes necessitate reconsideration of present rules of evidence.³³

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THE VALIDITY OF AGREEMENTS BY BANKS TO REPURCHASE SECURITIES

The case of *Knass v. Madison & Kedzie State Bank*¹ is a typical sequel to certain banking excesses of the last decade.² Defendant bank had sold securities to complainant, and had agreed to repurchase³ the securities at par or a slight dis-

³² *Supra*, note 26.

³³ The potentialities of the *Funk* case can already be discerned in the recognition of its application to rules of admissibility of testimony other than those relating to competency of witnesses. *Wolfe v. United States*, 290 U.S. 617, 54 Sup. Ct. 279 (1934).

¹ 354 Ill. 554, 188 N.E. 836 (1933).

² See Fribourg, *The New York Mortgage Bond Situation*, *The Annalist* (Dec. 22, 1933), 803; Williams, *The Future of Mortgage Banking*, *Great Lakes Banker* (Feb. 1934), 3.

³ The agreements were signed by a vice-president of defendant bank, generally without any designation of official position or *descriptio personae*.

count. At various times defendant did repurchase a portion of the securities; finally, however, it refused to perform its agreement. Complainant then instituted a suit for specific performance of the agreement, joining as defendants the bank, a receiver appointed for it, and a successor bank to which all the assets of the old bank had been assigned for purposes of liquidation. The lower court held the repurchase agreements were enforceable against the vendor bank alone,⁴ and both complainant and defendant appealed. Two main problems⁵ were thus presented to the Illinois Supreme Court: (1) Were the agreements enforceable against the vendor bank? (2) If the vendor bank was liable on the agreements, is the successor bank also liable? The Court based its decision almost wholly on its solution to the first problem, holding the agreements *ultra vires* and unenforceable against the old bank, and thus unenforceable against the new bank.

By statute in Illinois banking institutions may be created "for the purpose of discount and deposit, buying and selling exchange and doing a general banking business . . . and such banks or banking associations shall have the power to loan money on personal and real estate security and accept and execute trusts."⁶ As a bank incorporated under legislative sanction has only those powers expressly granted or necessarily implied from the statute under which it is created,⁷ the capacity of defendant bank to enter into repurchase agreements must be justified by reference to the terms of this general statute. The Supreme Court held that a promise to repurchase securities was not within the powers enumerated by the statute, and that there was no showing that such promises were part of any general banking practices. Thus the contract to repurchase was *ultra vires*.

But determination that a contract is *ultra vires* does not *per se* preclude its enforcement; in many cases the corporate promisor may be estopped to deny its lack of capacity.⁸ The Illinois court also found that the promises

⁴ *Knass v. Madison & Kedzie State Bank*, 269 Ill. App. 588 (1933), noted in 1 *Univ. Chi. L. Rev.* 343 (1933).

⁵ A subsidiary problem also presented was as to whether defendant bank had actually signed the agreements, inasmuch as only the signature of one of its vice-presidents appeared on the face of the bills of sale (see *supra* note 3). The court might have held that the agreements were the personal obligation of the vice-president who signed, and not of defendant bank. See *Mead v. Altgeld*, 136 Ill. 298, 26 N.E. 388 (1891); *Kinser v. Cal. Fire Clay Co.*, 165 Ill. 505, 46 N.E. 372 (1897); *Braun v. Hess*, 187 Ill. 283, 58 N.E. 371 (1900); *Murray v. Standard Pecan Co.*, 309 Ill. 226, 140 N.E. 834 (1923); 4 *Michie, Banks and Banking* (Perm. ed. 1931), §§ 7, 43.

⁶ Ill. Cahill's Rev. Stat. (1933), c. 162, § 1.

⁷ *Ballantine, Corporations* (1927), § 53; 4 *Michie, Banks and Banking* (Perm. ed. 1931), § 1.

⁸ *Logan Co. Nat. Bank v. Townsend*, 139 U.S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107 (1891); *Alldrich v. Chemical Nat. Bank*, 176 U.S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611 (1900); *Citizen's Central Nat. Bank v. Appleton*, 216 U.S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443 (1910); *Rankin v. Emigh*, 218 U.S. 27, 30 Sup. Ct. 672, 54 L. Ed. 915 (1910); *Farmers' and Merchants' Nat. Bank v. Smith*, 77 Fed. 129 (C.C.A. 8th 1896); *Jackman v. Continental Nat. Bank*, 16 F. (2d) 728 (C.C.A. 8th 1926); *Coon v. Smith*, 4 F. Supp. 960 (D.C.E.D. Ill. 1933).

were contrary to public policy, as expressed in the Act of June 4, 1879, Section 4:⁹

"It shall not be lawful for any . . . incorporated bank receiving savings deposits, or deposits of trust funds, to assume the payment of, or to become liable for, or to guarantee to pay the principal of, or the interest on, any bonds, notes or other evidences of indebtedness of, for, or on account of any person or persons, company or incorporation; and in any assumption, liability or guarantee, whereby such deposits or trust funds could be jeopardized or impaired shall be null and void."

The court felt that the promises to repurchase were included within the language of this statute, regarding the vendor bank as a broker selling securities on commission for a mortgagor. It appears from the record in related cases,¹⁰ however, that the bank bought the securities at a discount and sold them at retail, retaining the profits; such securities as were not sold were placed in the investment portfolio of the bank. It seems somewhat difficult to bring a repurchase agreement within the exact language of the statute, because no liability is assumed on behalf of a third person; the bank merely contracted, on its own behalf, to provide a ready market for such securities as its customers desired to sell.

It would seem, however, that the statute does express a strong public policy against repurchase agreements. The dominant purpose of the statute was to protect depositors in savings banks by preventing such banks from embarking on speculative enterprises. A bank's promise to repurchase securities creates a liability which is contingent on circumstances over which the bank has little, if any, control. It is a liability which may force a bank to absorb large losses in the event of a market collapse, and thus result in paying out all of the bank's liquid assets, to the detriment of the depositors. The result reached by the court seems just, in view of the fact that the complainant may still sue the mortgagor, and may foreclose on the mortgaged property. On the other hand the depositor, who stands to gain nothing from the repurchase transaction (since the bank has no option to repurchase if the market value of the securities becomes higher than their par value), must rely on the general assets of the bank, which should not be jeopardized by the bank's speculation. The Federal Se-

⁹ Ill. Cahill's Rev. Stat. (1933), c. 38, § 41. The Illinois Constitution (1870), Art. XI, § 5, provides that acts of the General Assembly creating corporations with banking powers must be ratified by popular vote, and this section was not submitted to popular vote. The court in the *Knass* case did not discuss the constitutionality of the section, however, probably relying on *People v. Gould*, 345 Ill. 288, 178 N.E. 133 (1931), where it was held the constitutional provision was inapplicable because this section was a portion of the Criminal Code. On the other hand, it could be argued the section is not penal in nature, and thus the fact that it appears in the Criminal Code is immaterial.

¹⁰ *Freedman v. Madison & Kedzie State Bank*, 259 Ill. App. 519 (1931); *Awotin v. Atlas Exchange Nat. Bank*, 265 Ill. App. 238 (1932); *Knass v. Madison & Kedzie State Bank*, 269 Ill. App. 588 (1933); *Hoffman v. Sears Community State Bank*, 269 Ill. App. 644 (1933); cf. *Madison & Kedzie Trust & Savings Bank v. Dean*, 263 Ill. App. 646 (1931).

curities Act,¹¹ the National Banking Act,¹² and the Federal Deposit Insurance Corporation Act¹³ exemplify the growing public policy that security selling should be divorced from the banking business, and the *Knass* case expresses a judicial realization of the same policy. Many bankers have also declared that security selling is not a proper commercial banking function.¹⁴

The complainant in the *Knass* case urged that the sale of the bonds and the agreement to repurchase constituted a conditional sale and so was not within the prohibitive legislation, citing *Wolf v. National Bank of Illinois*.¹⁵ In that case a vendor bank sought to avoid liability on a repurchase agreement on the theory that the agreement was void under the Illinois Gambling in Futures Act.¹⁶ The court described the transaction as a conditional sale, mainly to prevent the application of the Gambling in Futures Act, which is unpopular and strictly construed.¹⁷ Subsequent cases overlooked a number of special facts in the *Wolf* case and construed all repurchase agreements as conditional sales.¹⁸ The court in the *Knass* case distinguished the *Wolf* case on its facts, but disregarded the cases subsequently misapplying it, and thus perhaps left the interpretation of repurchase contracts in some doubt. It seems clear, however, that the agreement in the *Knass* case was not a conditional sale within the ordinary meaning of the term; the vendee complainant had exercised complete dominion over the securities, had sold some of them and hypothecated others, and was under no obligation to the bank in respect to them.¹⁹

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¹¹ 48 Stat. 74 (1933), 15 U.S.C.A. Supp. §§ 77a-77mm (1933).

¹² 48 Stat. 184 (1933), 12 U.S.C.A. Supp. § 24 (1933).

¹³ Part of the Banking Act of 1933, 48 Stat. 168, 12 U.S.C.A. Supp. § 264 (1933).

¹⁴ Kraschel, State Banking Systems in Agricultural States, Great Lakes Banker (July 1933), 68; Holton, Strengthening Public Confidence in the Banks, Great Lakes Banker (July 1933), 19; Underhill, Real Estate, Pick and Choose, Am. Bankers' Assn. Jour. (Aug. 1933), 22; Weidenhammer, Control of New Investments, 171 Annals Am. Acad. (Jan. 1934), 73.

¹⁵ 178 Ill. 85, 52 N.E. 896 (1899).

¹⁶ Ill. Cahill's Rev. Stat. (1933), c. 38, § 308.

¹⁷ *Ubben v. Binnian*, 182 Ill. 508, 55 N.E. 552 (1899); *Loeb v. Stern*, 198 Ill. 371, 64 N.E. 1043 (1902); *Miller v. Sincere*, 273 Ill. 194, 112 N.E. 664 (1916); *Stewart v. Dodson*, 282 Ill. 192, 118 N.E. 405 (1917); 1 A.L.R. 1544 (1919); 2 Williston, Sales (2d ed. 1924), § 664.

¹⁸ *Ubben v. Binnian*, 182 Ill. 508, 55 N.E. 552 (1899); *Stewart v. Dodson*, 282 Ill. 192, 118 N.E. 405 (1917); *Roush v. Ill. Oil Co.*, 180 Ill. App. 346 (1913); *Hills v. Hopp*, 210 Ill. App. 365 (1918); *Freedman v. Madison & Kedzie Bank*, 259 Ill. App. 519 (1931); *Awotin v. Atlas Exchange Nat. Bank*, 265 Ill. App. 238 (1932); *Knass v. Madison & Kedzie State Bank*, 269 Ill. App. 588 (1933); *Hoffman v. Sears Community State Bank*, 269 Ill. App. 644 (1933) cf. *Coon v. Smith*, 4 Fed. Supp. 960 (D.C.E.D. Ill. 1933), decided before the *Knass* case changed the Illinois rule on repurchase agreements. Several other courts have construed repurchase agreements as conditional sales: *Ophir Cons. Mines Co. v. Brynteson*, 143 Fed. 829 (C.C.A. 7th 1906); *Hunt v. Wyman*, 100 Mass. 198 (1868); *Vent v. Duluth Coffee & Spice Co.*, 64 Minn. 307, 67 N.W. 70 (1896).

¹⁹ See Uniform Conditional Sales Act, 2a U.L.A. (1924), § 1; 1 Williston, Sales (2d ed. 1924), §§ 270-272.

THE EVIDENTIAL VALUE OF BLOOD TESTS

A court of last resort recently, for the first time in American legal history, passed upon the admissibility in evidence of the results of a blood test designed to show that the defendant was not the father of a certain child, as had been charged. The lower court's refusal to admit such evidence was sustained, on the ground that the defendant had failed to prove that the blood test is sufficiently accurate to have the requisite probative value for legal evidence.¹ It is believed that an examination of the subject in the light of the results of medical research during the past decade² will indicate that the court might well have taken a more liberal attitude,³ and that the reliability of blood tests has been proved to the extent that they may now be considered valuable aids in the administration of justice.

Since the opening of the twentieth century, medical research has established a number of important propositions as to the nature and characteristics of human blood. All human blood may be classified into certain definite groups. The blood of a particular individual may be attributed to one of these groups on the basis of its agglutination or coagulation with other types of blood serum. These blood characteristics are transmitted from generation to generation according to the Mendelian laws of heredity. Finally, on the basis of these blood groupings, the possibility or impossibility that an individual having blood of a certain type was born from the union of two other individuals of ascertained types may be determined.⁴

Certain conclusions may be drawn from these propositions as to the use of the blood test in cases of disputed paternity: (1) If a child's blood falls within a group to which might be attributed the blood of a union of the alleged parent and the undisputed parent, it is possible, *though not certain*, that the child is their offspring; (2) on the other hand, if the child's blood is not such a possible

¹ *State v. Damm*, 252 N.W. 7 (S.D. 1933). The court said: "We base such holding specifically upon the proposition that it does not sufficiently appear from the record in this case that modern medical science is agreed upon the transmissibility of blood characteristics to such an extent that it can be accepted as an unquestioned scientific fact that, if the blood groupings of the parents are known, the blood group of the offspring can be necessarily determined, or that, if the blood groupings of the mother and child are known, it can be accepted as a positively established scientific fact that the blood group of the father could not have been a certain specific characteristic group." (252 N.W. 7, 12).

² See Lee, *Blood Tests for Paternity*, 12 Am. Bar Assn. Jour. 441 (1926). Mr. Lee offers a learned discussion of medical theory based upon Ottenberg's work in 1921-22.

³ For some recent liberal developments in the field of evidence, see *Funk v. United States*, 290 U.S. 371, 54 Sup. Ct. 212 (1933), in which the wife of a defendant was permitted to testify on his behalf in a criminal trial; and *United States v. Provident Trust Co.*, 290 U.S. 614, 54 Sup. Ct. 389 (1934), in which evidence of incapacity to have issue was admitted.

⁴ Ottenberg, *Heredity Blood Qualities; Medico-Legal Applications of Human Blood Grouping*, 6 Jour. Immunology 363 (1921). His conclusion as to the legal value of such tests is emphatic: "The number of instances in which the group blood test is of value is limited, but within those limits its evidence is exclusive."

resultant, then it is *certain* that the person allegedly a parent is not such in fact.⁵

These conclusions were accepted at an early date by continental courts, and numerous cases may be found in which blood tests were utilized to determine parentage.⁶ In England and America, however, no reported case has been found which discloses the use of such a test;⁷ in Ireland, two lower courts have, quite recently, admitted such evidence.⁸ Until about ten years ago, the reluctance of the courts to admit evidence of this type was justified in part by the lack of agreement among medical experts as to the theories involved, although there was complete uniformity as to the practical results.⁹ These theoretical difficulties were ended by Bernstein's discoveries in 1924. In addition, a further set of tests was developed in 1928 which clarifies and renders more exact the classification originally developed by Bernstein, and makes it possible in some instances to determine differences within the categories formerly recognized.¹⁰

⁵ The possibilities are expressed in tabular form as follows [from Bernstein, 23 *Klin. Wchnschr.* 1495 (1924); 37 *Ztschr. f. Indukt. Abstram. u. Vererbungs.* 237 (1925)]:

Heredity of the Landsteiner Blood Groups (Bernstein)

Groups of Parents	Groups of Children Possible	Groups of Children Impossible
1. O×O	O	A, B, AB
2. O×A	O, A	B, AB
3. O×B	O, B	A, AB
4. A×A	O, A	B, AB
5. A×B	O, A, B, AB	none
6. B×B	O, B	A, AB
7. O×AB	A, B	O, AB
8. A×AB	A, B, AB	O
9. B×AB	A, B, AB	O
10. AB×AB	A, B, AB	O

⁶ See Weiner's articles, 21 *Jour. Immunology* 157 (1931); 24 *Jour. Immunology* 443 (1933); and 186 *Am. Jour. Med. Sci.* 257 (1933); also, editorial, 85 *Jour. Am. Med. Assoc.* 612 (1931).

⁷ In Weiner, *Determination of Non-Paternity*, 186 *Am. Jour. Med. Sci.* 257, 264-265 (1933), a number of instances of the use of the blood tests in trial courts is set out. See also *Beuschel v. Manowitz*, 1 U.S.L.W. 408 (N.Y. Sup. Ct. 1934), in which it was held that the defendant was entitled to an order requiring plaintiff and her child to submit to blood tests.

⁸ See 66 *Ir. L. T.* 64, 111 (1932). Both were lower court cases. In the first, the defendant was convicted, but secured a new trial when, on appeal, a blood test was held admissible to show the impossibility of the alleged paternity. In the second, the test appeared unsuccessful.

⁹ For example, see the controversy between Ottenberg and Buchanan: Ottenberg, 77 *Jour. Am. Med. Assoc.* 682 (1921); 78 *ibid.* 873 (1922); 79 *ibid.* 2137 (1922). Buchanan, 78 *ibid.* 89 (1922); 79 *ibid.* 180 (1922). Ottenberg's position was apparently the strongest, in view of the preponderance of current medical authority supporting his theory. See Weiner, 99 *Jour. Am. Med. Assoc.* 242 (1932), who says that the only disagreement was over the theory proposed to explain the undisputed law.

¹⁰ Bernstein's work was fairly conclusive, and research since that time has failed to reveal a single exception to the theory he stated, although such eminent scientists as Schiff, Thomsen, Snyder, Furuhashi, and Vuori have worked on the problem. Weiner has shown that the theory does not change the law itself, as previously formulated; but that it offers additional opportu-

Even with this added test, the number of blood groups is small, and the number of people whose blood falls within any one group is large. No claim is made that blood tests will determine that an individual is the parent of a particular child; their present value lies in determining, in a well-defined class of instances, that a particular individual *could not* be the parent of a particular child. It has been estimated that the chances of establishing non-paternity by means of the earlier (Bernstein) tests alone are about one in six; if in addition the new tests are used, the chances are increased to about one in three.¹¹ More than two-thirds of all cases in New York City in which new-born infants have been accidentally interchanged in hospitals have thus been solved.¹²

As legal evidence, the blood test definitely seems to belong in the category of "expert opinion," since the conclusions are based upon medical research, involving propositions totally unfamiliar to the layman.¹³ Where the result of the test is to show that the person charged with being the child's parent *might* be such, the probative value of the evidence is admittedly low, and its prejudicial effect in a jury trial, particularly in a criminal case, may be high. Thus it may properly be excluded where its introduction is sought to prove paternity.¹⁴ Where, however, the result shows that the person charged *could not* be the parent of a child, its value as proof of non-paternity is unquestioned in medical circles; and, it is believed, the same recognition should be accorded to it in courts of law.¹⁵

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nities for the proof of non-paternity. Weiner, *Determination of Non-Paternity*, 186 Am. Jour. Med. Sci. 257 (1933).

The new tests, developed by Landsteiner and Levine, deal with certain additional substances in the blood. See Landsteiner and Levine, 47 Jour. Exp. Med. 757 (1928); 48 *ibid.* 731 (1928). Experiments in confirmation of the theory, conducted by Schiff, Weiner, Vaisberg, Thomsen, Clausen, and others, number about 20,000, and no exception has been found. For example, see Weiner and Vaisberg, 20 Jour. Immunology 371 (1931); Weiner, Rothberg, and Fox, 23 Jour. Immunology 63 (1932).

¹¹ Weiner, Lederer, and Polayes, 19 Jour. Immunology 259 (1930); Hooker and Boyd, 16 *ibid.* 451 (1929).

¹² Weiner, *supra* note 7, 259.

¹³ But see Lee, *supra* note 2, who argues that blood tests are to be classed as real evidence. On the use of other Mendelian traits in evidence, see 1 Wigmore, Evidence (2d ed. 1923), § 165.

¹⁴ See 4 Wigmore, Evidence (2d ed. 1923), § 1904.

¹⁵ In criminal cases the accused, if he fears that the results of the blood test will be unfavorable and that the court may not exclude the testimony on grounds of prejudice, may properly refuse to submit to the test since he may thus incriminate himself. Cf. Hinton, Cases on Evidence (2d ed. 1930), 186-221.